



IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2749 OF 2025
(Arising out of S.L.P.(Criminal) No.2766 of 2025)

KUSHAL KUMAR AGARWAL ... APPELLANT(S)

VS.

DIRECTORATE OF ENFORCEMENT ... RESPONDENT(S)

ORDER

ABAHY S OKA, J

Leave granted.

Heard the learned counsel appearing for the appellant and the learned Additional Solicitor General appearing for the respondent.

In the present case, a complaint was filed under Section 44(1)(b) of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "the PMLA") on August 2, 2024. The appellant is shown as accused in the complaint. The Bhartiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as "the BNSS") came into force on July 1, 2024. Section 223 of the BNSS reads thus:

"223. Examination of complainant.

(1)A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of

such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:

Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212;

Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

Section 223 of the BNSS corresponds to Section 200 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the CrPC'). However, a proviso similar to the proviso to sub-section (1) of Section 223 does not find place in Section 200 of the CrPC.

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/s Union of

India and others¹ and Tarsem Lal v/s Enforcement Directorate². 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, 2024, Section 223 of the BNSS will apply to the present complaint.

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.

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.

Mr. Raju, the learned Additional Solicitor General, has made two submissions. Firstly, he submits that hearing given to the accused in terms of the proviso to sub-section (1) of Section 223 of the BNSS will be confined to the question whether a case is made out to proceed on the basis of the complaint and hence, only the complaint and the documents produced along with the complaint can be considered at the time of hearing. His

1 2024 SCC OnLine Sc 533

2 (2024)7SCC 61

second submission is that it is well settled that cognizance is taken by the criminal Court of the offence and not the offender. Therefore, after taking cognizance and after following the procedure prescribed by proviso to sub-section (1) of Section 223 of the BNSS if cognizance is taken, there will be no occasion to again take cognizance of the same offence when supplementary or further complaints are filed. Therefore, at that stage, there will be no occasion to give the accused the opportunity to be heard.

The aforesaid two submissions made by Mr. Raju, the learned Additional Solicitor General, need not be considered, as the same do not arise in this appeal at this stage. However, we make it clear that the said contentions are expressly kept open, which can be raised before the Special Court.

The impugned order dated 20th November, 2024, is set aside only on the ground of non-compliance with the proviso to sub-section (1) of Section 223 of the BNSS.

We make it clear that we have not expressed any opinion on the merits of the complaint and the aforesaid contentions raised by the learned Additional Solicitor General.

We direct the appellant to appear before the Special Court on 14th July, 2025, so that he can be given an opportunity of being heard in terms of the proviso to sub-section (1) of Section 223 of the BNSS. We make it clear that no further notice shall be issued by the Special Court to the appellant.

The appeal is accordingly partly allowed.

.....J.
(ABHAY S.OKA)

.....J.
(UJJAL BHUYAN)

NEW DELHI;
May 09, 2025