

Trial-In-Absentia: Implications Under New Law

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INTRODUCTION

Since time and memorial, the criminal trials in India have been suffering with severe delays and it is an undoubted fact that justice delayed is justice denied. The procedure for criminal trials in India does allow courts to expedite trial, especially in a case where one of the accused remains unserved or escapes the judicial reach of courts. Such procedure was covered as an exception under the Criminal Procedure Code, 1973 (“CrPC”), where an undeniable right available to parties to be present in trial, and examine the witnesses and evidence presented from the opposite party could be curtailed. With implementation of the three new criminal acts namely, *Bharatiya Nyaya Sanhita* (“BNS”) which has replaced the Indian Penal Code, 1860 (“IPC”), *Bharatiya Nagarik Suraksha Sanhita* (“BNSS”) which has replaced the CrPC, and *Bharatiya Sakshya Adhinyam* (“BSA”) which has replaced the Indian Evidence Act, 1872 (“IEA”), India is steering into a new era of criminal administration, *inter alia*, adopting a victim centric approach and accommodating the technological changes. This article aims to cover one such important change introduced under the new criminal code, which CrPC did not previously recognise. It is the concept of “**trial in absentia**”.

TRIAL-IN ABSENTIA

A trial in absentia refers to a legal proceeding that may continue despite the absence of the accused, including against the accused. A trial in absentia is considered an exception to the principles of natural justice, the right to a fair trial and the right to defend oneself, which are immutable human rights contained in various human rights charters as well as part of the fundamental rights in the Constitution of India.

In a practical sense, a trial in absentia also has wider ramifications for multinational or foreign companies which get embroiled in a criminal trial in India. This is on account of concerns around service, arrest, and the speed of trial. Particularly in cases where the clients have no presence in India, the legal process of serving summons on international entities/persons can take time and unnecessarily prolong the trials. With trial in absentia being recognized in Indian law, and the ability to proceed against an accused even if he has not joined the trial need a closer examination.

POSITION UNDER CRPC

Until now, CrPC recognised certain procedures in cases where the accused was not present before the court, such as the segregation of trial between those present and the absentee, and the recording of evidence in such trials.

The CrPC mandated that all evidence taken during the trial or other proceedings shall be taken in the presence of the accused, or, when their personal attendance is dispensed with, in the presence of their pleader. However, there were two exceptions contemplated under the CrPC:

1. When an accused person has absconded, and there is no immediate prospect of arresting them;¹ and
2. When the personal attendance of the accused before the court is not necessary in the interests of justice, or when the accused persistently disturbs the proceedings in court.²

In the first case, the court may proceed to examine the witnesses produced on behalf of the prosecution and record their depositions. These may be given in evidence against an accused once they are arrested and when the deponent cannot be secured or produced for the trial.

In the second case, if they are represented by a pleader, the accused's presence may be dispensed with by the court, which nevertheless may direct the personal attendance of such accused at any subsequent stage of the proceedings. If the accused is not represented by a pleader, the court may either adjourn such inquiry or trial, or order that the case of such accused be tried separately. In other words, the court may split the trial, segregating the absentee and continuing with only those present.

The absence of an accused – deliberate or otherwise – can cause substantial delay in a trial. The Indian Supreme Court in the case of **Hussain v. Union of India, (2017) 5 SCC 702**³ noted that the trials were being delayed due to the absconding of the accused and recommended suitable amendments to the CrPC to reduce the delay same during such trials.

TRIAL IN ABSENTIA UNDER BNSS

Provisions for trials in absentia were introduced under Section 355 and 356 of the BNSS. It is interesting to note that the BNSS retains Section 317 of the CrPC under Section 355. Under

¹ Criminal Procedure Code, 1973. Sec. 299.

² Criminal Procedure Code, 1973. Sec. 317.

³ Hussain v. Union of India, (2017) 5 SCC 702.

Section 355 of the BNSS, a court may proceed if the accused disturbs the proceedings of the court or if their personal attendance is not required.⁴ However, more importantly, for the first time, BNSS introduced a specific provision for inquiry, trial or judgment in absentia of the proclaimed offender.⁵

The BNSS provides that when a person declared as a proclaimed offender under Section 84 of BNSS, has absconded for the purpose of evading a trial and there is no immediate prospect of arresting such accused person, trial can be commenced in the absence of such accused person. It is provided that active absconding from the trial would be deemed “*as a waiver of the right of such person to be present and tried in person*”.

After analyzing Section 356 of the BNSS, the following essentials are necessary to conduct a trial in absentia:

1. The accused must be a proclaimed offender under law;
2. The accused has absconded to evade trial; and
3. There is no immediate prospect of arrest;

SAFEGUARDS UNDER THE BNSS

In order to strike a balance between time-bound disposal of the case and following the principles of fair trial, BNSS provides for certain safeguards that trial courts need to follow before commencing the trial in absentia. Under the BNSS, the trial court can only undertake a trial in absentia once an accused person has been declared as a proclaimed offender/person. *Secondly*, the court has to ensure that two consecutive warrants have been issued within the period of thirty days. *Thirdly*, the court cannot commence the trial unless a period of 90 days has lapsed from the date of the framing of the charge. *Fourthly*, the court has to take steps to inform a relative or friend of an accused about the commencement of the trial. *Fifthly*, the court also has to publish a notice in a national or local daily newspaper circulating in the place of the accused’s last known address, and informing them that the trial will commence within 30 days if they fail to appear. And *lastly*, the said notice needs to be affixed on some conspicuous part of the house and displayed in the police station of the district of the accused’s last known place of residence.

⁴ Bharatiya Nagarik Suraksha Sanhita, 2023. Sec. 355.

⁵ Bharatiya Nagarik Suraksha Sanhita, 2023. Sec. 356.

Further, where the court has examined any witnesses for prosecution in relation to a case, such statement can be given as evidence against the proclaimed offender. In case the proclaimed offender is arrested and produced or appears before the court during such trial, the court may allow said offender to examine any evidence that may have been taken in their absence. However, if an accused disappears during a trial, their voluntary absence shall not derail the trial, including the judgment, even if they are arrested and produced or appear at the conclusion of such trial.

The BNSS also provides that no appeal shall lie against the judgment in such trials, unless the proclaimed offender presents themselves before the court of appeal. Furthermore, no appeal against conviction shall lie after the expiry of three years from the date of the judgment. The BNSS also modernises the approach to such trials and provides that the deposition and examination of the witness may be recorded by audiovisual electronic means, as far as practicable, and that such recording shall be preserved.

CONCLUSION

Considering the victim centric approach under the new criminal laws, trial in absentia allow for faster conclusion of trials where any accused has evaded the rigours of law and also allows the courts to provide speedy resolution to the victim. The provision also builds adequate safeguards before such process is initiated against an absconder. Most importantly, the new criminal laws have added certain provisions, such as no appeal against a trial in absentia until a person presents himself before the court of appeal that take the concept to its logical conclusion. However, it has to be seen that such provisions are used judiciously and proper guardrails are not given a pass at the cost of a speedy trial.
