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Trial in Absentia Under BNSS Gains Focus After NIA Seeks Proceedings Against Hafiz Saeed in Pahalgam Terror Case

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Recent Developments:

- A **Special NIA Court in Jammu** has issued a **Non-Bailable Warrant (NBW)** against **Hafiz Saeed**, the Pakistan-based chief of the banned **Lashkar-e-Taiba (LeT)**, in connection with the **Pahalgam Terror Attack** investigation.
- The action follows the filing of a **supplementary chargesheet** by the **National Investigation Agency (NIA)** naming Hafiz Saeed as a key conspirator acting both individually and as the head of **LeT** and its proxy outfit **The Resistance Front (TRF)**.
- As Hafiz Saeed is unlikely to appear before an Indian court, the **NIA is expected to invoke Section 356 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**, which provides for **Trial in Absentia** of proclaimed offenders.

Trial in Absentia: Meaning and Legal Basis

Definition:

- **Trial in Absentia** refers to a **criminal trial conducted without the physical presence of the accused**, provided the accused has deliberately absconded to evade the judicial process and fulfils the statutory conditions prescribed under law.
- **Section 356 of the BNSS, 2023** empowers courts to conduct a complete inquiry, trial and pronounce judgment against a **Proclaimed Offender**, even in the accused's absence, after complying with mandatory procedural safeguards.

Rationale Behind the Provision:

- The provision seeks to prevent **deliberate evasion of justice** by fugitives residing within or outside India.
- It aims to ensure that **serious criminal trials are not indefinitely delayed** merely because the accused remains absconding.
- It strengthens the efficiency of the criminal justice system while preserving the **constitutional requirement of a fair trial** through statutory safeguards.

Evolution from CrPC to BNSS

Position Under the Code of Criminal Procedure (CrPC), 1973:

- **Section 82(4)** provided for **proclamation and attachment of property** of absconding accused persons.
- **Section 317** permitted proceedings in the absence of an accused only in limited circumstances where personal attendance was unnecessary.

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- **Section 299** permitted recording of prosecution evidence if there was no immediate possibility of arresting the accused.
- The earlier framework **did not permit a complete criminal trial in absentia**, resulting in prolonged pendency of cases involving absconding accused persons.

Change Introduced by BNSS:

- **Section 356 of the BNSS** introduces, for the first time, a statutory framework for **complete inquiry, trial and judgment in absentia** against proclaimed offenders, thereby addressing a major procedural gap in the earlier criminal justice system.

Applicability of Trial in Absentia

Eligible Category of Accused:

- The provision applies **only to a Proclaimed Offender** declared under **Section 84 of the BNSS**.
- A court may declare a person a proclaimed offender if:
- The accused has absconded despite proclamation.
- The alleged offence is punishable with **imprisonment of 10 years or more, life imprisonment, or death**.
- The accused fails to appear before the court despite due process and judicial inquiry.

Scope:

- The provision is confined to **serious offences** and cannot be invoked for every criminal case or ordinary absconding accused.

Procedure Before Commencement of Trial in Absentia

Mandatory Preconditions:

- **Two consecutive arrest warrants** must be issued with an interval of at least **30 days**.
- A **public notice** must be published in a **local or national newspaper**, directing the accused to appear within **30 days**.
- The notice must be **affixed at the accused's last known residence** and displayed at the concerned police station.
- A **relative or friend**, wherever identifiable, must be informed regarding commencement of the trial.
- The court cannot commence the trial until **90 days have elapsed from the date of framing of charges**.
- The court must record written reasons establishing that the accused has absconded intentionally and there is **no immediate prospect of arrest**.

Safeguards to Ensure Fair Trial

Protection of Rights of the Accused:

- If the accused is not represented by a lawyer, the court must appoint a **State-funded defence counsel**.
- Evidence recorded before commencement of trial may be relied upon during proceedings.
- If the accused is subsequently arrested or voluntarily appears, the court may permit **cross-examination of witnesses** wherever necessary in the interest of justice.
- Statements of witnesses and judicial proceedings may be recorded using **audio-visual electronic means** to preserve transparency, authenticity and future judicial review.
- The accused retains the opportunity to participate in subsequent proceedings if apprehended.

Appeal Under Section 356

Special Restriction:

- A person convicted through **Trial in Absentia** cannot file an appeal unless he or she first **appears before the appellate court**.
- An appeal against conviction is generally not maintainable after **three years** from the date of judgment if the proclaimed offender continues to evade the judicial process.

Significance for India's Criminal Justice System

Administrative and Legal Importance:

- Prevents fugitives from frustrating criminal proceedings by remaining outside India's jurisdiction.
- Reduces long-pending criminal trials involving absconding accused.
- Strengthens India's legal response against **cross-border terrorism**, organised crime and economic offenders.
- Enhances judicial efficiency while balancing procedural fairness through statutory safeguards.
- Aligns criminal procedure with evolving challenges posed by transnational criminal networks.

Constitutional and Legal Issues

Constitutional Considerations:

- **Article 21** guarantees a **fair procedure established by law**, requiring that even absent accused persons receive procedural fairness.
- **Principles of Natural Justice**, particularly the right to be heard, remain relevant but may be deemed waived where the accused intentionally evades the judicial process after due notice.
- Judicial scrutiny is expected to ensure that **Section 356** is invoked only after strict compliance with statutory safeguards.

Challenges and Concerns

Implementation Issues:

- Courts must exercise caution to ensure that the accused has genuinely absconded and is not absent due to unavoidable circumstances.
- Effective international cooperation remains essential for eventual arrest and extradition of fugitives located abroad.
- Improper compliance with procedural safeguards may result in constitutional challenges.
- Continuous judicial oversight is necessary to prevent misuse against individuals who have not intentionally evaded trial.

Relevance for UPSC

GS Paper II:

- **Polity and Governance, Criminal Justice Reforms, Rule of Law, Judicial Process, Internal Security.**

GS Paper III:

- **Cross-Border Terrorism, Counter-Terrorism Framework, National Security, Legal Measures Against Terror Financing and Organised Crime.**

Prelims Pointers:

- **Section 356 BNSS** — Inquiry, Trial or Judgment in Absentia of a **Proclaimed Offender**.

- Applicable only after declaration under **Section 84 BNSS**.
- Restricted to offences punishable with **10 years or more, life imprisonment, or death**.
- Trial begins only after **90 days from framing of charges** and completion of mandatory procedural requirements.

Value Addition for UPSC

International Perspective:

- Several jurisdictions, including **France, Italy** and certain civil law countries, permit **Trial in Absentia** subject to procedural safeguards, whereas many common law jurisdictions traditionally require the accused's presence except in limited situations.
- International human rights standards generally accept **Trial in Absentia** only where the accused has been adequately informed of proceedings, has voluntarily absented himself or herself, and retains an effective opportunity to challenge the conviction upon appearance.
- The introduction of **Section 356 BNSS** reflects India's effort to reconcile **effective criminal justice, national security concerns** and **constitutional guarantees of due process**