# IN THE HIGH COURT OF JUDICATURE AT PATNA
**CRIMINAL REVISION No.685 of 2025**

Arising Out of PS. Case No.-4 Year-2024 Thana- E.C.I.R (GOVERNMENT OFFICIAL) District- Patna

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Pushpraj Bajaj, S/O Late Shyam Sundar Bajaj, R/o Block- CD, House No. 151, Sector 1, Salt Lake City, Kolkata-700064

... ... Petitioner/s

Versus

1. The Union of India through the Assistant Director, Enforcement Directorate, Patna Zonal Office, Patna
2. The Assistant Director, Enforcement Directorate, Patna Zonal Office, Patna

... ... Respondent/s

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**Appearance :**

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| For the Petitioner/s | : | Mr. Madhav Khurana, Sr. Advocate<br>Mr. Samarth K. Luthra, Advocate<br>Mr. Harsh Singh, Advocate<br>Mr. Abhijeet, Advocate |
| For the ED | : | Mr. Zoheb Hossain, Spl. Counsel<br>Mr. Tuhin Shankar, Retainer Counsel<br>Mr. Prabhat Kumar Singh, SPP<br>Mr. Pranjal Tripathi, Advocate<br>Mr. Vishal Kumar Singh, LC |

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**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA**

**CAV JUDGMENT**

**Date : 11-11-2025**

**I.A.No.01 of 2025**

This interlocutory application has been filed for condoning the delay of about 88 days in preferring this revision application.

2. For the reasons mentioned in this interlocutory application, I am satisfied that the petitioner was prevented from

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sufficient cause in preferring this revision application within time.

3. Accordingly, this interlocutory application is allowed and the delay in filing this revision application is hereby condoned.

**Cr. Revison No.685 of 2025**

4. The instant criminal revision has been filed under Sections 438 read with Section 442 of the Bhartiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as 'BNSS') seeking setting aside of the order dated 08.01.2025 passed by the learned Sessions Judge-cum-Special Judge (PMLA), Patna (hereinafter referred to as 'the learned Special Court') in Special Trial No. (PMLA) 10/2024 along with proceedings emanating therefrom, whereby and whereunder the learned Special Court has taken cognizance for the offence punishable under Sections 3 & 4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA') against the petitioner and others.

5. Brief facts of the case are that the respondent no.2/opposite party no.2, which is an agency mandated with the task of enforcing the provisions of PMLA, registered ECIR/PTZO/04/2024 dated 14.03.2024 (hereinafter referred to

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as ‘ECIR’) and an Addendum ECIR dated 20.09.2024 on the strength of two FIRs against one Sanjeev Hans and others wherein it has been alleged that Sanjeev Hans, while in public service, amassed huge assets, acquired with the help of one Gulab Yadav and Harloveleen Kaur. It appears the petitioner was neither named in the aforesaid FIRs nor in ECIR or Addendum ECIR.

6. It further transpires that the petitioner was arrested and taken into custody on 22.10.2024 and he has challenged the grounds of arrest and remand to judicial custody by filing Cr.W.J.C.No. 63 of 2025, which has been pending before this Court. During the course of investigation into the aforesaid ECIR/Addendum ECIR, the respondent no.2/opposite party no.2 filed Prosecution Complaint dated 16.12.2024 (hereinafter referred to as ‘PC’) under Section 44 (1) (b) of PMLA before the learned Special Court arraigning eight persons/entities as accused including this petitioner, who has been arraigned as accused no.5. It further transpires that two supplementary prosecution complaints (hereinafter referred to as ‘SPC’) were also filed on 08.01.2025 and 09.01.2025, respectively against the petitioner and eight other persons/entities.

7. On the basis of material available on record, the

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learned Special Court, *vide* order dated 08.01.2025, took cognizance for the offences defined under Sections 3 & 4 of PMLA against the petitioner and other accused persons/entities and issued process to them. This order is under challenge before this Court.

8. Mr. Madhav Khurana, learned senior counsel, appearing on behalf of the petitioner vehemently contended that the impugned order is completely illegal and is liable to be set aside as the same has been passed by the learned Special Court without adherence to the mandatory provisions contained in Section 223 of BNSS. The first proviso to Sub-section (1) of Section 223 of BNSS mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity of hearing to the accused.

9. Mr. Khurana further submitted that as the Prosecution Complaint dated 16.12.2024, Supplementary Prosecution Complaint dated 08.01.2025 and Supplementary Prosecution Complaint-1 dated 09.01.2025 and order taking cognizance thereon and in particular order dated 08.01.2025 were passed after the coming into force of the BNSS on 01.07.2024 in terms of Section 531 of the BNSS, which deals with the repeal of Cr.P.C. and savings clause, the learned Special

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Court was duty bound to adhere to the provisions of the BNSS including Section 223 thereof.

10. Mr. Khurana referred to the decision of ***the Allahabad High Court dated 06.08.2024*** passed in ***Crl. Misc. Writ Petition 12287/2024 (Deepu & Ors. vs. State of UP)*** wherein, the Court, after discussing the law regarding effect of enforcement of the BNSS as relating to the circumstances under consideration, summarized the position holding that the cognizance on the pending investigation on or after 01.07.2024 would be taken as per the BNSS and all the subsequent proceedings including enquiry, trial or appeal would be conducted as per the procedure of BNSS.

11. Therefore, the learned Special Court was duty bound to follow the provision to Section 223 (1) of BNSS regarding giving an opportunity of being heard to the petitioner. But as a matter of fact, no notice or opportunity of being heard has been provided to the petitioner prior to passing of the impugned order taking cognizance on the Supplementary Prosecution Complaint filed against the petitioner. This is in clear contravention and disregard of the express provision of law and hence, the impugned order is unsustainable and liable to be set aside on this ground alone.

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12. Mr. Khurana further submitted that the petitioner has neither been called upon for hearing nor has been supplied to any material, hence, the order has been passed in complete disregard of the express provision of the opportunity of being heard to the petitioner, which ensures fairness and its non-adherence goes against the mandate of Section 223 of BNSS. The passing of the impugned order without hearing the petitioner violates the principles of natural justice. In support of this submission, Mr. Khurana referred to the decision of the Hon'ble Supreme Court in the case of ***Kushal Kumar Agrawal vs. Directorate of Enforcement, 2025 SCC OnLine SC 1221***, wherein the Hon'ble Supreme Court observed that the proviso to Sub-section (1) of Section 223 of BNSS puts an embargo on the power of the Court to take cognizance in the absence of opportunity of hearing being afforded to the accused and, thus, set aside the order taking cognizance by the learned Special Court on a complaint filed under Section 44 (1) (b) of PMLA.

13. Mr. Khurana further submitted that Section 223 (1) of BNSS provides valuable right to an accused and its denial would lead to significant harm to an accused, subjecting him to criminal proceedings and potential loss of reputation.

14. Mr. Khurana further submitted that the present

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case is fully covered by the decision of the Hon'ble Supreme Court in the case of ***Kushal Kumar Agrawal*** (supra) and this fact has been acknowledged by the respondents/opposite parties, in the case of ***Jaspreet Singh Bagga vs. Directorate of Enforcement (Crl.M.C.No.1548/2025),*** where cognizance was taken on 15.10.2024 and the learned special counsel appearing on behalf of Directorate of Enforcement admitted that applicability of the ratio of the judgment in ***Kushal Kumar Agrawal*** (supra) is not doubted in the facts of the case. Further in the case of ***Directorate of Enforcement vs. Mr. Arvind Dham (Crl.M.C. 7860/2024)***, the learned special counsel appearing on behalf of the Directorate of Enforcement conceded that as the prosecution complaint was filed on 06.09.2024, in terms of proviso to Section 223 of BNSS, the petitioner was required to be heard before taking cognizance and the Directorate of Enforcement even withdrew its application filed before the Delhi High Court. Similarly in the case of ***Purshottam Profiles vs. Directorate of Enforcement (Crl.Rev. P. 1300/2024 & Crl. M.A. 34693/2024)***, the learned Single Judge of Delhi High Court set aside the impugned order of cognizance dated 25.09.2024 as it failed to appreciate the applicability of Section 223 of the BNSS to a prosecution

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complaint filed under the PMLA in the light of Section 65 of PMLA and law laid down by the Hon'ble Supreme Court in ***Kushal Kumar Agrawal*** (supra).

15. Thus, Mr. Khurana submitted that the Directorate of Enforcement has taken a consistent stand about necessity of accused being given an opportunity of hearing and applicability of Section 223 of BNSS prior to taking cognizance in the orders passed subsequent to 01.07.2024, i.e., after coming into force of BNSS.

16. Mr. Khurana next referred to the decision of the Calcutta High Court in the case of ***Tutu Ghosh vs. Enforcement Directorate (order dated 18.07.2025 passed in CRR No. 2072 of 2025)*** wherein the learned Single Judge held that violation of the first proviso to Section 223 of BNSS vitiates the order taking cognizance and consequential proceedings. After discussing the provisions of law, the learned Single Judge held that denial of opportunity of hearing to the accused persons prior to taking cognizance under Section 210 of BNSS is fatal to such cognizance and vitiates the order of cognizance itself along with the subsequent proceedings undertaken in pursuance thereof. Further learned Single Judge held that Section 46 of the PMLA makes it abundantly clear that

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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. Making distinction from the cases of ***Fertigo Mktg. & Investment (P) Ltd. vs. CBI, (2021) 2 SCC 525, State of Karnataka vs. Kuppuswamy Gownder, (1987) 2 SCC 74, U.P. vs. Sudhir Kumar Singh, (2021) 19 SCC 706*** and ***Satvinder Kaur vs. State (Govt. of NCT of Delhi), (1999) 8 SCC 728*** as well as ***State of A.P. vs. Punati Ramulu, 1994 Supp (1) SCC 590*** and relying upon the decision of the Hon'ble Supreme Court in the case of ***Yes Tuteja and another vs. Union of India and Ors., (2024) 8 SCC 465*** and ***Kushal Kumar Agrawal*** (supra), the learned Single Judge held that the objections sustained in the cases distinguished cannot be equated with the blatant denial of the substantive right to be heard prior to cognizance being taken and held that denial of 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

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justice.

17. Mr. Khurana further submitted that it is trite law that when the law provides for something to be done in a particular mode or manner, then it must be done in that way or not at all. In other words, every provision of a statute must be given its full effect. Further, if initial action is not in consonance with the law, all subsequent and consequential proceedings stand vitiated and placed reliance upon the decision of the Hon'ble Supreme Court in the case of ***State of Punjab vs. Davinder Pal Singh Bhullar and Ors., (2011) 14 SCC 770***.

18. Thus, Mr. Khurana submitted that the impugned order, taking cognizance as against, *inter alia,* the petitioner, being *de hors* the procedure under Section 223 of BNSS vitiates all subsequent proceedings arising out of the SPC, as *sublato fundamento cadit opus*, i.e., when initial action is not as per law, all consequential and subsequent proceedings would vitiate and placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Dharani Sugars and Chemicals Ltd. vs. Union of India, (2019) 5 SCC 480***.

19. Mr. Khurana further submitted that summoning of an accused in a criminal case is a serious matter and criminal machinery cannot be set in motion against a person as a matter

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of course. Rather, it is the duty of the court to meticulously examine the material on record and exercise great deal of caution to the facts of the case and the law applicable thereto before summoning a person as an accused to face the trial. In the present case, the impugned order is cryptic, non-speaking and has been passed without application of judicial mind. No specific reason has been given by the learned Special Court for taking cognizance against the petitioner nor there is any specific role or allegation against the petitioner other than bald and vague averments made by the opposite parties in the SPC. Summoning of the petitioner for trial for the offences under the rigorous provisions of the PMLA based solely on the opposite party's unsubstantiated assumptions, devoid of any concrete material, is unwarranted and unjust.

20. Mr. Khurana referred to the decision of the Hon'ble Supreme Court in the case of ***Mehmood Ul Rehman vs. Khazir Mohammad Tunda, (2015) 12 SCC 420*** wherein it has been held that process must not be issued in a mechanical manner or as a matter of course.

21. Mr. Khurana next referred to the decision of the Hon'ble Supreme Court in the case of ***Pepsi Foods Ltd. vs. Judicial Magistrate, (1998) 5 SCC 749*** wherein it has been held

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that the summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course.

22. Mr. Khurana submitted also referred to the decision of the Hon'ble Supreme Court in the case of ***Birla Corporation Limtied vs. Adventz Investments and Holdings Limited and Ors., (2019) 16 SCC 610***, wherein it has been held that issuance of process to the accused calling upon them to appear in the criminal case is a serious matter and lack of material particulars and non-application of mind as to the materials cannot be brushed aside on the ground that it is only a procedural irregularity.

23. Thus, on these grounds, Mr. Khurana submitted that the impugned order suffers from material irregularity and blatant illegality and is liable to be set aside along with consequent proceedings.

24. *Per contra*, Mr. Zoheb Hossain, learned special counsel appearing on behalf of Directorate of Enforcement vehemently opposed the submission made on behalf of the petitioner. The learned counsel submitted that even if it is presumed that the learned court which took cognizance was not empowered under Section 210(a) of the BNSS, the order taking

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cognizance would only amount to an irregularity and would not vitiate the proceedings. The learned counsel referred to Section 506 (e) of BNSS which provides that if any Magistrate not empowered by law to take cognizance of an offence under Clause (a) or clause (b) of Section 210 (1) of BNSS erroneously taken cognizance, though in good faith, the proceedings shall not be set aside merely on the ground of his being not so empowered. The same provision existed in Section 460 of Cr.P.C. This fact was taken note of by the Hon'ble Supreme Court in the case of ***Pradeep S. Wodeyar vs. State of Karnataka, (2021) 19 SCC 62*** wherein it has been held that in view of provisions of Section 460 (e) of the Cr.P.C., the act of the Magistrate in taking cognizance in such circumstances is an irregularity which does not render the proceeding void. The learned counsel referred to paragraphs 36.2, 42, 44, 49.2 and 108.4 in support of his contention.

25. Mr. Hossain further submitted that no prejudice has been caused to the petitioner as the petitioner has already been before the court and has got numerous opportunities till the stage of cognizance. There is no occasion for failure of justice on account of denial of opportunity of being heard to the petitioner. If no prejudice was caused to the petitioner, the

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petitioner cannot claim the trial got vitiated by not affording the petitioner opportunity of hearing before taking of cognizance.

26. Mr. Hossain, thus, submitted that even assuming that the learned court was not empowered by law to take cognizance without hearing the accused, nevertheless does so, the act would fall within the ambit of Section 506 (e) of BNSS. Further, under Section 511 of BNSS, no such order is vitiated unless it has occasioned in a failure of justice.

27. Mr. Hossain next submitted that the petitioner cannot claim prejudice on the ground of not being heard at the stage of cognizance when a detailed hearing under Section 45 of PMLA has already been conducted and decided against him. No real prejudice would be caused in the present case even assuming the hearing contemplated under the proviso to Section 223 of BNSS was not given to the petitioner as the petitioner would get a right of hearing before the framing of charges. Further, bail application of the petitioner was heard at length and rejected under Section 45 of PMLA and it shows the court was satisfied that that there are reasonable grounds for believing that the accused is guilty of the offence, the threshold of a *prima facie* case required for taking cognizance is less than the standard required to be demonstrated during bail by the

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prosecution which has already been established. Therefore, hearing contemplated under the proviso to Section 223 of BNSS is deemed to have been given at the stage of hearing on bail and since the expression 'Cognizance' is of wide import and it includes the time when the trial court applies its mind to an offence. In this regard, reliance has been placed on the decision of the Hon'ble Supreme Court in the case of ***Chief Enforcement Officer vs. Videocon International Ltd., (2008) 2 SCC 492*** wherein the Hon'ble Supreme Court held that the expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means"become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially".

28. Mr. Hossain next submitted that no prejudice has been demonstrated or pleaded by the petitioner on account of not granting an opportunity in terms of proviso to Section 223 of BNSS. The Hon'ble Supreme Court in the case of ***State of U.P. vs. Sudhir Kumar Singh, (2021) 19 SCC 706*** held that a mere alleged breach of the principles of natural justice is not sufficient to warrant interference unless prejudice is demonstrated. Referring to the same judgment, learned counsel

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submitted that where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction *per se* does not lead to invalidity of the order passed. The learned counsel further submitted that prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

29. Thus, Mr. Hossain submitted that no prejudice has either been demonstrated or pleaded by the petitioner in his petition on account of being not granted opportunity in terms of proviso to Section 223 of BNSS and, therefore, the proceedings cannot be set aside unless miscarriage of justice is pleaded and proved. The learned counsel placed his reliance on the decision of the Hon'ble Supreme Court in the case of ***Fertico Mktg. & Investment (P) Ltd. vs. CBI, (2021) 2 SCC 525*** in support of his contention.

30. Mr. Hossain reiterated that no prejudice would be caused to the petitioner as the offence is triable by a court of sessions and the accused would have a right of hearing at the stage of framing of charges. The offence under the PMLA is triable by a court of sessions as provided under Section 44 (d) of PMLA. Hence, before the stage of framing of charges under

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Section 251 of BNSS, the accused has a right to be heard and even to be discharged under Section 250 of BNSS. The proviso to Section 223 of BNSS was enacted to remedy the absence of a right to discharge in summons triable cases. Guided by the mischief rule in ***Heydon's case (1584)***, the Court must adopt an interpretation that furthers the object of the law and suppresses the mischief. For this reason, any view that undermines the purpose of the statute or lets offenders evade accountability must be rejected.

31. Mr. Hossain, thereafter referred to the decision of the Hon'ble Supreme Court in the case of ***Adalat Prasad vs. Rooplal Jindal, (2004) 7 SCC 338*** wherein, differing from its earlier view in the case of ***K.M. Mathew vs. State of Kerala, (1992) 1 SCC 217***, the Hon'ble Supreme Court observed that after taking cognizance of the complaint and examining the complainant and the witnesses if the court is satisfied that there is sufficient ground to proceed with the complaint, the Magistrate can issue process by way of summons under Section 204 of the Code. It has been further held that what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated

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under Section 202 that there is sufficient ground for proceeding with the complaint and hence to issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code.

32. Mr. Hossain, thereafter, referred to the case of ***Subramanium Sethuraman v. State of Maharastra, (2004) 13 SCC 324*** wherein the Hon'ble Supreme Court reaffirmed the view taken in ***Adalat Prasad*** (supra) and held that the case involving a summons case is covered by Chapter XX of the Code which does not contemplate a stage of discharge like Section 239 which provides for a discharge in a warrant case.

33. Thus, Mr. Hossain submitted that the present petition is misconceived and devoid of merit. The petitioner had already been heard extensively during the consideration of his bail under Section 45 of PMLA which involves a rigorous scrutiny. No prejudice has been caused and even assuming any procedural irregularity, the same does not vitiate the proceedings in view of judgment of the Hon'ble Supreme Court in the case of ***Pradeep S. Wodeyar*** (supra).

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34. Mr. Hossain further submitted that the main issue raised by the petitioner in this criminal revision petition is that he has not been accorded with an opportunity of being heard by the learned Special Judge, PMLA, Patna before cognizance was taken. But the contention of the petitioner about violation of provision of Section 223 of BNSS is wholly misconceived as statutory requirement cannot be applied retrospectively to vitiate proceedings already concluded prior to judgment of the Hon'ble Supreme Court in the case of ***Kushal Kumar Agarwal*** (supra). Mr. Hossain further submitted that reliance placed by the petitioner on Section 223 of BNSS and on the judgment of the Hon'ble Supreme Court in the case of ***Kushal Kumar Agrawal*** (supra) is wholly misplaced since the said interpretation cannot operate retrospectively to unsettle cognizance already taken prior to 09.05.2025 when the judgment in the case of ***Kushal Kumar Agrawal*** (supra) was pronounced. PMLA being a special legislation overrides the general procedural provisions of the BNSS. The learned trial court took the cognizance according to law prevailing and it cannot be asked to go back in time and redo the stage of cognizance. When the cognizance was taken, there was no judicial precedent mandating a pre-cognizance hearing of the accused under Section 223 of BNSS. The said

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judgment, at best, operates prospectively and cannot be given retrospective effect to nullify cognizance orders validly taken in accordance with law as it then stood. Mr. Hossain further submitted that judicial acts performed in conformity with prevailing law cannot be reopened merely because of a subsequent interpretation. Mr. Hossain further submitted that the principle of fairness underlying in Section 223 was fully satisfied in substance, since the petitioner was repeatedly summoned and examined under Section 50 of PMLA, confronted with incriminating material and afforded adequate opportunity to explain his position during investigation. Thus, learned counsel submitted that the safeguard under Section 223 of BNSS cannot be stretched to such an extent that it frustrates the paramount object of the PMLA, which is to prosecute and prevent money laundering.

35. Replying to the submission of the learned counsel for the Directorate of Enforcement, Mr. Madhav Khurana, learned senior counsel appearing on behalf of the petitioner submitted that the learned special counsel for the Directorate of Enforcement has been taking a stand which is at variance with the stand taken in different cases, i.e., in the cases of ***Jaspreet Singh Bagga*** (supra), ***Mr. Arvind Dham*** (supra), ***Purshottam***

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***Profiles*** (supra) and ***Tutu Ghosh*** (supra). When the statute has given a right to an accused, the same cannot be taken away on the ground that accused has not suffered any prejudice. Mr. Khurana further submitted that though cognizance is taken under Section 210 of BNSS, the same deals with the condition requisite for initiation of proceeding. On the other hand, the mandatory nature of proviso to Section 223 is clear from its wordings which is under Chapter 16 dealing with the complaints to Magistrate. A bare reading of this provision shows no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard. Therefore, there are two parts of it. The Magistrate may or may not have the jurisdiction for taking cognizance, but he is bound to give an hearing to the accused prior to taking cognizance. There was no *pari materia* to proviso to Section 223 of BNSS in the Code of Criminal Procedure. Therefore, there was no occasion for the Hon'ble Supreme Court to consider the same prior to coming into effect of BNSS. For this reason, there could be no applicability of ratio of ***Pradeep S. Wodeyar*** (supra) in the present case.

36. Mr. Khurana further submitted that it is absurd to contend that law would become applicable only after it is

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interpreted by the Hon'ble Supreme Court. Mr. Khurana further submitted that the contention of learned special counsel for the Directorate of Enforcement that as the cognizance has already been taken and the judgment of the Hon'ble Supreme Court in the case of ***Kushal Kumar Agrawal*** (supra) was rendered subsequently, there was no requirement of giving opportunity of hearing to the accused/petitioner in terms of Section 223 of BNSS. Mr. Khurana further submitted that the law remains the same and if the trial court proceeded on wrong appreciation of law, it is ludicrous to say that the cognizance taken earlier was correct but has only subsequently become bad in the light of the pronouncement of ***Kushal Kumar Agrawal*** (supra). It is settled law that the interpretation by the courts from time to time only clarifies the position of law and does not alter or amend. So, it is completely wrong on part of the learned special counsel to submit that the judgment of ***Kushal Kumar Agrawal*** (supra) would only have a prospective effect and law was something else when the cognizance order was passed.

37. Thus, Mr. Khurana reiterated that the case of the petitioner is squarely covered by the decision of the Hon’ble Supreme Court in the case of ***Kushal Kumar Agrawal*** (supra) and the impugned order dated 08.01.2025 taking cognizance

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against the petitioner is not sustainable being contrary to the provisions of law and the same needs to be set aside with all consequential proceedings.

38. I have given my thoughtful consideration to the rival submission of the parties and perused the material available on record.

39. The challenge to the impugned order is basically on the ground that the learned Special Judge, PMLA Court did not provide any opportunity of pre-cognizance hearing to the petitioner in terms of proviso to Section 223 of BNSS. The opposition to this contention by the Directorate of Enforcement is mainly on two grounds; one that the cognizance was taken prior to ***Kushal Kumar Agrawal*** (supra) and second no prejudice has been caused to the petitioner as he has been given sufficient opportunity prior to cognizance as he was repeatedly examined and summoned under Section 50 of PMLA and confronted with incriminating material and afforded adequate opportunity to explain his position during investigation. Further ground has been taken that in future the petitioner would have right of hearing at the stage of framing of charges and there is one more ground of the objection that the petitioner has not pleaded or demonstrated any prejudice which was caused to him

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by not giving an opportunity of hearing.

40. At the outset, I would like to take up the first issue raised by the Directorate of Enforcement about prospective effect of the decision of ***Kushal Kumar Agrawal*** (supra).

41. The contention raised by the learned special counsel about ratio of ***Kushal Kumar Agrawal*** (supra) to be applicable only against prospective cases is strange and against the settled principles of law. If a statute provides for doing something, the same could not be said to be dependent on future interpretation by a constitutional Court. The law is there and it is to be applied in the light of its plain meaning and purport. If the learned trial court did not proceed in the matter giving effect to its true import and subsequently, the Hon'ble Supreme Court dealt with the same provision demonstrating its scope, then the law from the day one is what the Hon'ble Supreme Court said subsequently and not what the trial court meant it to be. There cannot be two laws in operation side by side, one prior to the interpretation by the Hon'ble Supreme Court and the other after the interpretation of the Hon'ble Supreme Court. The law is what the Hon'ble Supreme Court says it is and, therefore, the contention that law was something else prior to the decision of ***Kushal Kumar Agrawal*** (supra) is not tenable.

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42. Section 223 of BNSS is the provision which is relied on by the petitioner to assail the order of cognizance dated 08.01.2025 passed by the learned Special Court, which 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.*

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*(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless—*

*(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and*

*(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received".*

43. Cognizance of offence by Magistrate has been provided under Section 210 of BNSS, which reads thus :

***"210. Cognizance of offences by Magistrate-***

*(1) Subject to the provisions of this Chapter, 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—*

*(a) upon receiving a complaint of facts, including any complaint filed by a person authorised under any special law, which constitutes such offence;*

*(b) upon a police report (submitted in any mode including electronic mode) of such facts;*

*(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been*

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*committed.*

*(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try".*

44. Now the contention of the Directorate of Enforcement for not affording opportunity of hearing to the petitioner is merely an irregularity for taking cognizance under Section 210 of BNSS and in support thereof Section 506 (e) of BNSS has been referred. But Section 210 of BNSS is not a stand alone provision. It has to be read in conjunction with Section 223 of BNSS.

45. Further, Section 506 of BNSS reads as under :

***"506. Irregularities which do not vitiate proceedings***.—

*"If any Magistrate not empowered by law to do any of the following things, namely:—*

*(a) to issue a search-warrant under Section 97;*

*(b) to order, under Section 174, the police to investigate an offence;*

*(c) to hold an inquest under Section 196;*

*(d) to issue process under Section 207, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;*

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*(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of Section 210;*

*(f) to make over a case under sub-section (2) of Section 212;*

*(g) to tender a pardon under Section 343;*

*(h) to recall a case and try it himself under Section 450; or*

*(i) to sell property under Section 504 or Section 505,*

*erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered".*

46. Therefore, Section 210 of BNSS empowers the Magistrate to take cognizance of any offence under the circumstances enumerated thereunder. Section 506 talks about cases in which cognizance has been taken, but the Magistrate is not empowered by law to do so. But Section 223 of BNSS which has been introduced in BNSS along with its proviso in its new 'Avatar' of corresponding provision under Section 200 of Cr.P.C., has incorporated one of the principles of natural justice which mandates that a Magistrate prior to taking cognizance must hear the other side. If such right is taken away on the ground that not affording an opportunity of hearing is merely an irregularity, the same would amount to acting against the statutory mandate and legislative intent. So, even if the

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Magistrate would not be empowered to take cognizance in absence of pre-cognizance hearing, the same would not merely be an irregularity.

47. If a statute provides for a thing to be done in a particular manner, it must be done in that manner or not at all. In this regard, a reference could be made to the decision of the Hon'ble Supreme Court in the case of ***Meera Sahni vs. Lieutenant Governor of Delhi and Ors., (2008) 9 SCC 177.*** It would be relevant to quote paragraph 35 of the said decision :

> *"35. It is by now a certain law that an action to be taken in a particular manner as provided by a statute, must be taken, done or performed in the manner prescribed and in no other manner. In this connection we may appropriately refer to the decision of this Court in Babu Verghese v. Bar Council of Kerala [(1999) 3 SCC 422] wherein it was held as under : (SCC pp. 432-33, paras 31-32)*
>
> *"31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor [(1875) 1 Ch D 426] which was followed by Lord Roche in Nazir Ahmad v. King Emperor [(1936) 63 IA 372 : AIR 1936 PC 253 (2)] who stated as under : (IA pp. 381-82)*
>
> *'where a power is given to do a certain*

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*thing in a certain way, the thing must be done in that way or not at all.'*

*32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of Vindh Pradesh, AIR 1954 SC 322 and again in Deep Chand v. State of Rajasthan AIR 1961 SC 1527. These cases were considered by a three-Judge Bench of this Court in State of U.P. v. Singhara Singh AIR 1964 SC 358 and the rule laid down in Nazir Ahmad case (supra) was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law".*

48. Therefore, I find no merit in the contention of the learned special counsel for the Directorate of Enforcement that the petitioner failed to demonstrate or show that any prejudice was caused to him due to not affording an opportunity of pre-cognizance hearing.

49. So far as other contention of the learned special counsel for the Directorate of Enforcement about the petitioner having a number of opportunities prior to cognizance and also having opportunity of hearing at the time of framing of charges is concerned, the same is simply unsustainable.

50. The contention of the learned special counsel for the Directorate of Enforcement that the petitioner has been

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given ample opportunity of hearing as he was repeatedly summoned and examined under Section 50 of PMLA, confronted with incriminating material and afforded adequate opportunity to explain his position during investigation, would not cut much ice as the legislature in its wisdom provided for a pre-cognizance hearing and if the same was not given to the petitioner, no amount of prior opportunity could cure such defect.

51. Similarly, the contention of learned special counsel for the Directorate of Enforcement that the petitioner would have a right of hearing at the stage of framing of charges, is also not sustainable in the eyes of law. If the initial proceeding stood vitiated, being against the provision of law, the subsequent curative measures could not put a cloak of legality on subsequent proceedings.

52. Now, having regard to the position of law as discussed hereinabove and specifically taking note of the decision of the Hon'ble Supreme Court in the case of ***Kushal Kumar Agrawal*** (supra), I have no hesitation in holding that as the complaint has been filed after 01.07.2024 and cognizance has been taken on 08.01.2025, Section 223 of BNSS will apply to the present complaint. Thereafter, proviso to Section 223 of

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BNSS mandatorily provides for an opportunity of hearing to an accused before cognizance could be taken against him, which means no cognizance of an offence shall be taken by the Magistrate without giving the accused of an opportunity of being heard and admittedly, no opportunity has been given by the learned Special Court to the petitioner before taking cognizance of an offence.

53. Therefore, I am of the considered opinion that the impugned order dated 08.01.2025 passed by the learned Special Court in Special Trial No. (PMLA) 10/2024 suffers from infirmity and, hence, the same is set aside. The matter is remanded to the learned Special Judge, PMLA, Patna for taking decision afresh in accordance with law after hearing the petitioner in terms of Section 223(1) of BNSS within a reasonable time.

54. Accordingly, the present revision petition stands allowed.

55. However, it is made clear that this Court has interfered with the impugned order merely on infirmity and illegality committed by the learned Special Court. This order shall not be treated to be an order expressing any opinion on the merits of the case.

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56. Pending application, if any, also stands disposed of.

**(Arun Kumar Jha, J)**

V.K.Pandey/-

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