

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL MISC.APPLICATION (FOR QUASHING & SET ASIDE
FIR/ORDER) NO. 6401 of 2026

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JAYDEEPSINH PRATAPSINH VAGHELA
 Versus
 STATE OF GUJARAT & ANR.

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Appearance:

MR CHETAN K PANDYA(1973) for the Applicant(s) No. 1
 DIGPALSNGH H RATHORE(8083) for the Respondent(s) No. 2
 MR.MANAN MAHETA, APP for the Respondent(s) No. 1

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CORAM:HONOURABLE MRS. JUSTICE M. K. THAKKER

Date : 08/05/2026

ORAL ORDER

1. This application for quashment of the complaint under section 138 read with section 142 of N.I.Act.
2. This Court has passed following order on 13.04.2026:

Learned advocate Mr. Pandya submits that while issuing the summons, the learned trial Court has not followed the procedure prescribed under Section 223 of the Bharatiya Nagarik Suraksha Sanhita, 2023. It is submitted by the learned advocate Mr. Pandya that the proviso of the above section provides that before issuing the summons, the accused is required to be heard or an opportunity of hearing is required to be given. It is submitted by the learned advocate Mr. Pandya that in absence of the same, the order of issuance of the summons dated 24.01.2025 is passed.

Considering the submissions, let Notice be issued making it returnable on 23.04.2026.

Direct Service is permitted

3. Today learned advocate Mr.Digpalsinh Rathore,

appearing for the respondent, has submitted that admittedly, the requirement of section 223 of BNSS, 2023 has not been complied with. It is submitted that if the matter is remanded back to the learned Magistrate Court with direction to comply with the provision of section 223 of BNSS, 2023 to then proceed further, he does not have any objection.

4. This Court has referred the provision of section 223 of BNSS, 2023, which is reproduced hereinbelow:

Section 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.

(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.

5. This Court has also referred the decision of the Apex Court in the case of ***Kushal Kumar Agarwal Vs Directorate of Enforcement reported in 2025 SCC OnLine SC 1221*** wherein, it is held as under:

3.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:

Section 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.

4. Section 223 of the BNSS corresponds to Section 200 of the Criminal Procedure Code, 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.

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, 2024, 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.

8. 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 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. The appeal is accordingly partly allowed.

6. Considering the above aspect, in the opinion of this Court, before issuing the summons, prime requirement is to give opportunity to hear the accused which is not fulfilled here. In that background, the impugned order dated 24.01.2025, issuing the summons is quashed and the criminal complaint is remanded back to the learned Chief Judicial Magistrate, Ahmedabad to decide afresh after complying with the provision of section 223 of BNSS, 2023.
7. This Court has not gone into the merits of the case. All rights of the parties are kept open and learned court shall decide the matter in accordance with law, without being influenced by this order.
8. Direct service is permitted.

ARCHANA S. PILLAI

(M. K. THAKKER,J)