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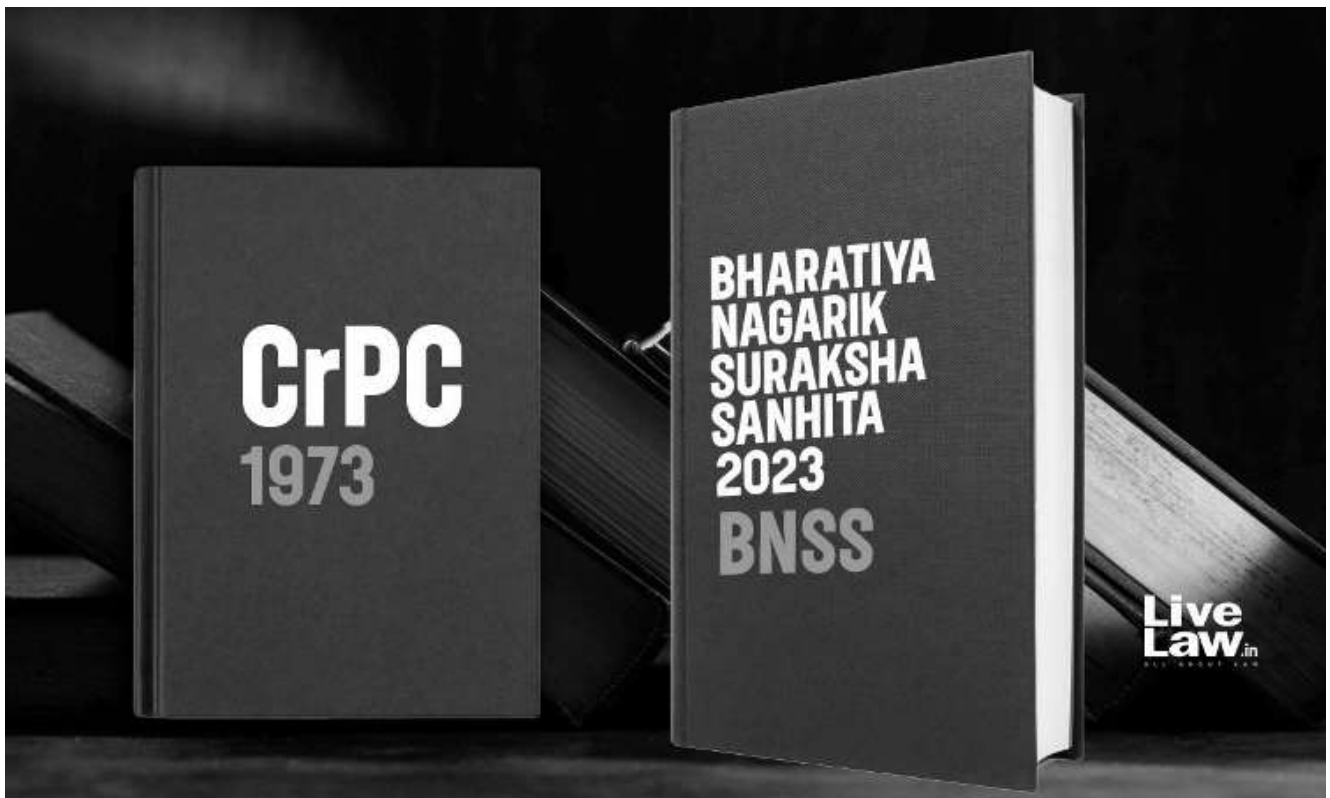
# Default Bail Under BNSS: Sixty Days or Ninety Days -- The Confusion Continues

**Justice Narayana Pisharadi**

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30 Jan 2025 1:34 PM

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Article 21 of the Constitution of India declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. The right to default bail is part of the procedure established by law under Article 21 of

the Constitution. It is, therefore, not merely a statutory right but a fundamental right granted to an accused person.<sup>1</sup>

Clause (a) of the first proviso to Section 167(2) of the Code of Criminal Procedure, 1973 (for short 'the Code'), which provided for the release of a person on default bail, now stands replaced by Section 187(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023 (for short 'the BNSS').

### **Section 187(3) of the BNSS**

Section 187(3) of the BNSS states that, the Magistrate may authorise the detention of the accused person, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this sub-section for a total period exceeding— (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of ten years or more; (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXV for the purposes of that Chapter.

### **The change**

As per clause (a)(i) of the first proviso to Section 167(2) of the Code, when a person is accused of an offence punishable with death, imprisonment for life or ***imprisonment for a term of not less than ten years***, the investigation of the case has to be completed within a period of ninety days to avoid the accused being released on bail. Significantly, the expression, "***imprisonment for a term of not less than ten years***" occurring in clause (a)(i) of the first proviso to Section 167(2) of the Code, now stands substituted as "***imprisonment for a term of ten years or more***" in Section 187(3)(i) of the BNSS.

## Meaning of the expression “imprisonment for a term of not less than ten years”

The expression, “***imprisonment for a term of not less than ten years***” occurring in clause (a)(i) of the first proviso to Section 167(2) of the Code had come up for interpretation by the Supreme Court in the case of ***Rakesh Kumar Paul v. State of Assam***.<sup>2</sup> In that case, the offence alleged against the accused was under Section 13(1) of the Prevention of Corruption Act, it being punishable with “***imprisonment for a term which shall be not less than four years but which may extend to ten years***” and fine. The charge-sheet in that case was filed after the expiry of the period of sixty days but before completing the period of ninety days of custody by the accused.

The majority view of the Supreme Court in the case of ***Rakesh Kumar Paul*** was that, the words “***not less than***” occurring in clause (i) to proviso (a) of Section 167(2) of the Code must be given their natural and obvious meaning, which is to say, not below a minimum threshold and these words must relate to an offence punishable with a minimum of ten years imprisonment. It was held that, the words “***not less than ten years***”, obviously meant that the punishment should be ten years or more and it cannot include offences where the maximum punishment is ten years. It obviously meant that the minimum punishment is ten years, whatever be the maximum period of punishment. It was held that, in all cases where the minimum sentence is less than ten years but the maximum sentence is not death or life imprisonment, then Section 167(2)(a)(ii) of the Code would apply and the accused would be entitled to grant of default bail after sixty days in case charge-sheet is not filed and that Section 167(2)(a)(i) of the Code would apply only in cases where the offence alleged against the accused is punishable with (i) death and any lower sentence; (ii) with life imprisonment and any lower sentence or (iii) with a minimum sentence of imprisonment for a period of ten years.

## What is the effect of the change?

Whether the substitution of the expression "***imprisonment for a term of not less than ten years***" occurring in clause (a)(i) of the first proviso to Section 167(2) of the Code, as "***imprisonment for a term of ten years or more***" in Section 187(3)(i) of the BNSS, has made any change in the law?

In ***State of Karnataka v. Kalandar Shafi***,<sup>3</sup> the Karnataka High Court has examined the effect of substituting the expression "***imprisonment for a term of not less than ten years***" occurring in clause (a)(i) of the first proviso to Section 167(2) of the Code as "***imprisonment for a term of ten years or more***" in Section 187(3)(i) of the BNSS. The question for consideration before the High Court was, whether police custody of the accused persons could be granted under Section 187(2) of the BNSS, after the expiry of the initial period of custody of 40 days, where they were accused of offences punishable with imprisonment for a term which may extend to ten years. In order to answer the said question, it became necessary for the High Court to decide whether the period of 60 days or 90 days would apply in cases where the accused persons are alleged to have committed offences punishable with imprisonment for a term which may extend to ten years. After a comparison of the provisions contained in Sections 187(2) and 187(3) of the BNSS with the provisions contained in Section 167(2) of the Code, the High Court observed that, in Section 167(2) of the Code, 90 days of investigation is permitted, where imprisonment is for a term not less than ten years and in BNSS, the same 90 days is permitted where imprisonment is for a term of ten years or more and "***it is only a play of words***". The High Court took the view that the expression "***ten years or more***" in Section 187(3) of the BNSS only depicts a threshold sentence of ten years and it was held as follows:

*"10. Therefore, if the prosecution wanting 90 days to file their final report, it will only be for an offence which has minimum sentence of ten years. If the offence now alleged against these accused are noticed, it does not have a threshold minimum sentence of ten years, but it is extendable up to ten years. Therefore, the term can be between one year to ten years. If it is one year to ten years, Section 187(3) of BNSS cannot be pressed into service for the purpose of police custody or any other reason for that matter, as the investigation for offences punishable upto ten years must get*

*completed in 60 days. I hasten to add that it is only in few cases where it relates to life, death or ten years or more, the investigation can be for 90 days. In all other offences under the IPC or BNS, investigation must complete within 60 days. In the considered view of the Court, there can be no other interpretation”.*

After referring to some of the decisions rendered by the Supreme Court on Section 167(2) of the Code, including **Rakesh Kumar Paul**, the High Court further held as follows:

*“In Section 187 of BNSS the phraseology is offence punishable for ten years or more. As observed hereinabove, **ten years or more would unequivocally mean that the threshold punishment is ten years, and not a punishment up to ten years. ....** Under Section 187(3) of BNSS the phrase used is ten years or more. It is axiomatic that the threshold punishment is ten years.”*

Ultimately, the High Court summarized its conclusions, on law and facts, as follows:

*“(i) A slight tweak in the new regime qua 187(3) of BNSS in juxtaposition to Section 167(2) of the earlier regime – the Cr.P.C has not changed the purpose of the provision. (ii) **The phraseology of the words***

***'ten years or more' found in sub-clause (i) of Section 187(3) of the BNSS would mean, the minimum threshold punishment imposable on an offence under the BNS should be ten years.** (iii) The offence in the case at hand, does not bear a minimum threshold sentence of ten years, but is extendable or to an extent of ten years, which would mean, discretion available to the concerned Court to impose punishment up to ten years. Therefore, the minimum threshold is not ten years. (iv) Completion of investigation in a punishment which is up to ten years is undoubtedly 60 days. Rest of the other offences, be it death, life imprisonment of ten years and more, would be 90 days. (v) If the investigation is to complete within 60 days, the period of police custody would run from day one day forty of registration of the crime. If it is 90 days, it would run from day one to day 60, maximum period in both*

*the cases is 15 days of police custody. (vi) In the case at hand, the offence is punishable up to ten years, Therefore, the police custody is only from day one to day forty".*

Thus, the Karnataka High Court has taken the view that, the period of ninety days mentioned in Section 187(3)(i) of the BNSS would apply, only when the offence is punishable with a minimum sentence of imprisonment of ten years and when the offence does not bear a minimum threshold sentence of ten years but it is punishable with imprisonment which may extend to ten years, the period of sixty days would apply. In other words, it means that, the substitution of the expression "***imprisonment for a term of not less than ten years***" occurring in clause (a)(i) of the first proviso to Section 167(2) of the Code, as "***imprisonment for a term of ten years or more***" in Section 187(3)(i) of the BNSS, has not made any change in the law.

In this context, it is to be noticed that in ***Rakesh Kumar Paul***, the Supreme Court has approved the dictum laid down in the case of ***Rajeev Chaudhary v. State (NCT) of Delhi***,<sup>4</sup> wherein the question involved was with regard to the interpretation and construction of the expression "***offence punishable with imprisonment for a term of not less than ten years***" occurring in the proviso (a) to Section 167(2) of the Code. In ***Rajeev Chaudhary***, the Supreme Court has held that, in a case where an offence is punishable with "***imprisonment for ten years or more***", the accused could be detained up to 90 days. But, it was further held that, the expression "***not less than ten years***" obviously meant "***ten years or more***" and would cover only those offences for which punishment could be imprisonment for a clear period of "***ten years or more***". In other words, the decision in ***Rajeev Chaudhary*** indicates that, there is no difference between the meaning of the expressions "***not less than ten years***" and "***ten years or more***".

**Special leave petition dismissed**

The complainant, who had filed the writ petition before the High Court of Karnataka, had filed Special Leave Petition (Crl) No.18063 of 2024 before the Supreme Court, challenging the order passed by the High Court in **Kalandar Shafi**. As per the order dated 08.01.2025, the Supreme Court dismissed the said Special Leave Petition. The order of the Supreme Court reads as follows:

*"Heard learned Senior Counsel appearing for the parties. By this petition the petitioner-complainant seeks that the accused persons (respondent nos.2 to 4 herein) be sent to police custody. We are informed that the accused (respondent nos.2 to 4 herein) are already in judicial custody. **The concerned Court itself came to the conclusion that police custody is not required** and has dismissed the application(s) of the prosecution as well as the Complainant. We see no reason to interfere with the order of the High Court, in exercise of our jurisdiction under Article 136 of the Constitution of India. The present petition is, accordingly, dismissed".*

What is the effect of dismissal of a Special Leave Petition (SLP) by the Supreme Court? Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all Courts within the territory of India, that is, the pronouncement of the law on the point shall operate as a binding precedent on all Courts within India. Law declared by the Supreme Court has to be essentially understood as a principle laid down by the Court and it is this principle which has the effect of a precedent. A principle, as understood from the word itself, is a proposition which can only be delivered after examination of the matter on merits. A decision, unaccompanied by reasons, can never be said to be a law declared by the Supreme Court though it will bind the parties *inter-se* in drawing the curtain on the litigation. On the other hand, when reasons are given by the Supreme Court for dismissing the SLP, the decision becomes one which attracts Article 141 of the Constitution.<sup>5</sup>

The dismissal of SLP against an order or judgment of a lower forum is not an affirmation of the same. If such an order of the Supreme Court is non-speaking, it does not constitute a declaration of law under Article 141 of the Constitution, or attract the doctrine of merger.<sup>6</sup>

If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Supreme Court that a case for invoking the appellate jurisdiction of the Court is not made out. When the order passed by the Supreme Court is not a speaking one, it is not correct to assume that the Court has necessarily decided implicitly all the questions in relation to the merits of the matter, which was under challenge before the Court in the special leave petition. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. A petition for leave to appeal to the Supreme Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, that is, if it does not assign reasons for dismissing the special leave petition, it would not be a declaration of law by the Supreme Court under Article 141 of the Constitution.<sup>7</sup>

Rejection of special leave petition cannot be construed as imprimatur of Supreme Court on the correctness of the decision sought to be appealed against.<sup>8</sup>

When the order of the Supreme Court, dismissing Special Leave Petition (Crl.) No.18063/2024, is examined in the light of the principles mentioned above, it can be found that, it has not interpreted the provisions contained in Sections 187(2) and 187(3) of the BNSS and it has not laid down any principle of law on default bail in the light of the provisions contained in Section 187(3) of the BNSS.

## Conclusion

If there is no difference between the meaning of the expressions "***not less than ten years***" and "***ten years or more***", why the Legislature has substituted the expression "***imprisonment for a term of not less than ten years***" occurring in clause (a)(i) of the first proviso to Section 167(2) of the Code, as "***imprisonment for a term of ten years or more***" in Section 187(3)(i) of the BNSS? Can it be treated as a mere "***play of words***" as observed by the Karnataka High Court? Section 187(3) of the BNSS is an important provision concerning the liberty of a person. It is also a provision which aims to provide sufficient time for the investigating officer to conduct the investigation of a case in an effective and meaningful manner. Any confusion as to the meaning of the expression "***imprisonment for a term of ten years or more***" in



the provision will not be conducive to fair investigation and fair trial and it would, ultimately, lead to failure of justice. Hence, authoritative pronouncement of the Apex Court, settling the law on the issue is essential, especially when the Court has declared default bail as a fundamental right and not merely a statutory right.

**Author is Former Judge, High Court of Kerala. Views Are Personal.**

1. Bikramjit Singh v. State of Punjab: (2020) 10 SCC 616.
2. AIR 2017 SC 3948.
3. 2024 LiveLaw (Kar) 518.
4. AIR 2001 SC 2369.
5. Union of India v. Mohanan Nair: AIR 2020 SC 5107.
6. Singaravelan v. District Collector: (2020) 3 SCC 133.
7. Kunhayammed v. State of Kerala : AIR 2000 SC 2587.
8. M/s. Rup Diamonds v. Union of India: AIR 1989 SC 674.

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#### Tags

Section 167(2) Cr.PC (<https://www.livelaw.in/tags/section-1672-crpc>)

Section 187(3) BNSS (<https://www.livelaw.in/tags/section-1873-bnss>)

Right to Default Bail (<https://www.livelaw.in/tags/right-to-default-bail>)

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