

WP-5242-2025.DOC

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 5242 OF 2025

Neville Tuli,

Aged 61 years, Occupation : Entrepreneur

A-6, Green Avenue Street,

Vasant Kunj, New Delhi – 110 070.

..Petitioner

**SAINATH
SANJAY
BODKHE**

Digitally signed by
SAINATH SANJAY
BODKHE

Date: 2026.07.15
21:54:42 +0530

Versus

1. Securities and Exchange Board of India

(SEBI), SEBI Bhavan,

Plot No. C-4A, G-Block,

Bandra Kurla Complex,

Mumbai – 400 051.

...Respondents

2. State of Maharashtra

Mr. Vyapak Desai, a/w Mr. Manish Bohra, Mr. Ansh Desai, i/b
Manish Bohra, for the Petitioner.

Mr. Sudeep Pasbola, Senior Advocate, a/w Mr. Chetan Mali,
Mr. Rajan Gurnani, Ms. Janki Patil, Mr. Sachin Mishra
& Mr. Umang Arya, for Respondent No.1 - SEBI.

Mr. D. J. Haldankar, APP for Respondent No.2 - State.

CORAM : N. J. JAMADAR, J.

RESERVED ON : 09th APRIL 2026

PRONOUNCED ON : 15th JULY 2026

JUDGMENT:

1. Rule. Rule made returnable forthwith, and, with the
consent of the learned Counsel for the parties, heard finally.

2. This Petition under Article 227 of the Constitution of India and Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS, 2023”) poses the following question:

“Is it incumbent upon the Special Court under the Securities and Exchange Board of India Act, 1992 (“SEBI Act, 1992”) to give an opportunity of hearing to an accused under the first proviso to Section 223 of the BNSS 2023 before taking the cognizance of the offences punishable under SEBI Act, 1992?”

3. The aforesaid question arises for consideration in the backdrop of the following facts :-

3.1 The Securities and Exchange Board of India (SEBI)-Respondent No.1/Complainant is a Regulatory Authority established under Section 3 of the SEBI Act, 1992. Osian’s Connoisseurs of Art Pvt Ltd (“Osian’s”) was incorporated under the provisions of the Companies Act, 2013. The Petitioner - Accused No.1 was a director of Osian’s.

3.2 Osian’s floated Osian’s Art Fund (“OAF”). OAF was settled as a private trust under the Indian Trusts Act, 1882, with the company as a settlor and Oseta Investments Trustee Company

Pvt Ltd (“Oseta Trustee”) as the trustee in accordance with the Trust Deed dated 10th March 2006.

3.3 On 15th April 2013, the Whole Time Member of SEBI passed an order to the effect that OAF was a collective investment scheme. The said scheme was operated without registration, in violation of Section 12(1-B) of the SEBI Act, 1992 and Regulation 3 of the SEBI (Collective Investment Schemes) Regulations 1999 (CIS Regulation 1999).

3.4 Eventually, after the dismissal of the Appeals preferred by the company, Respondent No.1 passed an order under Section 11, 11-B read with Section 19 of the SEBI Act, 1992 and Regulation 65 of the CIS Regulations, 1999 and thereby directed the company to refund monies to investors with 10% interest from the date when the amount to the investors first became due and till the date of the scheme’s closure, within the stipulated period.

3.5 Appeals preferred by the company against the said order were dismissed by the Securities Appellate Tribunal and the Supreme Court.

3.6 In the wake of the default, in compliance with the directions issued by the Respondent vide order dated 28th May 2021, the prosecution notices dated 8th August 2024 were issued to the Petitioner and co-accused No.2, another director of the Company.

3.7 In the meanwhile, the Corporate Insolvency Resolution Process (“CIRP”) was initiated against the company. Thus, on account of the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (“the IBC, 2016”), the complainant lodged complaint against the Petitioner (A1) and Accused No.2, the directors of the company for the commission of an offence punishable under Section 24(2) of the SEBI Act, 1992, before the Special Court at Mumbai.

3.8 By the impugned order, the learned Judge, Special Court (SEBI), directed issue of process against the accused for an offence punishable under Section 24(2) of the SEBI Act, 1992, opining that there was sufficient ground to proceed against the accused.

4. The Accused No.1 has preferred this Writ Petition assailing the order of taking cognizance and issuance of process primarily

on the ground that there is a clear breach of the mandatory requirement of providing an opportunity of hearing to the accused under the first proviso to Section 223 of the BNSS, 2023, before taking cognizance of the offence, as the prosecution has been initiated on the basis of a complaint. The Petitioner asserts, the impugned order of taking cognizance of the offence without affording an opportunity of hearing to the proposed accused is in teeth of the statutory mandate contained in the first proviso to Section 223(1) of the BNSS, 2023 and non-compliance renders the impugned order null and void.

5. At this juncture, it must be noted that the Petitioner has assailed the impugned order on other grounds as well. However, at the time of hearing, the Petitioner confined the challenge to the impugned order on the score of non-compliance of the prerequisite for taking cognizance envisaged under the first proviso to Section 223(1) of the BNSS, 2023, as the said violation, according to the Petitioner, goes to the root of the matter.

6. An Affidavit in Reply has been filed on behalf of Respondent No.1 controverting the contentions in the Petition in regard to the alleged violation of the statutory prescription.

Adverting to the provisions contained in the SEBI Act, 1992, which envisage establishment of Special Court and mode of taking cognizance of the offence by the Special Court, Respondent No.1 contends, the complaints before the Special Court are not governed by the provisions contained in Section 223 of the BNSS, 2023. The Special Court constituted under the SEBI Act, 1992 is essentially the Court of Sessions and not the Court of Magistrate, and, thus, the provisions contained in Section 223 of the BNSS 2023 do not govern the judicial act of taking cognizance by the Special Court under the provisions of SEBI Act, 1992.

SUBMISSIONS

7. In the wake of the aforesaid facts and pleadings, I have heard Mr. Vyapak Desai, the learned Counsel for the Petitioner, and Mr. Sudeep Pasbola, the learned Senior Advocate for Respondent No.1, at length. The learned Counsel for the parties took the Court through the material on record.

8. Mr. Desai, the learned Counsel for the Petitioner, submitted that the trial of the offences before the Special Court is governed by the provisions contained in the BNSS, 2023, save in a case where the SEBI Act, 1992, contains a special

provision. In the matter of taking of cognizance of the offences on a complaint, the provisions contained in Chapter XVI of the BNSS, 2023 are clearly attracted as there is no contrary provision in the SEBI Act, 1992.

9. Mr. Desai further submitted that, the reliance on the part of Respondent No.1 on the provisions contained in Sections 26-A and 26-B of the SEBI Act, 1992 is of no assistance to Respondent No.1. On the contrary, Section 26-D(1) makes it explicitly clear that the provisions of the Code of Criminal Procedure, 1973 (now BNSS, 2023) shall apply to the proceedings before the Special Court, save as otherwise provided in that Act. There is no provision in the SEBI Act, 1992 which is in derogation of the provisions contained in Section 223 of the BNSS, 2023, in the matter of taking cognizance of the offences thereunder.

10. Mr. Desai would urge that, the controversy is no longer *res integra*. Even in the case of a complaint filed under Section 44(1)(b) of the Prevention of Money Laundering Act, 2002 ("PML Act, 2002"), the provisions of which, in the matters of the establishment of the Special Court and taking of the cognizance of the offences thereunder by the Special Court, are *pari*

materia with the provisions of the SEBI Act, 1992, it has been held that the provisions of Section 223 of the BNSS, 2023 are attracted. Reliance was placed by Mr. Desai on the judgment of the Supreme Court in the case of ***Kushal Kumar Agarwal Vs Directorate of Enforcement***¹ wherein it was enunciated that the provisions of Chapter XVI containing Sections 223 to 226 of BNSS, 2023 will apply to a complaint under Section 44 of the PML Act, 2002.

11. Per contra, Mr. Sudeep Pasbola, the learned Senior Advocate for Respondent No.1, submitted that SEBI Act, 1992 is a special statute. Section 26 of the said Act contains an interdict against taking cognizance of the offences save on the complaint made by the Board. Such complaint by the Board, Mr Pasbola emphasised, is preceded by a detail enquiry by the Authorities under the SEBI Act, 1992. Having regard to the object of the SEBI Act, 1992, and the detail enquiry /investigation proceedings, which precede the filing of the complaint, the Special Court has been empowered to take cognizance of the offences under the SEBI Act, 1992, without pre-cognizance enquiry envisaged by the proviso to Section 223(1) of the BNSS, 2023. Any other view would defeat the

1 2025 SCC OnLine SC 1221.

purpose of the constitution of the Special Court and the object of expeditious disposal of the prosecutions initiated under the SEBI Act, 1992, submitted Mr. Pasbola.

12. Special emphasis was laid by Mr. Pasbola on the provisions contained in Section 26-D(1) of the SEBI Act, 1992 which declares that for the purposes of the provisions contained in the Code of Criminal Procedure, 1973, the Special Court shall be deemed to be a Court of Session. The necessary corollary, according to Mr. Pasbola, is that, the Sessions Court is not bound by the provisions contained in Section 223 of the BNSS, 2023 which falls under the Chapter dealing with complaints to Magistrates.

13. To buttress the aforesaid submissions, Mr Pasbola placed reliance on the judgments of the Supreme Court in the cases of *Ajit Kumar Palit Vs State of West Bengal*,² *State of West Bengal Vs Bejoy Kumar Bose and Ors*³ and *Sanjabij Tari Vs Kishore S Borcar and Ors*⁴

14. Mr. Pasbola submitted that the decision of the Supreme Court in the case of *Sanjabij Tari (Supra)* declaring that in a

2 AIR 1963 SC 765.

3 AIR 1978 SC 188.

4 2025 SCC OnLine SC 2069

complaint for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, (“N. I. Act, 1881”), there shall be no requirement to issue notice to the accused in terms of Section 223 of the BNSS, 2023 at the pre-cognizance stage, governs the prosecutions under SEBI Act, 1992, with equal force.

15. In the light of the aforesaid rival submissions, the core question that comes to the fore is, whether the provisions contained in Section 223 of the BNSS, 2023, which is a general law in the matter of investigation, inquiry and trial of the offences, would govern the prosecution for the offences under SEBI Act, 1992 ? or Are there provisions in the SEBI Act, 1992 which regulate the manner of taking cognizance of the offences punishable thereunder ?

16. To explore an answer to the aforesaid question, it would be necessary to examine the general applicability of the provisions of BNSS, 2023 to the prosecutions under special enactments, the object of the penal provisions under SEBI Act, 1992, whether there are provisions in the SEBI Act, 1992 which give a contra indication, and what is the import of those provisions in

the matter of taking cognizance of the offences punishable under the SEBI Act, 1992, by the Special court.

17. To begin with, it is necessary to note the provisions contained in Section 4(2) of the BNSS, 2023 (which corresponds with Section 4(2) of the Code, 1973). Section 4(2) of the BNSS, 2023, reads as under :-

“(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.”

18. A bare textual reading of the aforesaid provision would indicate that, the provisions of the BNSS, 2023 shall apply to the investigation, inquiry and trial of all the offences under any other, law apart from the Bhartiya Nyaya Sanhita, 2023 (IPC, 1860). The application of the provisions of the BNSS, 2023 would, however, be excluded only when a special law prescribes a special procedure to deal with the investigation, inquiry or the trial of the offences under such special enactments. In the absence of any special procedure in the special statute in regard to a particular matter pertaining to the investigation, inquiry or trial of a special offence; be it the act of taking cognizance of the

offence or the trial, the procedure under the BNSS, 2023 shall apply automatically as a default procedure enshrined by the general law governing the Criminal Procedure. To put it in other words, wherever the special enactment does not contain any provision in regard to a particular matter, the corresponding provision in the BNSS, 2023 would be attracted to fill in the gap.

19. Keeping in view the aforesaid well recognized position in law in the matter of application of the general law of procedure, prescribed under BNSS, 2023, to the matters for which the special enactment does not make a special or inconsistent provision, the nature of the change introduced by the BNSS, 2023 in the matter of taking cognizance of the offence on a private complaint, deserves to be noted.

20. Section 223 of the BNSS, 2023 corresponds to Section 200 of the Code, 1973. A significant change brought about by the first proviso to Section 223(1) of the BNSS, 2023 is that, it heralded a departure from the well ingrained rule of criminal jurisprudence that, the accused has no right of audience before the Court takes cognizance and issues process against the accused. The law which prevailed before the introduction of the proviso to Section 223(1), by and large, did not recognize a right

of hearing at a pre-cognizance stage. The first proviso to Section 223(1) marked a paradigm shift by enshrining the right of hearing at a pre-cognizance stage. It mandates that, no cognizance of an offence on the basis of a complaint shall be taken by the Magistrate without giving the accused an opportunity of being heard. The first proviso is peremptory in nature. Thus, once the manner of taking cognizance of the offence, is found to be governed by Section 223 of BNSS, 2023, then there can be no escape from the mandate of the first proviso to Section 223(1) of BNSS, 2023.

21. At this juncture, it is necessary to note, the Parliament considered it appropriate to provide an opportunity of hearing to the accused at a pre-cognizance stage, with a view to ensure that, the accused are not made to suffer the ordeal of facing the prosecutions by resorting to private complaint mechanism, indiscriminately.

22. At this stage, the object of the provisions contained in the SEBI Act, 1992, deserves to be appreciated. The SEBI Act, 1992 has been enacted to protect the interest of investors in securities and to promote the development of, and to regulate, the

securities market and for matters connected therewith or incidental thereto.

23. In the case of *SEBI v. Ajay Agrawal*⁵, the Supreme Court observed that, the SEBI Act, 1992 is preeminently a social welfare legislation seeking to protect the interests of the common men, who are small investors. While interpreting the provisions of a social welfare legislation, it is the paramount duty of the Court to adopt such an interpretation as to further the purpose of law and, if possible, eschew the interpretation which frustrates the law.

24. To achieve the aforesaid object, by successive amendments to SEBI Act, 1992, the Parliament has conferred powers on the authorities under the SEBI Act, 1992, enhanced the punishment and penalties for the violation of the provisions of the Act and incorporated measures to protect the interest of the investors. A brief resume of the relevant provisions of the SEBI Act, 1992, may be apposite.

25. Section 24(2) of the SEBI Act, 1992 punishes the failure to pay the penalty imposed by the Adjudicating Officer or the Board or failure to comply with any directions or orders passed

⁵ 2010(3) SCC 765

by the authorities under the SEBI Act, 1992. It reads as under :-

“24. Offences- (1).....

(2) If any person fails to pay the penalty imposed by the adjudicating officer or the Board or fails to comply with any directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years or with fine, which may extend to twenty-five crore rupees or with both.”

26. Section 26 of the SEBI Act, 1992 provides for the cognizance of offences by the Courts, as under :-

“[26. Cognizance of offences by Courts. - (1) No Court shall take cognizance of any offence punishable under this Act or any rules or regulations made thereunder, save on a complaint made by the Board.

27. Section 26-A of the SEBI Act, 1992, envisages the establishment of the Special Courts. It reads as under :-

[26-A. Establishment of Special Courts. - (1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of a single Judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High

Court within those jurisdiction the Judge to be appointed is working.

(3) A person shall not be qualified for appointment as a Judge of a Special Court unless he is, immediately before such appointment, holding the office of a Sessions Judge or an Additional Sessions Judge, as the case may be.

28. Section 26-D of the SEBI Act, 1992, which bears upon the applicability of the provisions of the general law contained in BNSS, 2023 to the prosecutions for the offences under the SEBI Act, 1992, reads as under :-

“26-D. Application of Code to proceedings before Special Court. - (1) Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting prosecution before a Special court shall be deemed to be a Public Prosecutor within the meaning of clause (u) of Section 2 of the Code of Criminal Procedure, 1973 (2 of 1974).
.....”

29. Whether the aforesaid provisions, provide a special procedure in the matter of taking cognizance of the offences ?
Section 26 of the SEBI Act, 1992 which deals with the

cognizance of the offences only governs the mode of initiation of the prosecution for the offences punishable under SEBI Act, 1992 and that mode is a complaint made by the Board. What is interdicted by Section 26 is the other modes of taking cognizance of the offences, as provided in Section 210 of the BNSS 2023 (Section 190 of the Code, 1973), than that of a complaint by the Board itself. The special provision in regard to the mode of taking cognizance of the offence by the Code, only on a complaint made by the Board, does not deal with the manner of taking cognizance.

30. Section 26-A envisages the establishment of Special courts for the purpose of providing speedy trial of the offences under the SEBI Act, 1992. Sub-section (3) of Section 26-A provides that, a person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding the office of a Sessions Judge or an Additional Sessions Judge, as the case may be. Section 26-A is, thus, plainly restricted to the aspect of establishment of the Special Courts and the qualification of the person to preside over the Special Courts.

31. Section 26-D of the SEBI Act, 1992 expressly makes the provisions of the Code, 1973 (now BNSS, 2023) applicable to the proceedings before a Special Court and further declares that, for the purposes of the said provisions, the Special court shall be deemed to be a Court of Session.

32. On its plain reading, Section 26-D makes the provisions of the Code, 1973 applicable to the proceedings before a Special Court unless, there is a contrary provision in the SEBI Act, 1992, itself. Thus, although sub-section (1) of Section 26-D begins with an inbuilt saving clause by using the expression, 'save as otherwise provided in this Act' yet there is no provision in the SEBI Act, 1992, which delineates a special procedure in the matter of manner of taking cognizance of the offences under the SEBI Act, 1992. Nor Section 26-D begins with a usual *non obstante* clause 'notwithstanding anything contained in the Code of Criminal Procedure, 1973' generally employed by the legislature where the departure is sought to be made from the general law.

33. A correct reading of Section 26-D of the SEBI Act, 1992 would indicate that, for the purpose of proceedings before a Special Court, the Special Court shall be deemed to be a Court

of Session. Save the aforesaid, there is nothing in Section 26-D to suggest that, the rest of the provisions of BNSS, 2023, in regard to taking cognizance of the offences do not apply to the complaints under the SEBI Act, 1992.

34. Evidently, the Parliament has consciously used the *non obstante* clause in the provisions contained in the SEBI Act, 1992, wherever it intended to give overriding effect to the particular provision over the provisions of the Code of Criminal Procedure, 1973. Thus, under Section 24-A, the composition of offences has been permitted notwithstanding anything contained in the Code, 1973. Likewise, under Section 26-B, notwithstanding anything contained in the Code, 1973, all offences under the said Act committed prior to the date of commencement of the Securities Laws (Amendment) Act, 2014 or on or after the date of such commencement, shall be taken cognizance of and tried by the Special Court. In contrast, Section 26-D begins with only an inbuilt saving clause 'Save as otherwise provided in this Act'.

35. If the provisions contained in Section 26 are read, in the aforesaid context, the fact that it does not begin with a *non obstante* clause qua the Code, 1973, assumes significance.

Section 26 only provides that, the cognizance of the offence can only be taken on a complaint made by the Board. It could, thus, be seen that, wherever the Parliament intended to give overriding effect to the provisions of the SEBI Act, 1992, such intent was made explicit by employing a *non obstante* clause. The rule of interpretation expressed in the maxim, “Expressio Unius Est Exclusio Alterius” which means, ‘where a statute specifies certain exceptions, the absence of other exceptions implies they were not intended’, may thus be attracted to discern the legislative intent, in the case at hand.

36. In the light of the aforesaid resume of the provisions contained in SEBI Act, 1992, the submissions canvassed on behalf of the parties deserve to be appreciated.

37. I find it difficult to accede to the submission of Mr. Pasbola that, Section 26-D of the SEBI Act, 1992 provides a mechanism for the manner of taking cognizance of the offences. The reliance placed by Mr. Pasbola on the decisions in the cases of *Ajit Kumar Palit (supra)* and *State of W.B. Vs. Bejoy Kumar Bose (supra)*, to buttress the submission that, the Special Court is empowered to take cognizance on the complaint without providing an opportunity of hearing to the accused, as

envisaged by Section 223 of the BNSS, 2023, appears inapposite.

38. In the case of *Ajit Kumar Palit (supra)*, the Supreme Court was confronted with the question of proper construction of Sections 4 and 5 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (“West Bengal Amendment Act, 1949”). The said Act was enacted to provide for the speedy trial of the offences specified in the Schedule appended thereto. Interpreting the provisions of the West Bengal Amendment Act, 1949, and the provisions of the Code of Criminal Procedure, 1898, the Supreme Court observed that, as soon as a Special Judge receives the orders of allotment of the case, passed by the State Government, it becomes vested with jurisdiction to try the case and when it receives the record from the Government, it can apply its mind and issue notice to the accused and, thus, start the trial of the proceedings assigned to it by the State Government.

39. I am afraid the aforesaid decision advances the cause of the submission on behalf of the complainant. The decision in the case of *Ajit Kumar Palit (supra)*, is distinguishable for reasons more than one. First, Section 4(1) of the West Bengal

Amendment Act 1949, began with a *non obstante* clause. It provided that, notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law, the offences specified in the Schedule shall be triable by the Special Court, only. Sub-section (2) gave power to the State Government to distribute the cases amongst the Special Courts. Second, Section 26 of the SEBI Act, 1992, as noted above, provides only specified mode of taking cognizance. Third, Section 26-D of the SEBI Act, 1992 makes the provisions of the Code of Criminal Procedure, 1973, specifically applicable to the proceedings under the SEBI Act, 1992, save as otherwise provided in that Act.

40. The decision in the case of ***State of W.B. Vs. Bejoy Kumar Bose (supra)***, which held that, no valid objection could be taken against the Special court taking cognizance on the written complaint without complying with the provisions of Section 200 CrPC, also turned upon the special provisions contained in the said statute. The observations in Paragraph Nos. 8 to 10 are instructive and, hence, extracted below :-

“8. The above decision of this Court could have concluded the matter, but it is pointed out by Mr. A. K. Sen appearing on behalf of the respondent

that in view of the amendment of Section 5(1) of the Act by the West Bengal Act XXIV of 1960 introducing the words “in the manner laid down in Clauses (a) and (b) of Sub-section (1) of Section 190 of the CrPC, 1973”, the legal position has completely changed. He submits that it is now obligatory for the Special Judge to examine the complainant raider Section 200, CrPC, prior to taking cognizance of the offence. Since in the present case, proceeds the argument of Mr. Sen, the Special Judge took cognizance merely on the complaint of the Sub-Inspector of Police without proceeding in accordance with Section 200, Cr.P.C. the entire proceedings are vitiated.

9. We are unable to accede to the above submission of Mr. Sen. It is true that the amendment has introduced the manner of taking cognizance in accordance with Section 190(1)(a) & (b), Cr.P.C. appearing in Chapter XV of the Criminal Procedure Code, 1973 but the legislature in the amendment at the same time, has advisedly omitted to include Section 200, Cr.P.C. and the other provisions of the next Chapter which is Chapter XVI dealing with “complaints to Magistrates”.

10. It is clear that under Section 4(2) of the Act, the allotment by the State Government to the Special Judge of a case involving of scheduled

offences vests the necessary jurisdiction in the special Judge to proceed to trial and is, therefore, equivalent to that Court's taking cognizance of the offence (See Ajit Kumar Palit's case (supra). Because of the amendment of Section 5(2) in 1960, it may be now open to the Special Judge to apply his judicial mind to the complaint apart from allotment of the case in order to come to a decision as to whether he is satisfied on the material laid before him at that stage to take cognizance of the offence and proceed to trial. If he chooses to examine the complainant or any witnesses before issuing process against any accused, there is nothing in law to prevent him from doing so. If he does not do so and is satisfied on perusal of the complaint after allotment of the case by the Government that an offence has been disclosed against definite persons, no valid objection could be taken against his taking cognizance on the written complaint without complying with the provision of Section 200, Cr.P.C. No grievance can be made then that the Special Judge has not examined the complainant under Section 200, Cr.P.C. prior to issuing of process."

41. The Supreme Court took note of the fact that, Sections 4 and 5 of the West Bengal Criminal Law Amendment (Special

Courts) Act, 1949 envisaged a special procedure for taking cognizance of the offence. That is not the case at hand.

42. Reliance on the judgment in the case of *Sanjabij Tari (supra)*, also does not advance the cause of the submission on behalf of the complainant. It is pertinent to note, Section 142 of the N. I. Act, 1881 begins with a *non-obstante* clause and provides that, notwithstanding anything contained in the Code of Criminal Procedure, 1973, no Court shall take cognizance of any offence punishable under Section 138 of the N. I. Act, 1881 except upon a complaint in writing made by the payee or the holder in due course of the cheque within the stipulated period and no Court inferior to that of Metropolitan Magistrate or a Judicial Magistrate, First Class, shall try any offence punishable under Section 138 of the N. I. Act.

43. In that context, approving the view of Karnataka High Court in the case of *Ashok Vs. Fayaz Aahmad*⁶, the Supreme Court observed that, it was in agreement with the view of the Karnataka High Court that, the Act, 1881 is a special enactment, and there is no need for the Magistrate to issue summons to the accused before taking cognizance of the

6 MANU/KA/1743/2025

complaint. Thus, there was no requirement to issue summons to the accused in terms of Section 223 of the BNSS, 2023 i.e. at a pre-cognizance stage.

44. In contrast to this, in the cases of *Kushal Kumar Agarwal (supra)*, and *Parvinder Singh Vs. Directorate of Enforcement*⁷, arising out of the provisions contained in PML Act, 2002, the Supreme Court has emphasized the applicability of the provisions contained in the proviso to Section 223(1) of the BNSS, 2023 to the complaints filed under PML Act, 2002.

45. Section 43 of the PML Act, 2002 provides for the constitution of the Special Courts. It provides that the Special Court shall be a Court of Session which has been designated by a notification issued by the Central Government. Section 44 of the PML Act, 2002, *inter alia*, provides that notwithstanding anything contained in the Code, 1973 :-

(b) a Special Court may, [* * *] upon a complaint made by an authority authorised in this behalf under this Act take [cognizance of offence under section 3, without the accused being committed to it for trial]:

[Provided that after conclusion of investigation, if no offence of money-laundering is made out requiring filing of such complaint, the said authority shall submit a closure report before the Special Court; or]

46. Section 46 of the PML Act, 2002 makes the provisions of the Code, 1973 applicable to the proceedings before the Special Court, save as otherwise provided in that Act. Section 65 of the PML Act, 2002 makes the provisions of the Code, 1973 applicable to the proceedings under the PML Act, 2002 in so far as they are not inconsistent with the provisions of the PML Act, 2002.

47. The question of application of the provisions of the Code, 1973 to the complaints under PML Act, 2002, arose before the Supreme Court, in the case of *Tarsem Lal Vs. Directorate of Enforcement*⁸. The Supreme Court after an elaborate consideration, summarized the conclusions as under :-

“33.1 Once a complaint under Section 44(1)(b) PMLA is filed, it will be governed by Sections 200 to 205 CrPC as none of the said provisions are inconsistent with any of the provisions of PMLA;

33.2 If the accused was not arrested by ED till filing of the complaint, while taking cognizance on a complaint under Section 44(1)(b), as a normal rule, the court should issue a

summons to the accused and not a warrant. Even in a case where the accused is on bail, a summons must be issued ;

33.3 After a summons is issued under Section 204 CrPC on taking cognizance of the offence punishable under Section 4 PMLA on a complaint, if the accused appears before the Special Court pursuant to the summons, he shall not be treated as if he is in custody. Therefore, it is not necessary for him to apply for bail. However, the Special Court can direct the accused to furnish bond in terms of Section 88 CrPC;

33.4 In a case where the accused appears pursuant to a summons before the Special court, on a sufficient cause being shown, the Special Court can grant exemption from personal appearance to the accused by exercising power under Section 205 CrPC;"

(emphasis supplied)

48. In the case of *Kushal Kumar Agarwal (supra)*, the question of applicability of the first proviso to Section 223(1) of the BNSS, 2023, warranting an opportunity of hearing to the accused in a PMLA prosecution complaint, was posed before the Supreme Court and it was answered as under :-

"5. This Court has taken a consistent view that a complaint filed by the Enforcement Directorate under Section 44(1)(b) of the PMLA will be governed by Sections 200 to 204 of the CrPC. This view has been taken by this Court in the cases of Yash Tuteja v. Union of India and Tarsem Lal v. Enforcement Directorate. Therefore, the provisions of Chapter XVI, containing Sections 223 to 226, will also apply to a

complaint under Section 44 of the PMLA. As the complaint has been filed after 1st July, 202, Section 223 of the BNSS will apply to the present complaint.

6. The proviso to sub-section (1) of Section 223 puts an embargo on the power of the Court to take cognizance by providing that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

7. In this case, admittedly, an opportunity of being heard was not given by the learned Special Judge to the appellant before taking cognizance of the offence on the complaint. Only on that ground, the impugned order dated 20th April, 2024, will have to be set aside.

(emphasis supplied)

49. In a recent pronouncement in the case of *Parvinder Singh (supra)*, the Supreme Court again considered the applicability of the first proviso to Section 223(1) of the BNSS, 2023 to a prosecution complaint under PML Act, 2002. The Supreme Court upon construction of the proviso to Section 223(1) enunciated that, though Chapter XVI of the BNSS, 2023 lays down the procedural law dealing with complaints made to a Magistrate, the first proviso to Section 223(1) of the BNSS, 2023 is substantive in nature, as it does not merely regulate the manner in which the proceedings are to be conducted, rather it confers a right upon the accused to be heard before taking cognizance which forms a part of the right of an accused to a

fair trial enshrined under Article 21 of the Constitution of India.

Thus, the word, “shall” occurring in the first proviso has to be construed to be mandatory in nature, which enures to the benefit of an accused. Resultantly, cognizance of an offence taken by a Court without due compliance of the aforesaid proviso would be *void ab initio*.

50. The Supreme Court after extensively referring to the decisions in the cases of *Tarsem Lal (supra)* and *Kaushal Kumar Agarwal (supra)*, concluded that, Sections 200 to 205 of the Code, 1973 (now Sections 223 to 228 of BNSS, 2023) would be applicable to proceedings under PML Act, 2002. Non-compliance with the first proviso to Section 223(1) of the BNSS, 2023 vitiates the order taking cognizance, and the same cannot be sustained in the eyes of law.

51. This Court does not find that, there is a significant textual difference in the provisions contained in PML Act, 2002 and SEBI Act, 1992 in the matter of the manner of taking cognizance of the offences. In the absence of any contrary intent evincible from the SEBI Act, 1992, the first proviso to Section 223(1) would also govern the complaint for the offences punishable under the SEBI Act, 1992.

52. The conspectus of aforesaid consideration is that, the question framed above is required to be answered in the affirmative. The Special Court cannot take cognizance of the offences punishable under the SEBI Act, 1992, without compliance of the peremptory requirement of providing an opportunity of hearing to the accused, as provided under the first proviso to Section 223(1) of the BNSS, 2023.

53. Resultantly, the order of taking cognizance of the offence punishable under Section 24(2) of the SEBI Act, 1992, cannot be sustained. The impugned order, therefore, deserves to be quashed and set aside. The learned Judge, Special Court (SEBI) is now required to provide an opportunity of hearing to the accused and, thereafter, pass an appropriate order in accordance with law.

54. Hence, the following order :-

:: O R D E R ::

- I) The Writ Petition stands allowed.
- II) The impugned order of taking cognizance and issuance of process against the accused stands quashed and set aside on the sole

ground of non-compliance with the proviso to sub-section (1) of Section 223 of the BNSS, 2023.

III) The learned Judge, Special Court is requested to provide an opportunity of hearing to the petitioner before passing an order as regards taking cognizance of the offence punishable under Section 24(2) of the SEBI Act, 1992, in accordance with law.

IV) For the said purpose, the petitioner shall appear before the Special Court on 03rd August, 2026. No separate notice be issued to the petitioner – accused.

V) By way of abundant caution, it is clarified that, this Court has not entered into the merits of the matter and all contentions of all the parties are expressly kept open for consideration by the Special Court.

V) Rule made absolute in the aforesaid terms.

No costs.

[N. J. JAMADAR, J.]