From the Selected Works of Maurya Vijay Chandra

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From the Desk of Law Faculty, Delhi University

Maurya Vijay Chandra
The Rights of a CHILD

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The recent ruling of the Supreme Court on the bail release of under-trial prisoners is momentous. Its importance lies in the fact, that the judgement confers on an under-trial prisoner booked for certain category of offences a right to be released on bail if he has undergone a certain period of pre-trial detention. Another highlight of the judgement apart from this is that it enjoins upon the trial court to take suo moto cognizance of the pending of trial and under-trial detention. And the order would apply to all future cases. Further, the judgement itself provides for its circulation in the courts below within 3 months. And it is heartening to know that thousands of cases in each district have already been disposed off.

Our jails are over crowded because of large number of such under-trials. But before we set our expectations from the judgement we must look into the nature of the problem involved. True, many a time under-trials are not in a position to hire an advocate to argue their bail petition. The judgement like an automatic bail from the court will be a great help and is proving so as thousands of cases have been disposed off so quietly. But the problem lies elsewhere. A large number of prisoners who are likely to benefit from the judgement remain incarcerated even today with a bail order in their hand. The surety or the bail amount which can satisfy the court is not available to them, especially when the bail amount is of Rs. 10,000/- for a cheating of Rs. 100/- or a theft of Rs. 52/-. Even managing a surety of Rs. 1000/- becomes a problem for these inmates. People who migrate thousands of miles away from home to earn their living have to stay in a jhuggi or simply sleep in parks, hardly have anyone of consequence to stand as a guarantee for them. Only speedy disposal of their cases can solve their problem.

As far the inmates are concerned, the Cr.P.C. is unjust towards them. With a conviction rate of 8%, 92% are under-trials, who lose their liberty and freedom, which is a fundamental right so envisaged by the Constitution. Any interlocutory relief is ruled out due to the incapacity of these inmates to plead or even avail of them. The Cr.P.C. fails the test of "procedural fairness" pronounced by the apex court in the much acclaimed "Maneka Gandhi" case. Again in Hussainara Khatoon (No.1) the Supreme Court recognised the fundamental right to "speedy trial." If the Cr.P.C. fails to assure that, one can argue that the code is an unfair, unjust law contravening the mandate of Article 21. Should it be declared void? But this will leave a vaccum. The solution does not lie in striking down the Cr.P.C. The court is unable to take an extreme step for practical considerations. We will have to look for alternatives. One solution can be, in the form of government responsibility, where the government helping these persons execute a personal bond and assigning their responsibility on local police or local self-government, something on the lines of the "Manhattan Jail project" and what was suggested by Justice Krishna Iyer in Moti Ram's case. Further, many radical changes is a must in the procedural law, specially like summons are served repeatedly, witnesses don't turn up, warrants are sent, no documents come, etc. But this will need time and strong political will.

Here the courts can play a creative role. Having recognised the right of the long-detained prisoners to be released on bail, the judgement offers enough space to the bail granting courts
to grant liberal bail orders. As, Moti Ram case recognised that a bail granted by the Supreme Court cannot be defeated by proposing onerous conditions of surety. A mason could not be asked to furnish a security of Rs. 10,000/-. Therefore, this ruling and Moti Ram case combined can bring a lot of relief to the prisoners. But, this too is subjected to the individual and the court’s satisfaction and "safeness" of such liberal orders. Individual liberty afterall cannot be a license to be free from law. Though in Hussainara Khatoon the Supreme Court ordered outright release of some of the prisoners of this kind, the case represents a very advanced stage of the ailment we are talking about.

Therefore, there has to be some other solution. It is within the path shown by Hon’ble Justice Bhagwati in Bandhua Mukti Morcha. There it was said--

After having recognised the imperilment of Article 21; and after taking into account that, the procedure prescribed becomes patently unjust in cases of these under-trials it is possible for the court to treat each of such case as a writ petition under Article 32. And as the apex court did it in Bandhua Mukti Morcha, it could now grant relief to the prisoners by “appropriate remedy.” That remedy could be ordering the disposal of cases like the PIL’s. An amicus curiae is appointed--he reports and the court acts. But here the question arises are there so many committed advocates? One hopes and even going a step ahead, they could draw from the court martial procedure, where a neutral “judge-advocate” places the "entire" case before the tribunal. Or may be, the court could order a day to day trial of such cases which have suffered such momentous delays.

Another way could be to deal with these cases in the way Hussainara Khatoon was dealt with. Or perhaps fixing a time-frame for such trials to be completed. Hussainara Khatoon almost fixed a period of one year. But the subsequent reservation did not come in later judgements. To the contrary many a High Court judgements were overruled and finally in Antulay’s case the court retracted, to its decision. In Antulay while the right to speedy trial was recognised, the court categorically denied to fix a time frame. The reluctance of Supreme Court in Antulay’s case may have been justified due to the nature of that case. But the present class of cases are fundamentally different. They not only involve a dilatory trial but also a consequent loss of liberty. A guideline could be prepared giving offencewise maximum period of trial. And if the trial has to be extended beyond that the court should rule so or even a general time-frame could be fixed and an extension allowed only if thought proper by the court, so that the question of extension or dropping of trial does not become a further dilatory tactics. The decision of the trial court should be held final subject to confirmation of the High Court.

These are mere indicators of solutions. One does realise that the implementation of such safety mechanisms for the indigents would present many challenges and demand departures from the nuances of advocacy and courtroom etiquettes. But if these poor people are not to be left at the mercy of the government to come out with an effective solution, judges will have to assume a creative mantle “to mould state law into an instrument of socio-economic justice by discarding from the formal legal system precisely those elements which induce legal formality and neutralising of law.”

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