In the High Court at Calcutta
Criminal Revisional Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

C.R.R. No. 2072 of 2025

Tutu Ghosh
Vs.
Enforcement Directorate

With

C.R.R. No. 2073 of 2025

Bipin Kumar Kedia
Vs.
Enforcement Directorate

With

C.R.R. No. 2074 of 2025

Anil Kumar Kedia
Vs.
Enforcement Directorate

With

C.R.R. No. 2075 of 2025

Anil Kumar Jain
Vs.
Enforcement Directorate

For the petitioner in
C.R.R. No. 2072 of 2025 : Mr. Ayan Bhattacharjee, Sr. Advocate,
Mr. Arpit Choudhury,
Mr. Dipanjan Dey,
Ms. Bidisha Ghoshal ... Advocates.

For the petitioner in
C.R.R. No. 2073 of 2025 : Mr. Sabyasachi Banerjee, Sr. Advocate,
Mr. Anand Keshri,
Mr. Dipanjan Dey,
Ms. Bidisha Ghoshal ... Advocates.

For the petitioner in C.R.R. No. 2074 of 2025	:	Mr. Sanjay Banerjee, Mr. Dipanjan Dey, Ms. Bidisha Ghoshal ... Advocates.
For the petitioner in C.R.R. No. 2075 of 2025	:	Mr. Vikram Choudhury, Sr. Advocate, Mr. Sajal Yadahv, Ms. Noelle Banerjee, Mr. Dipanjan Dey, Ms. Bidisha Ghoshal, Ms. Nikita Gill, Ms. Muskaan Khurana ... Advocates.
For the Enforcement Directorate	:	Mr. S. V. Raju, Ld. ASGI, Mr. Dhiraj Trivedi, Ld. DSGI, Mr. Zoheb Hossain, Mr. Arijit Chakrabarti, Mr. Samrat Goswami, Mr. Ankit Khanna, Mr. Deepak Sharma, Ms. Swati Kumari Singh, Ms. Rupam ... Advocates.
Heard on	:	19.05.2025 and 04.07.2025
Reserved on	:	04.07.2025
Judgment on	:	18.07.2025

Sabyasachi Bhattacharyya, J.:-

1. The present Criminal Revisions assail an order dated February 15, 2025, whereby the learned Chief Judge, City Sessions Court at Calcutta, acting in the capacity of Special Court under the Prevention of Money-Laundering Act, 2002 (for short, “the PMLA”) taking cognizance of offences under Sections 3 and 4, read with Section 70 of the PMLA against each of the petitioners. The petitioners further seek

quashing of the proceedings initiated in connection with the complaint, being the ECIR/KLZO-I/10/2023 dated March 24, 2023.

2. Learned senior counsel appearing on behalf of the petitioners contends that the learned Special Judge took cognizance in violation of the First Proviso to Section 223 of the Bhartiya Nagarik Suraksha Sanhita, 2023 (for short, "the BNSS") since no opportunity of hearing was given to any of the petitioners/accused persons prior to taking such cognizance. Learned senior counsel contends that the provision of affording an opportunity of hearing to the accused prior to taking cognizance has been introduced in the new regime of criminal laws after the introduction of the BNSS and was absent in its predecessor-statute, the Code of Criminal Procedure (Cr.P.C.). It is argued that the said provision is mandatory and any contravention of the same leads to curbing the fundamental right to life and personal liberty, guaranteed under Article 21 of the Constitution of India, of the accused.

3. Learned senior counsel cites *Kushal Kumar Agarwal v. Directorate of Enforcement [Criminal Appeal No.2749 of 2025 [arising out of S.L.P.(Criminal) No.2766 of 2025]*, wherein the Hon'ble Supreme Court reiterated the propositions laid down in two earlier pronouncements of *Yash Tuteja and another v. Union of India and others*, reported at *(2024) 8 SCC 465* and *Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office*, reported at *(2024) 7 SCC 61*. In the said judgments, it was laid down that the only mode by which cognizance of an offence under Section 3, punishable under Section 4, of the PMLA can be taken by

the Special Court is upon a complaint filed by the authority authorised on this behalf. Section 46 of the PMLA applies the provisions of Cr.P.C. to such proceedings. Once a complaint is filed before the Special Court, the provisions of Sections 200 to 204 of the Cr.P.C. will apply to the complaint. There is no provision in the PMLA which overrides the said provisions of the Cr.P.C. and hence, the Special Court has to apply its mind to the question whether a *prima facie* case of commission of an offence under Section 3 of the PMLA is made out. It was further observed that the provisions of the Cr.P.C. shall be applicable to such procedure.

4. In *Kushal Kumar Agarwal (supra)*[1], it was held that a complaint filed by the Enforcement Directorate (ED) shall be governed by Sections 200 to 204 of the Cr.P.C. and, as such, the first proviso to Section 223(1) of the BNSS, which has now replaced the Cr.P.C., and the embargo incorporated therein is to be complied with. In violation of the same, the order taking cognizance has to be set aside.

5. Learned senior counsel for the petitioners also cites several judgments of Division Benches and learned Single Judges of different High Courts, which are mentioned below, in support of the said proposition:

(i) *Sri Basanagouda R. Patil v. Sri Shivananda S. Patil [Criminal Petition No.7526 of 2024];*

(ii) *Suby Antony v. R1 & Ors. [Crl. MC No.508/2025];*

---

1. Kushal Kumar Agarwal v. Directorate of Enforcement [Criminal Appeal No.2749 of 2025 {Arising out of S.L.P.(Criminal) No.2766 of 2025}].

(iii) *Mohd. Muzayyn v. State of U.P. [Application u/s 482 No.9725 of 2025];*

(iv) *Anil Kumar Yadev v. Directorate of Enforcement [CRM(M) No.329/2025];*

6. Learned senior counsel appearing for the petitioners further points out that a consistent stand has been taken by the learned Additional Solicitor General of India (ASGI) as well as other counsel appearing for the ED before different for a in the various cases enumerated below, where the ED conceded to the above legal position:

(i) *ED v. Sonia Gandhi & Ors. [CT No.14/2025];*

(ii) *Surender Panwar v. Directorate of Enforcement [CRM-M 26482-2025];*

(iii) *Directorate of Enforcement v. Mr. Arvind Dham [Crl.M.C. 7860 of 2024];*

(iv) *Nili Sheth W/O Siddharth Sheth v. State of Gujarat & Anr.;*

7. Learned senior counsel flags the inconsistent approach adopted by the ED before different courts which, according to him, is contrary to the spirit and sanctity of the sage counsel given by the Hon'ble Supreme Court in *Pankaj Bansal v. Union of India and others*, reported at *2023 SCC OnLine SC 1244*.

8. Learned senior counsel for the petitioners next contends that the argument of the ED that a complaint lodged under Section 44(1)(b) of PMLA is in effect a charge sheet/final report in terms of Section 173

Cr.P.C., equivalent to Section 193 of the BNSS, is not sanctioned by law.

9. Placing reliance on Sections 44, 45 and 65 of the PMLA, it is submitted that the provisions as to complaint, as provided in the Cr.P.C. (now BNSS), are applicable to complaints under the said Act. As such, the argument as to such complaints being akin to charge sheets cannot be accepted.

10. It is argued that the Supreme Court, in the various judgments cited above, has proceeded on the premise that a complaint by the ED under the PMLA is to be treated as a "complaint" and the provisions of Section 223 of the BNSS and its first proviso apply.

11. Learned senior counsel for the petitioners further submits that the contention of the ED that the test of 'prejudice' needs to be satisfied by the accused to vitiate a cognizance taken without an opportunity of being heard being given to the said accused is contrary to law. The non-compliance of the first proviso to Section 223(1), BNSS, it is argued, is not a curable irregularity but an incurable illegality.

12. It is submitted that a definite procedure has been prescribed regarding affording an opportunity of hearing to the accused prior to taking cognizance and such manifest legislative intent ought to be honoured by according to a "complaint" the literal meaning of the same. Learned senior counsel cites *Hussein Ghadially v. State of Gujarat*, reported at *(2014) 8 SCC 425*, where it was reiterated if the statute provides for a thing to be done in a particular manner, then it must be done in that

manner alone. All other modes or methods of doing that thing must be deemed to have been prohibited.

13. Learned senior counsel next cites State of *Punjab v. Davinder Pal Singh Bhullar*, reported at *(2011) 14 SCC 770*, for the proposition that if the initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of such action.

14. Citing *Badrinath v. Government of Tamil Nadu*, reported at *(2000) 8 SCC 395*, and *State of Kerala v. Puthenkavu N.S.S. Karayogam*, reported at *(2001) 10 SCC 191*, learned senior counsel reiterates the said proposition.

15. Learned senior counsel next relies on *Tsering Dolkar v. Administrator, Union Territory of Delhi*, reported at *(1987) 2 SCC 69*, where it was held by the Supreme Court that in the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act. The principles of preventive detention, it is contended, have been applied in PMLA cases while elaborating the scope of Section 19 thereof in respect of power to arrest, including in the case of *Avind Kejriwal v. Directorate of Enforcement*, reported at *(2025) 2 SCC 248*.

16. The petitioner cites State of *Haryana v. Bhajan Lal*, reported at *1992 Supp (1) SCC 335*, in support of the contention that the investigation of an offence is a field exclusively reserved for police officers, whose powers in that field are unfettered so long as the power to investigate

into the cognizable offence is legitimately exercised in strict compliance with the provisions falling under the Cr.P.C. If a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision, causing serious prejudice to the personal liberty and property of a person, then the court, on being approached by the person aggrieved, has to consider the nature and extent of the breach and pass appropriate orders without leaving the citizens to the mercy of police echelons, since human dignity is a dear value of our Constitution.

17. The Constitution Bench judgment of the Supreme Court in *State of Punjab v. Baldev Singh*, reported at *(1999) 6 SCC 172*, is also cited for the proposition that the severer the punishment, greater has to be the care taken to see that all the safeguards provided in the statute are scrupulously followed.

18. Learned ASGI, appearing on behalf of the ED, contends in reply that the decision of *Kushal Kumar Agarwal (supra)*[2] was passed only on May 9, 2025 whereas the cognizance order in the present case was taken much earlier on February 15, 2025. Thus, on the date of taking cognizance, the learned Magistrate was acting in good faith and the principles of *Kushal Kumar Agarwal (supra)*[2] cannot be applied.

19. Learned ASGI next argues that taking cognizance under Section 210, BNSS without giving an opportunity of hearing under the first proviso

---

2. Kushal Kumar Agarwal v. Directorate of Enforcement [Criminal Appeal No.2749 of 2025 {Arising out of S.L.P.(Criminal) No.2766 of 2025}].

to Section 223, BNSS would be an act covered under Section 506(e) of the said Act, which provides for irregularities which do not vitiate proceedings. If a Magistrate is "not empowered by law" to take cognizance of an offence but erroneously takes cognizance in good faith, the proceedings shall not be set aside merely on that ground. It is argued that the expression "not empowered by law" would include non-compliance of the first proviso to Section 223, BNSS.

20. It is further argued that the other judgments where consent was given by the ED on the question of non-compliance of the first proviso to Section 223 were judgments *in personam* and not binding as precedents. Learned ASGI cites *State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha*, reported at *(2009) 5 SCC 694* and *Ram Parshotam Mittal V. Hotel Queen Road Private Limited*, reported at *(2019) 20 SCC 326*, for the proposition that interim orders cannot be cited as precedents.

21. Moreover, it is contended, a court order based on concession is not "law declared" under Article 141 of the Constitution of India.

22. Learned ASGI cites *Municipal Corporation of Delhi v. Gurnam Kaur*, reported at *(1989) 1 SCC 101*, for the proposition that judgments *ad invitum* or consent orders have no binding precedential value.

23. It is argued on behalf of the ED that no prejudice has either been demonstrated or pleaded by the petitioners on account of not getting an opportunity of hearing in terms of the first proviso to Section 223. Thus, unless miscarriage of justice is pleaded and proved, the

proceedings cannot be set aside, as held in *Fertigo Mktg. & Investment (P) Ltd. v. CBI*, reported at *(2021) 2 SCC 525* and *State of Karnataka v. Kuppuswamy Gounder*, reported at *(1987) 2 SCC 74*.

24. In *U.P. v. Sudhir Kumar Singh*, reported at *(2021) 19 SCC 706*, it is argued, the Supreme Court has settled the law that no prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

25. The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant and should exist as a matter of fact, to be based upon a definite inference and likelihood of prejudice flowing from the non-observance of natural justice.

26. Learned ASGI next argues that the principle enunciated in *Kushal Kumar Agarwal (supra)*[3] does not conform to the earlier principles laid down by the Supreme Court and, as such, is not binding, being *per incuriam*. Learned ASGI cites *Sundeep Kumar Bafna v. State of Maharashtra*, reported at *(2014) 16 SCC 623*, in support of such contention.

3*. *Kushal Kumar Agarwal v. Directorate of Enforcement [Criminal Appeal No.2749 of 2025 {Arising out of S.L.P.(Criminal) No.2766 of 2025}].

27. Learned ASGI further argues that whereas Section 210(1)(a) of the BNSS has, with regard to complaints of which cognizance can be taken, incorporated the expression "including any complaint filed by a person authorised under any Special Law", which was missing in the corresponding Section 190 of the Cr.P.C., Section 223, BNSS does not qualify the word "complaint" with any such phrase. Thus, the rigours of Section 223 do not, *per se*, apply to a cognizance under Section 210 where the complaint is lodged under any Special Law such as the PMLA.

28. Learned ASGI cites *Allahabad University v. Geetanjali Tiwari (Pandey)*, reported at *2024 SCC OnLine SC 3776,* for the proposition that a provision of a statute should be read as it is, in a natural manner, plain and straight, without adding, substituting or omitting any words. While using the tools of interpretation, the court should remember that it is not the author of the statute who is empowered to amend, substitute or delete, so as to change its structure and contents.

29. Lastly, learned ASGI contends that Section 223, BNSS does not give power to the Magistrate to take cognizance but is a provision which runs parallelly with Section 210, BNSS. Section 223, BNSS (similar to the previous Section 200, Cr.P.C.) operates parallelly with regard to the same process of taking cognizance and provides for additional steps to be taken by the Magistrate "while taking cognizance". It generally applies to complaints filed in courts, which require examination of the complainant on oath so as to test the veracity of the complaint and to

prevent frivolous complaints. However, with regard to complaints under the special laws, the second proviso to Section 223(1)(b), BNSS provides that such examination of complainant and witnesses is not needed. It is, thus, argued that the present revisional applications ought to be dismissed.

30. Upon hearing learned counsel, it transpires that several important questions have been raised by the parties, which can be summarised as follows:

(i) *Whether violation of the first proviso to Section 223, BNSS vitiates the order of taking cognizance and consequential proceedings.*

(ii) *Whether absence of the words "including any complaint filed by a person authorised under Special Law", as enumerated in Section 210 (1) (a) of the BNSS, in Section 223, BNSS excludes operation of the first proviso to Section 223 to cognizance in respect of such complaints.*

(iii) *Whether the accused has a burden to show "prejudice" and "miscarriage of justice" to vitiate an order taking cognizance on the ground of depriving the accused of pre-cognizance opportunity of hearing.*

(iv) *Whether complaints under the PMLA are in the nature of charge sheets and not "complaints" under Sections 210 and 223 of the BNSS.*

(v) Whether the concessions given by the ED and divergent stands taken by it in previous cases can be taken note of while deciding the issues involved herein.

(i) Whether violation of the first proviso to Section 223, BNSS vitiates the order of taking cognizance and consequential proceedings.

31. There are primarily two sub-issues involved under the above broad head – whether Section 506(c), BNSS mitigates the irregularity of non-compliance of the first proviso to Section 223, BNSS and whether pre-cognizance hearing under Section 223, first proviso is a mere formality, the contravention of which does not render the consequential proceedings invalid.

32. Taking the first sub-issue first, Chapter XXXVII of the BNSS deals with irregular proceedings. Section 506, under the said Chapter, provides for irregularities which do not vitiate proceedings. Sub-clause (e) thereof stipulates that if any Magistrate "not empowered by law" to take cognizance of an offence under Clause (a) or Clause (b) of sub-section (1) of Section 210 erroneously in good faith takes cognizance, the proceedings shall not be set aside merely on the ground of his being not empowered.

33. To understand the connotation of "not empowered by law", we must go back to Section 210. Sub-section (1) of the said Section provides that

any Magistrate of the First Class and any Magistrate of the Second Class "specially empowered in this behalf under sub-section (2)", may take cognizance of any offence as stipulated in Clauses (a) and (b) of Section 210(1). Sub-section (2) of Section 210 provides that the Chief Judicial Magistrate may empower any Magistrate of the Second Class to take cognizance under sub-section (1) of such offence as are within his competence to inquire or try.

34. Thus, Section 210 itself, on a plain reading, explains the concept of "empowered by law". Borrowing from the arguments of learned ASGI, words should not be introduced by the court into a legislation where the plain and literal meaning of the same is sufficient to understand its connotation. Within the ambit of Section 210, the empowerment of a Magistrate to take cognizance under Clauses (a) and (b) of sub-section (1) is related to the hierarchy of the Magistrate. Only Magistrates of the First Class or Magistrates of the Second Class, if empowered by the Chief Judicial Magistrate to do so, are the Magistrates authorised to take such cognizance.

35. Section 506(c) speaks about the lack of authority of the Magistrate to take cognizance of an offence under Section 210(1), Clauses (a) and (b) and mitigates the effect thereof on a cognizance so taken; however, it does not pertain to non-compliance of the first proviso to Section 223 in any manner. Section 223 is an umbrella provision which governs and circumscribes Section 210, but is itself not the source of power of the Magistrate to take cognizance of offences in the first place. Such power

is derived from Section 210 itself. Thus, the expression "empowered by law" used in Section 506 relates to the authority of the Magistrate, be it territorial or hierarchical or otherwise, of the Magistrate to take cognizance under Section 210 in the first place and has nothing to do with the compliance under Section 223, first proviso. There lies the fallacy of such argument of the ED. Thus, the non-compliance of the first proviso to Section 223, BNSS cannot be an "irregularity" contemplated in Section 506.

36. Another aspect of the matter deserves serious consideration. The ED, in its arguments, seeks to relegate the non-compliance of the first proviso to Section 223, which emanates from the cardinal principle of *Audi Alteram Partem* embedded in natural justice, to a mere "irregularity" which is curable.

37. We are to keep in mind that the Legislature, in its wisdom, has deliberately introduced the first proviso to Section 223, thereby conferring on the accused the right to have an opportunity of hearing at the pre-cognizance stage, despite the Legislature being obviously aware of the subsequent stages of a proceeding and criminal trial where a right of hearing is again given to the accused. Such deliberately worded reflection of the Legislatures' intention, as embodied in the first proviso to Section 223, cannot be effaced or discarded to the waste paper basket, be it by the ED or by the Court of Law.

38. Seen from a different perspective, Article 21 of the Constitution recognizes the right to life and personal liberty, which inheres in a

person simply by dint of his being a human. Notably, Article 21 does not confer such power but merely recognizes the same and is couched in a negative language, debarring the deprivation of the life or personal liberty of any person by default (which is not even confined to citizens of India), except "according to procedure established in law".

39. The "procedure established in law" concerned in the present case is the power of the jurisdictional Magistrate to take cognizance of an offence, which sets the ball rolling for a criminal investigation and trial to be initiated. Such power, however, is circumscribed by the right of hearing ensured by the first proviso to Section 223(1) of the BNSS. Thus, on a proper reading of Article 21, the personal liberty of a person cannot be curtailed or deprived except according to the procedure established by law which, in the present case, includes giving the accused an opportunity of being heard before taking cognizance of an offence allegedly committed by him. As such, it would be a rampant violation of Article 21 itself if cognizance is taken, obviously resulting in the initiation of a criminal proceeding which directly affects the personal liberty of the accused, without giving the accused his opportunity of hearing.

40. Learned ASGI has raised an issue as to the limited scope of hearing which an accused can get at the time of a pre-cognizance hearing. However, the scope or extent of such hearing does not take anything away from the right itself. Even if the scope is limited, the right has been recognized categorically by the statute and has to be honoured.

41. In this context, we also have to take into consideration the harsh rigours of the PMLA which, under Section 24 of the PMLA, imposes a reverse burden on the accused to prove innocence, which is counter-intuitive to criminal jurisprudence in India. As held in *Baldev Singh (supra)*[4], "the severer the punishment, the greater has to be the care taken to see that all safeguards provided in a statute are scrupulously followed". Hence, it is all the more necessary to put the right of hearing afforded to the accused under the first proviso to Section 223(1) of the BNSS, which is obviously a progressive piece of legislation keeping in view the transition of criminal jurisprudence from a retributive to a reformative regime, on its proper pedestal of a mandatory pre-requisite of cognizance under Section 210, BNSS. Thus, the negation of such right altogether cannot be relegated to a mere irregularity, the compliance of which would not affect the cognizance itself and, consequentially, the resultant proceedings.

42. Accordingly, this issue is answered in the affirmative, holding that the denial of opportunity of hearing to the accused persons/petitioners prior to taking cognizance under Section 210, BNSS, is fatal to such cognizance and vitiates the order of cognizance itself, along with the subsequent proceedings undertaken in pursuance thereof.

---

4. ***State of Punjab v. Baldev Singh, reported at (1999) 6 SCC 172***

(ii) Whether absence of the words "including any complaint filed by a person authorised under Special Law", as enumerated in Section 210 (1) (a) of the BNSS, in Section 223, BNSS excludes operation of the first proviso to Section 223 to cognizance in respect of such complaints.

43. Although attractive at the first blush, the argument, that the absence of the expression "by a person authorised under any Special Law" in Section 223 takes away the rigours of the first proviso of the latter Section, is specious.

44. As rightly pointed out by learned ASGI, the said expression was missing in the corresponding provision in the Cr.P.C., that is, Section 190. It is interesting to note that the introduction of the said phrase in respect of taking cognizance by way of Section 210(1)(a) is contemporaneous with the introduction of the first proviso to Section 223, conferring a prior opportunity of hearing to the accused before taking cognizance.

45. Thus, whereas both were absent in the predecessor-statute (Cr.P.C.), it is manifest that the Legislature has, deliberately, introduced the two simultaneously to balance out each other. Whereas, under the BNSS regime, complaints under special laws have been brought within the purview of cognizance of offences under such laws by the empowered Magistrates, a simultaneous check against the abuse of such power has

been introduced by affording the accused a pre-cognizance right to get an opportunity of hearing.

46. Another aspect of the matter is that Section 223 is not the parent provision conferring authority on the Magistrate to take cognizance, as opposed to Section 210. Section 223 circumscribes the cognizance to be taken under Section 210 and provides for the modalities of taking cognizance.

47. Thus, Section 210 in its entirety, including the newly introduced provisions therein, are circumscribed in a sweeping manner by the modalities prescribed in Section 223. Hence, the first proviso to Section 223, along with all other provisions of the said Section, would be applicable to Section 210 as a whole, in its new Avatar as well.

48. Moreover, the argument of learned ASGI in that regard is a double-edged sword. The very omission to introduce any exception clause in respect of complaints filed by persons authorised under Special Laws in Section 223 clearly indicates that no such exception was intended by the Legislature at all.

49. Section 223(1) has two distinct components - examination upon oath of the complainants and witnesses present and reducing the substance thereof to writing signed by the complainants and the witnesses on the one hand, and giving an opportunity of hearing to the accused on the other. While the second proviso to Section 223 remains as it was in the Cr.P.C. and carves out an exception regarding the examination of the complainant and the witnesses in certain cases, no corresponding

exception has been provided in Section 223 with regard to opportunity of hearing to the accused, in case of complaints under special statutes. Thus, by its very omission, the legislative intent is manifested to the effect that no relaxation regarding opportunity of evidence being given to an accused, as provided under the first proviso to Section 223(1), BNSS has been sought to be read into Section 223 with regard to complaints under special laws.

50. Hence, this issue is held in the negative. The absence of the words "including any complaint filed by a person authorised under any Special Law" in Section 223 of the BNSS does not have the impact of exclusion of the operation of the first proviso to Section 223(1) in respect of complaints under Special Laws.

(iii) Whether the accused has a burden to show "prejudice" and "miscarriage of justice" to vitiate an order taking cognizance on the ground of depriving the accused of pre-cognizance opportunity of hearing.

51. As discussed above, the right to personal liberty enshrined and recognized in Article 21 of the Constitution operates by default, barring only cases where such right is curtailed or deprived by procedure established by law.

52. Such procedure, in the present case, is Section 210, read with Section 223, of the BNSS. Whereas Section 210 curtails the personal liberty of

an individual by empowering the Magistrates to take cognizance of offences, including offences under Special Laws, thereby setting the process of a criminal investigation, followed by a criminal trial, in motion, the said curtailment is circumscribed by the right of audience of the accused at a pre-cognizance stage. Sections 223 and 210 have to be read in conjunction. If one is divorced from the other, both lose relevance. Hence, a further burden, where it is not provided in the statute itself, cannot be imposed on the accused, in case of violation of the first proviso to Section 223(1), BNSS, to show prejudice or miscarriage of justice.

53. The right of hearing prior to cognizance, being a necessary incident of the maxim *Audi Alteram Partem*, which is a cardinal tenet of natural justice and a part and parcel of the right to life and personal liberty, is self-effulgent and need not be illumined by the further borrowed light of "prejudice" or "miscarriage of justice".

54. As discussed earlier, the introduction of the said right is a progressive piece of legislation, taking into account the dynamics of criminal jurisprudence, and cannot be watered down by a restrictive interpretation. Nothing further is required to be proved to vitiate a cognizance if there is a violation of the first proviso to Section 223.

55. It is extremely important to note that the said proviso is couched in a negative, hence, mandatory, language and no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of hearing. Thus, the very fact that an opportunity of

hearing at the pre-cognizance stage was not be given to the accused *per se* vitiates the cognizance, since such cognizance becomes a nullity in the eye of law as it could not be taken in the first place in view of the negative language of the first proviso to Section 223(1), BNSS. The "prejudice" argument of the ED, cannot, thus, be accepted.

56. Certain judgments have been relied on by the ED for the said proposition, one of which is *Fertigo Mktg. & Investment (P) Ltd. (supra)*[5]. In the said judgment, the Supreme Court took into consideration a "mere technical error or irregularity" in the complaint which, in the opinion of the Supreme Court, did not warrant setting aside of the investigation unless prejudice was shown to have been caused to the accused. There, the Supreme Court was considering a case of absence of prior consent under Section 6 of the Delhi Special Police Establishment Act and lack of approval of the CVC prior to investigation.

57. Again, in *Kuppuswamy Gownder (supra)*[6], a technical objection as to lack of territorial jurisdiction was taken. In such context, it was held that an investigation cannot be derailed merely on technical errors or irregularities.

58. As opposed thereto, the substantive opportunity of hearing, as embodied in Section 223(1), first proviso, cannot be relegated to a mere

---

5. ***Fertigo Mktg. & Investment (P) Ltd. v. CBI, reported at (2021) 2 SCC 525***

6. ***State of Karnataka v. Kuppuswamy Gownder, reported at (1987) 2 SCC 74.***

technical formality but is a substantive right. Thus, the ratio laid down in the said judgment is not applicable in terms in the present case.

59. In *Sudhir Kumar Singh (supra)*[7], the Supreme Court observed in Paragraph 42.3 that no prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or admits it, which can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the court finds on fact that no real prejudice can therefore be said to have been caused to the person complaining of breach of natural justice.

60. Such general proposition, with due respect, is not applicable in the present case, where the first proviso to Section 223(1), BNSS, gives a specific right of prior audience before taking cognizance of an offence, which is a substantive right. The distinguishing factor in the said report is that prejudice has to be proved if there is an admission or acquiescence of guilt. In the present case, the prejudice caused to the accused persons/petitioners is self-evident and implicit in the denial of the right of prior audience itself. At no point of time did the accused persons, in the present case, have even any opportunity to be heard, let alone admit their guilt or acquiesce. The order taking cognizance of the offence without giving such opportunity of hearing has been challenged before this Court in the present revisions. Thus, the principle laid

---

7. ***U.P. v. Sudhir Kumar Singh, reported at (2021) 19 SCC 706.***

down in *Sudhir Kumar Singh (supra)*[8] is also not applicable in the present case in view of the observations made in the said judgment itself.

61. In *Satvinder Kaur v. State (Govt. of NCT of Delhi)*, reported at *(1999) 8 SCC 728*, as well as *State of A.P. v. Punati Ramulu*, reported at *1994 Supp (1) SCC 590*, technical objections as to lack of territorial jurisdiction of the concerned police station, where the complaint was lodged, was cited. Such objections cannot be equated with the blatant denial of the substantive right to be heard prior to cognizance being taken.

62. As held by the Supreme Court in *Yash Tuteja (supra)*[9] and *Tarsem Lal (supra)*[10], violation of mandatory pre-requisites under the Cr.P.C. even in cases of PMLA complaints, vitiates the cognizance itself.

63. Section 65, read with Section 46 of the PMLA, make it abundantly clear that the provisions of the Criminal Procedure Code are applicable to all proceedings before Special Courts under the PMLA. *Vide* Notification No. S.O. 2790 (E) dated July 16, 2024, the provisions of the BNSS have replaced the Cr.P.C. in the said Sections. Thus, there cannot be any manner of doubt that if the mandatory provision of the first proviso to Section 223(1) of BNSS is violated, in view of the negative language in

---

8. U.P. v. Sudhir Kumar Singh, reported at (2021) 19 SCC 706

9. Yash Tuteja and another v. Union of India and others, reported at (2024) 8 SCC 465.

10 .Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office, reported at (2024) 7 SCC 61

which the said proviso is couched, the cognizance itself becomes a nullity and is patently vitiated.

64. *Kushal Kumar Agarwal (supra),*[11] cited by the petitioners, held in no uncertain terms that, in such cases, the order taking cognizance has to be set aside.

65. Accordingly, this court is of the firm view that the denial of the right of prior hearing, as enumerated in the first proviso to Section 223 of the BNSS, is sufficient to vitiate the order taking cognizance, without any further requirement on the part of the accused to prove prejudice and/or miscarriage of justice. In fact, the very denial of the right constitutes the prejudice and miscarriage of justice.

(iv) Whether complaints under the PMLA are in the nature of charge sheets and not "complaints" under Sections 210 and 223 of the BNSS.

66. A bare perusal of Section 46(1), read in conjunction with Section 65, of PMLA indicates that the provisions of the Cr.P.C. shall be applicable to proceedings before the Special Court and to all other proceedings under the PMLA. *Vide* Notification No. S.O. 2790 (E) dated July 16, 2024, the provisions of the BNSS have been introduced in place of Cr.P.C. Thus, it is the provisions of the BNSS which govern the criminal proceedings

---

11. Kushal Kumar Agarwal v. Directorate of Enforcement [Criminal Appeal No.2749 of 2025 {Arising out of S.L.P.(Criminal) No.2766 of 2025}].

in respect of the PMLA as well as the Special Courts constituted thereunder. Section 44(1)(b) of the PMLA provides that a Special Court may, upon a complaint being made by an authority authorised in this behalf under the PMLA, take cognizance of an offence under Section 3 without the accused being committed to it for trial. Thus, the power of a Special Court to take cognizance, conferred under Section 44(1)(b), is circumscribed by Sections 46 and 65 of the PMLA, which enable the applicability of BNSS to such cognizance.

67. The said principle has also been reiterated in *Yash Tuteja (supra)*[12] and *Tarsem Lal (supra)*[13]. It is to be noted that Section 44(1)(b) of the PMLA uses the expression "complaint". Where the Legislature consciously uses a particular word, the same, unless there is anything to militate against the same in any other law or elsewhere in the same law, has to be read in the sense as used in the statute. In the event the law-makers were of the intention to treat the complaint under the PMLA to be a charge sheet, they would specifically provide so in the Act itself. Having not done so, a "complaint" has to be read as precisely that, within the contemplation of the PMLA and not as a charge sheet. In fact, the process of investigation and subsequent trial is initiated only upon such cognizance being taken by a Special Court.

68. Hence, this issue is also decided in against the ED and in favour of the petitioners.

---

12 Yash Tuteja and another v. Union of India and others, reported at (2024) 8 SCC 465.

13 Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office, reported at (2024) 7 SCC 61

(v) Whether the concessions given by the ED and the divergent stands taken by it in previous cases can be taken note of while deciding the issues involved herein.

69. Learned senior counsel for the petitioners vociferously argues that the ED has been taking divergent stands before different courts, on a case-to-case basis. It is alleged that whereas concessions were given on behalf of the ED in certain cases by learned ASGI, while appearing before different courts, as to non-compliance of the first proviso to Section 223(1) of BNSS vitiating the cognizance, a diametrically opposite stand is being taken before this Court.

70. Although such contention appears to be true, much weight cannot be lent to such argument in the present context. It is seen from the observations made in *Pankaj Bansal (supra)*[14] that the Supreme Court deprecated the style of functioning of the ED, being a premier investigating agency charged with the onerous responsibility of curbing the debilitating economic offence of money-laundering in our country, on the ground that it was failing to discharge its function in exercise of its powers as per such parameters. It is also found from the materials placed before this court that, in several cases before various courts, the ED has conceded to the issue of non-compliance of the first proviso to Section 223(1) being fatal to the order taking cognizance. However, it is well settled that a concession, even if given in one case, does not bind

---

14 ***Pankaj Bansal v. Union of India and others, reported at 2023 SCC OnLine SC 1244***

the party giving such concession in other cases. That apart, the petitioners cannot rely on the judgments rendered on consent, for the simple reason that consent orders do not comprise of "adjudications" which can give rise to a binding precedent within the contemplation of Article 141 of the Constitution.

71. On a more fundamental premise, it is trite law that counsel's concession on law cannot be treated to be binding on the parties and their cannot be admission against the law. The question which has arisen before this Court is one of legal interpretation of a statute. No amount of admission by any of the parties, either way, can be a relevant factor in such interpretation.

72. Thus, the apparently contradictory stand taken by the ED before different courts is not a germane factor in the present adjudication and, thus, a non-issue. Hence, such divergence of stands taken by the ED before different forums/courts is hereby held to be immaterial for the present purpose.

CONCLUSION

73. In view of the above findings, the impugned order dated February 15, 2025, taking cognizance of the offences made out in the complaints against the petitioners under the PMLA, being patently violative of the first proviso to Section 223(1), BNSS, since no pre-cognizance opportunity of hearing was given to the petitioners, is vitiated in law

and a nullity in the eye of law. Accordingly, the said order dated February 15, 2025 passed in ML Case No.12 of 2024 in connection with ECIR/KLZO-I/10/2023 is hereby set aside. Consequentially, the subsequent proceedings taken in pursuance of the said orders are also quashed, in view of the genesis of such proceedings itself being a nullity in the eye of law.

74. Thus, C.R.R. No. 2072 of 2025, C.R.R. No. 2073 of 2025, C.R.R. No. 2074 of 2025 and C.R.R. No. 2075 of 2025 are accordingly allowed in terms of the above observations.

75. Urgent certified copies, if applied for, be furnished to the parties upon compliance of requisite formalities.

(Sabyasachi Bhattacharyya, J.)