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NOTICE TO THE ACCUSED UNDER SECTION 223 OF BHARATIYA NAGRIK SURAKSHA SANHITA, 2023

-Aoun Ullah Khan

ABSTRACT

The Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS'), which came into force on 1st July 2024 in place of the Criminal Procedure Code, 1973 ('CrPC'), carried forward several procedural aspects from the CrPC while also bringing in important changes. The primary aim of enacting this new legislation was to establish a quicker and more effective justice delivery system, which included, among other things, stricter time limits for investigation, trial, and the pronouncement of judgments.

This article examines the potential ripple effect of one such change made to Section 200 of the CrPC (now Section 223 of the BNSS), which deals with the 'Examination of the complainant', on the related procedural provisions concerning the issuance of process (Section 227 of the BNSS), postponement of the issuance of process, and dismissal of a complaint (Sections 225 and 226 of the BNSS, respectively). Under Section 200 of the CrPC, a Magistrate taking notice of an offence based on a private complaint was required to examine, under oath, the complainant and any witnesses present, and to record the substance of such examination in writing, duly signed by the complainant, the witnesses, and the Magistrate. The earlier provision made no reference to giving the proposed accused any opportunity to be heard at this stage. However, Section 223 of the BNSS, which replaces Section 200 of the CrPC, introduces a new proviso that permits the alleged accused to present his version or side of the matter forming the subject of the complaint.

INTRODUCTION

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) represents a notable change in criminal procedure, particularly at the stage when cases are first set in motion. At the heart of this process is the concept of cognizance, which refers to the formal application of judicial mind by a Magistrate to an alleged offence. Under Section 210 of the BNSS (which

replaces Section 190 of the CrPC), a Magistrate may take cognizance of an offence on the basis of a police report, information received, or a private complaint. Where a matter is initiated through a private complaint, the procedure is governed strictly by Section 223 of the BNSS. Historically, under Section 200 of the CrPC, inquiries conducted before cognizance was taken were entirely one-sided, that is, ex-parte in nature. The proposed accused had no legal standing, or locus standi, to participate in such proceedings. Section 223(1) of the BNSS brings about a substantial change by incorporating the principle of “audi alteram partem” the right to be heard into the pre-cognizance stage. A new statutory proviso now requires that a Magistrate must first give the accused an opportunity to be heard before taking cognizance of a complaint. This serves as an important safeguard against cases that are filed without basis or with the intent to harass.

Recent decisions from the Gauhati High Court, the Karnataka High Court, and the Kerala High Court have clarified that the procedural steps set out under Section 223 are entirely mandatory. Upon receiving a complaint under Section 210, the Magistrate must first examine the complainant and any witnesses on oath. Only after this examination, and strictly before formally taking cognizance, must the Magistrate issue a notice to the accused. This establishes a balanced, two-sided inquiry, allowing the proposed accused to raise procedural objections at an early stage, thereby protecting their rights and contributing to a more streamlined criminal justice process.

SECTION 210 OF THE B.N.S.S. 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 who has been specifically empowered in this regard 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 the Magistrate's own knowledge, that such offence has been committed.

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

¹ Bharatiya Nagarik Suraksha Sanhita, 2023, S. 210 (India).

[Corresponding to Section 190 of the CrPC]

MEANING OF "COGNIZANCE"

In legal usage, the term 'cognizance' is generally understood to mean the act of a court of law, possessing the relevant jurisdiction, taking formal judicial notice of a cause or matter placed before it, in order to determine whether there is sufficient basis for initiating proceedings and deciding the matter through a judicial process. Taking cognizance does not require any formal action or step of any particular kind; it occurs as soon as a Magistrate, acting in that capacity, applies his mind to the suspected commission of an offence. Once the Magistrate applies his mind to the alleged offence and decides to initiate proceedings against the alleged offender, it may be said that he has taken cognizance of the offence. It is important to note that cognizance is of the offence, not of the offender. Cognizance is said to occur when a Magistrate first takes judicial notice of an offence, whether on the basis of a complaint, a police report, information received from a person other than a police officer, or a written or oral complaint.[Prasad Shrikant Purohit v. State of Maharashtra, (2015) 7 SCC 440.]²

The word 'cognizance' has not been defined either in the Criminal Procedure Code or in the BNSS. However, in **Gopal Marwari v. Emperor, A.I.R. 1943 Pat. 245**,³ it was observed that the term 'cognizance' is used in the Code to indicate the point at which the Magistrate first takes judicial notice of an offence. This is distinct from the initiation of proceedings; rather, it is a condition that must be fulfilled before proceedings can be initiated by the Magistrate. The court also noted that the term 'cognizance' carries a somewhat imprecise meaning and is not always used in precisely the same sense.

In **Sinha, Chief Enforcement Officer v. Videocon International Ltd. and Others**,⁴ the Supreme Court held that the expression "cognizance" means "to take notice of judicially." It marks the point when a court or Magistrate formally takes note of an offence with the intention of commencing proceedings in connection with that offence alleged to have been committed by a person. The Supreme Court further stressed that taking cognizance refers to the application of mind by the Magistrate to the offence, and that it is an essential condition for conducting a valid trial.

Pre-Cognizance Stage in Complaint Cases:

The "pre-cognizance stage" refers to the period before a Magistrate formally takes cognizance of an offence — that is, before the Magistrate begins to formally examine a complaint or set

² (2015) 7 S.C.C. 440 (India).

³ A.I.R. 1943 Pat. 245 (India).

⁴ (2008) 2 S.C.C. 492 (India).

proceedings in motion. During this stage, under Section 200 of the CrPC, the accused generally had no right to be heard or to argue their case. However, the BNSS, which replaced the CrPC, introduces a new requirement for a pre-cognizance hearing in certain cases under Section 223(1).

It is important to note that such a pre-cognizance hearing is not intended to serve as a platform for a preliminary trial or for examining factual defences in detail. This requirement applies only to complaint cases — that is, private complaints — and not to cases initiated through police FIRs, where the pre-cognizance stage involves police investigation.⁵

ALLEGED/PROPOSED ACCUSED TO BE HEARD BEFORE COGNIZANCE IS TAKEN ON A COMPLAINT

The process by which a Magistrate takes cognizance of a private complaint was previously governed by Section 200 of the CrPC, 1973, which has now been replaced by the corresponding Section 223 of the BNSS, 2023. Prior to this change, Section 200 of the CrPC required the Magistrate to examine the complainant and witnesses on oath and apply his mind to the contents of the complaint in order to decide whether to take cognizance and subsequently issue process under Section 204 of the CrPC. With the introduction of the BNSS, 2023, Section 223 sets out additional requirements that the Magistrate must fulfil before taking cognizance. The most significant of these is the requirement that the accused must be given an opportunity to be heard before cognizance is formally taken by the Magistrate.

STATUTORY PROVISION

Examination of Complainant — Section 223(1) of the BNSS:

A Magistrate having jurisdiction, while taking cognizance of an offence on a 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

⁵ RATANLAL & DHIRAJLAL, BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 (Justice M. L. Singhal ed., 23d ed., LexisNexis 2024).

- 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.

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

- (a) such public servant is given an opportunity to make submissions regarding the circumstances that gave rise to the alleged incident; and
- (b) a report containing the facts and circumstances of the incident from the officer superior to such public servant is received.⁶

OBJECT OF THE NOTICE TO BE GIVEN TO THE PROPOSED ACCUSED BEFORE COGNIZANCE

The proviso to Section 223(1) of the BNSS firmly requires that a Magistrate must not take cognizance of a private complaint without first giving the proposed accused an opportunity to be heard. The primary purpose of this legislative requirement is to act as an important judicial check against complaints that are filed without genuine basis, with the intent to harass, or by way of retaliation, thereby protecting individuals from the undue burden and social consequences of unwarranted criminal proceedings. By placing the foundational principle of natural justice “audi alteram partem”, or the right to be heard directly at the pre-cognizance stage, the BNSS substantially changes what was previously a one-sided, ex-parte inquiry into a fair, two-sided process. This enables the accused to point out clear procedural defects or unfounded allegations before the Magistrate formally sets the criminal process in motion against them.

CONCEPTUAL ANALYSIS AND SCOPE OF SECTION 200 OF THE CrPC AND SECTION 223 OF THE BNSS: A PROCEDURAL SHIFT:

MEANING OF THE TERM "COMPLAINT"

Section 2(1)(h) of the BNSS defines "complaint" as any allegation made orally or in writing to a Magistrate, with a view to the Magistrate taking action under the BNSS, stating that some person, whether known or unknown, has committed an offence, but does not include a police

⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, § 223 (India).

report. According to the Explanation added to Section 2(1)(h), a police report disclosing the commission of a non-cognizable offence, submitted to the court after investigation, shall be treated as a complaint, and the investigating officer shall be treated as the complainant.⁷

The **proviso to Section 223** of the BNSS requires that in a criminal complaint case, after the Magistrate has examined the complainant and any witnesses on oath but before formally taking cognizance of the offence, the Magistrate must issue a notice to the accused, providing them with an opportunity to be heard. The Karnataka High Court, in **Sri Basanagouda R. Patil v. Sri Shivananda S. Patil**, recently held that the procedure under Section 223 of the BNSS means that the opportunity of being heard is not a mere formality. Accordingly, the notice issued to the accused under the proviso to Section 223(1) of the BNSS must be accompanied by a copy of the complaint and the sworn statements of any witnesses. This would allow the accused to appear and present their position before the Magistrate takes cognizance of the matter. The court held that this was the clear intent and purpose of Section 223 of the BNSS. If, despite affording the accused an opportunity to be heard under Section 223, a Magistrate takes cognizance without properly applying his mind to the matter, the aggrieved party would still have access to other remedies that were available under the CrPC, such as filing a revision petition or a criminal writ petition seeking to set aside the Magistrate's order. The provision allows for a fair and balanced assessment of the complaint, making it possible for a case that lacks merit to be dismissed before it progresses to the stage of formal cognizance.⁸

SECTION 200 OF THE CrPC — THE TRADITIONAL FRAMEWORK AND ITS COMPARISON WITH SECTION 223 OF THE BNSS

Under the earlier framework, if the police failed to register a First Information Report ('FIR'), the complainant could approach any Magistrate under Section 190 of the CrPC and seek a direction for the police to investigate the complaint under Section 156(3)/175(3) of the BNSS. However, if the Magistrate found that the allegations disclosed a cognizable offence and that forwarding the complaint to the police would not be appropriate, Section 200 of the CrPC would apply. Under that provision, the Magistrate was required to examine the complainant and witnesses on oath before taking cognizance. A plain reading of Section 200 made it clear that, at this stage, the accused had no locus standi to present their case before the Magistrate. If the Magistrate found sufficient grounds to proceed, he could issue summons under Section

⁷ Bharatiya Nagarik Suraksha Sanhita, 2023, § 2(1)(h) (India).

⁸ JUSTICE KHAISTGIR, *THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023* (Subhro Kamal Mukherjee & Kamal Kumar eds., Kamal Law House 2024).

204 of the CrPC, at which point the accused would have the right to appear, make submissions, and contest the case.

In **Narayandas Bhagwandas Madhavdas v. State of W.B., AIR 1959 SC 1118**,⁹ it was observed that when cognizance of an offence is taken would depend on the facts and circumstances of each case, and that it is not possible to attempt a precise definition of the term. It is only when a Magistrate applies his mind for the purpose of proceeding under Section 200 and the sections that follow in Chapter XVI of the CrPC, or under Section 204 of Chapter XVII of the CrPC, that it can be clearly stated that he has applied his mind and, therefore, has taken cognizance.

The Supreme Court, in **Chandra Deo Singh v. Prokash Chandra Bose & Another, AIR 1963 SCR 1430**,¹⁰ observed that since the very question for consideration under Section 200 of the CrPC is whether the accused should be called upon to answer the allegations made in the complaint, the accused has no right to participate in such proceedings, nor can the Magistrate permit him to do so, until process has been issued. At this stage, only the intrinsic quality of the statements placed before the Magistrate — that is, the complaint, the oath-based statement of the complainant, and the statements made by persons examined at the complainant's instance is to be considered.

In contrast, Section 223 of the BNSS substantially builds upon the procedural framework established under Section 200 of the CrPC, while remaining distinct from it. It retains the core requirement of examining the complainant and witnesses before cognizance is taken, but goes a step further by incorporating certain additional procedural protections. The proviso to Section 223(1) of the BNSS provides that "no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard." Therefore, unlike Section 200 of the CrPC, Section 223 of the BNSS makes it mandatory for the Magistrate to afford the accused an opportunity to be heard at the preliminary stage, before cognizance is formally taken a requirement that has been newly introduced by this legislation.

NOTICE AS A PRE-COGNIZANCE STEP UNDER THE BNSS

The proviso to Section 223 of the BNSS requires that, in a complaint case, after the Magistrate has examined the complainant and witnesses on oath but before taking cognizance of the offence, a notice must be issued to the accused giving them an opportunity to be heard. The Karnataka High Court, in **Basanagouda R. Patil v. Shivananda S. Patil, Criminal Petition**

⁹ A.I.R. 1959 S.C. 1118 (India).

¹⁰ A.I.R. 1963 S.C. 1430 (India).

No. 10076 of 2024,¹¹ considered in detail the procedural steps required of a Magistrate under Section 223.

The case arose from a private complaint filed by the Respondent (the complainant) under Section 223 of the BNSS, alleging that defamatory remarks had been made against him at an election rally. The central question before the Karnataka High Court was whether the Magistrate had correctly followed the procedure for issuing notice to the accused, as required by the proviso to Section 223(1) of the BNSS.

The Appellant (the accused) argued that the Magistrate had erred by issuing the notice immediately after the complaint was filed, since Section 223 of the BNSS requires that notice be issued only before cognizance is taken — that is, after the sworn statements have been recorded. The Respondent (the original complainant) countered that the proviso to Section 223 of the BNSS only mandates that the accused be given an opportunity to be heard before cognizance is taken, without specifying whether the notice must be issued after the filing of the complaint or after the recording of sworn statements.

The court held that the provision clearly stipulates that the Magistrate must first examine the complainant and witnesses on oath and record their statements, and only thereafter issue notice to the accused, as required by the proviso to Section 223(1) of the BNSS. Once the notice has been served and the accused's submissions have been considered, the Magistrate may take cognizance and proceed in accordance with law. Accordingly, issuing notice before the sworn statements had been recorded was found to be a procedural error that was inconsistent with the mandatory requirements of Section 223 of the BNSS.

The court further emphasised that the opportunity to be heard is not a mere formality. It held that the notice issued under the proviso to Section 223(1) of the BNSS must be accompanied by the complaint, the sworn statement of the complainant, and the statements of any witnesses, so that the accused can appear and present their case before cognizance is taken. In the court's view, that was the clear purpose and intent of Section 223 of the BNSS.

Accordingly, the notice sent to the accused under the proviso to Section 223(1) of the BNSS must have appended to it the complaint and the sworn statements of the complainant and any witnesses. This enables the accused to appear and put forward their case before the Magistrate takes cognizance of the matter.

¹¹ *Criminal Petition No. 10076 of 2024* (Karn. H.C.) (India).

Building on the Karnataka High Court's decision, the Allahabad High Court in **Surya Prakash Yadav v. State of UP, 2025 AHC 8095¹²** and the Kerala High Court in **Suby Antony v. R1, 2025 Kerala 6236¹³** also affirmed that under Section 223 of the BNSS, the accused must be given an opportunity to be heard after the Magistrate has examined the complainant and witnesses. It is therefore clear, from the foregoing discussion and from a reading of these judgments, that after the sworn statements of the complainant and any witnesses have been recorded, notice must be issued to the accused along with copies of the complaint and the recorded statements.

ROLE OF THE ACCUSED

The amendment has now created a specific role for the proposed accused at the stage of initiation of proceedings, through the first proviso of Section 223(1) of the BNSS, 2023. However, reading the provision in the context of the chapter as a whole, certain gaps remain to be addressed. While the amendment may be justified on the grounds of natural justice and the objective of reducing the burden on appellate courts that deal with revision petitions and applications seeking the setting aside of proceedings entirely, the resulting delay in initiation of proceedings is a concern that continues to invite consideration.

The Act says nothing about whether the accused's arguments are restricted to the information on record, such as the complaint, or if they are free to add papers to the record at the beginning of the trial.

Examining the complainant and witness, presenting oral and documentary evidence, or holding an in-depth hearing based on prima facie facts are all alternatives available to the accused. However, this contradicts the requirement for a prompt trial, which has been identified as a crucial factor. The Supreme Court noted in *A.R. Antulay v. Ramdas Srinivas Nayak and Others*¹⁴ that

“Upon a complaint being received and the court records the verification; it is open to the court to apply its mind to the facts disclosed and to judicially determine whether process should or should not be issued. It is not a condition precedent to the issue of process that the Court of necessity must hold the inquiry as envisaged by Section 202 or direct investigation as therein contemplated. The power to take cognizance without holding inquiry or directing investigation is implicit in Section 202 when it says that the Magistrate may “if he thinks fit, postpone the issue of process against the accused and either inquire into the case himself or direct an

¹² 2025 A.H.C. 8095 (All.).

¹³ 2025 Ker. 6236 (Ker.).

investigation to be made by a police officer....for the purpose of deciding whether or not there is sufficient ground for proceeding”. Therefore, the matter is left to the judicial discretion of the court whether on examining the complainant and the witnesses if any as contemplated by Section 200 to issue process or to postpone the issue of process. This discretion which the court enjoys cannot be circumscribed or denied by making it mandatory upon the court either to hold the inquiry or direct investigation. Such an approach would be contrary to the statutory provision. Therefore, there is no merit in the contention that by entertaining a private complaint, the purpose of speedy trial would be thwarted or that a pre process safeguard would be denied.”

In this case, the Supreme Court discusses how an investigation or inquiry into the complaint under Section 202 is not required. The Supreme Court emphasizes that the goal of a swift trial would be undermined if an investigation were required. However, due to the additional proviso to Section 223 of the BNSS, 2023, the magistrate must now investigate the matter in relation to hearing both parties, which might significantly lengthen the trial. However, in the long term, the accused's hearing at this point might enable the magistrates to stop the issue early and prevent wasting years on false and malicious complaints.

NOTICE TO THE ACCUSED

Determining the precise time of the accused's notice is the next thing to take into account. The Karnataka High Court addressed this problem in the ***Basanagouda R*** case, however the statute is vague on whether the notice is given right away after the magistrate receives the complaint or after the complainant's sworn statement is recorded. [Shivananda S. Patil v. Patil]¹⁴.

In Suby Antony v. JFCM-III, the Kerala High Court upheld the ruling and procedural order established by the Karnataka High Court. A prospective accused person may now be classified differently under Section 223 of the BNSS, 2023. However, here it remains unclear and subject to judicial interpretation as to the rights and procedure of participation of the proposed Accused at the initial stage of the complaint. If the judgment of the Karnataka High Court is followed it is still to be answered whether the proposed accused may, like the complainant, submit their contentions in writing along with documentary evidence which may form a part of the record and be part of the trial process. However, here it remains unclear and subject to judicial interpretation as to the rights and procedure of participation of the proposed Accused at the initial stage of the complaint. If the judgment of the Karnataka High Court is followed it is still to be answered whether the proposed accused may, like the complainant, submit their

¹⁴ (1984) 2 S.C.C. 500 (India).

contentions in writing along with documentary evidence which may form a part of the record and be part of the trial process.

PROPOSED ACCUSED TAKE THE STAND! THE LACUNAE OF SECTION 223 OF BNSS, AND COGNIZANCE IN PRIVATE COMPLAINTS.

This newly added proviso gives an opportunity to the proposed accused to be heard before the Magistrate takes cognizance of the private complaint. At first blush it may appear, and was perhaps the intent of the legislature, that the aforesaid proviso allows the proposed accused persons, to put forth their case at the outset and prevent the Court from wrongly taking cognizance of the private complaint in their absence.

1. WHEN NOTICE IS TO BE ISSUED

Read with the interpretation of the term ‘cognizance’, the proviso to Section 223 BNSS, arguably implies that the Magistrate must issue notice and grant an opportunity of hearing to the (proposed) offender, to determine whether any offence has been committed. Further, the proviso itself is arguably inexplicit in its language viz. the proviso does not specify the stage at which the proposed accused is to be notified for their presence. The proviso is silent on what constitutes “opportunity of being heard”. Courts in the country have had few occasions to interpret the scope of Section 223 of the BNSS since its coming into effect last year. The Hon’ble Karnataka High Court on one such occasion in *Sri. Basanagouda R. Patil (Yatnal) v. Sri. Shivananda S. Patil*[ii] (“Sri Bansangouda Patil case”)¹⁵, has clarified the procedure to be followed by magisterial courts on issuance of notice to proposed accused under the said provision. The Hon’ble Court therein summarised the legal conundrum and passed directions in the following manner “The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn statement, as the mandate of the statute is, while taking cognizance of an offence the complainant shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence, should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would

¹⁵ 2024 SCC OnLine Kar 96.

come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard”.

2. SCOPE OF “OPPORTUNITY OF BEING HEARD”

Recently, the Hon’ble Kerala High Court in *Suby Antony v. Respondent No. 1 (Deleted)* (“*Suby Antony case/Suby Antony v. Judicial First-Class Magistrate-III*”)¹⁶, relied on the Hon’ble Karnataka High Court’s aforesaid judgement, and held that notice to the proposed accused could not have been issued before the Magistrate had examined the complainant and witnesses. However, neither judgement has elucidated on the import of “opportunity of being heard” given to the proposed accused, i.e., whether the proposed accused is entitled to filing a reply to the complaint, and / or to lead documentary evidence in order to object to cognizance being taken, and /or cross-examine any of the complainant’s witnesses as done during the pre-charge stage.

3. OTHER LEGAL VACUUMS

Further, there appears to be a legal vacuum in relation to the following questions that emanate from the proviso to Section 223, BNSS –

1. In the event the Court takes cognizance of the complaint, after examining the complainant, witnesses and ‘hearing’ the proposed accused, does the discretionary power of the Court under Section 225, BNSS, i.e., ‘Postponement of issue of process’, become otiose?
2. In the event the Court is not inclined to take cognizance of the private complaint upon ‘hearing’ the proposed accused, can the private complaint be dismissed on the said ground under Section 226, BNSS?

The fact that Section 225 of the BNSS remains unaltered from its erstwhile counterpart, begets the question - if at the first instance of taking cognizance of a private complaint, the Court has had occasion to hear the proposed accused and has then proceeded to take cognizance, is the discretion to postpone issuance of process under Section 225 of the BNSS a mere fallacy? Alternatively, a scenario may arise wherein upon examining the complainant and witnesses, as well as ‘hearing’ the proposed accused, the Court is not inclined to take cognizance of the said complaint. In such an eventuality, would the private complaint be liable to be dismissed under Section 226, BNSS? Notably, Section 226 of the BNSS has not undergone any change from its corresponding provision in the CrPC, i.e., Section 203. The Hon’ble Kerala High Court in the *Suby Antony case*, highlighted an anomaly which emerges owing to the proviso’s addition to Section 223, BNSS. Deeming the proviso to be a “radical change in procedure”, the Hon’ble

¹⁶ 2025 SCC OnLine Ker 532.

Court observed: " ...Pertinently, in spite of the proviso to Section 223(1) making it mandatory to provide opportunity of hearing to the accused before taking cognizance, Section 226 does not reckon the accused's objection at the stage of taking cognizance as a relevant factor for dismissing the complaint."

As such, it appears that dismissals of private complaints owing to the objections of the proposed accused persons at the stage of taking cognizance, are liable to be assailed since Section 226 of the BNSS categorically lays down the factors to be considered for such dismissal, i.e., statements on oath (if any) of the complainant and of the witnesses, and the result of the inquiry or investigation (if any) under Section 225. The provision does not provide for the proposed accused's objection as a ground for dismissal of the complaint, thereby arguably rendering the opportunity of being heard at the stage of cognizance, redundant. Perhaps judicial interpretation which clarifies the procedure to be followed, and /or legislative intervention to amend the relevant provisions of the BNSS to align with the proviso to Section 223, is necessary to resolve these anomalies.

APPLICATION OF SECTION 223 BNSS TO THE NEGOTIABLE INSTRUMENTS ACT, 1881 CASES:

The question of whether notice must be served to the proposed accused prior to taking cognizance in cases under the Negotiable Instruments Act, 1881 (in short, "NI Act") as mandated by the proviso to Section 223 of the BNSS, has sparked considerable debate within the legal fraternity. The proviso to Section 223 of the BNSS becomes relevant when a complaint is lodged under Chapter XVI (16) {Complaints to Magistrates} of the BNSS. It establishes an essential statutory right for the accused, enabling them to present a defence at the pre-summoning stage. This position finds support in judicial pronouncements from the Karnataka and Allahabad High Courts as well, which have clarified that notice under the proviso to Section 223 of the BNSS must be served after recording the complainant's and witnesses' statements. These rulings affirm that the requirement of notice prior to taking cognizance applies unequivocally to the NI Act cases as well.

Consequently, it is now evident that serving notice to the proposed accused is a mandatory step under the proviso to Section 223 of the BNSS in such matters. In the *Mohammad Afzal Beigh vs Noor Hussain S/O Late and Gulam Ali* in Crl.M. no. 742/2025- of J&K and Ladakh¹⁹, it is held that Section 223 BNSS provides for issuance of pre-cognizance notice to the accused, and said provision was not available in the corresponding Section 200 of the repealed Code. Such a requirement provided under Section 223 of the BNSS by way of a proviso appears to be justice-oriented as the same takes care of any legitimate defence of the accused to be

appreciated by the Magistrate even at an earliest, while holding a preliminary inquiry and is not barred at all even in respect of complaints under N.I. Act.

In this context I would like to refer Section 142 of Negotiable Instruments Act. Section 142. Cognizance of offences. —

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause(c) of the proviso to section 138 Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

In this context The Hon'ble Madras High Court in Criminal OP(MD) No.19778/2022 and other connected matters between M/ultimate Computer Care and Another Vs. M/s. S. M. K. Systems decided on 12.02.2025 has held as that; "Having regard to the fact that the N. I. Act has prescribed a special procedure, it is a Special Law within the meaning of Section 5 of the BNSS, 2023. Hence, the procedure of hearing the accused at the stage of taking cognizance as prescribed in the proviso to Section 223 BNSS shall not apply to complaints under Section 138 of the N. I. Act, 1881. Further in Neeti Sharma vs Saranjit Singh in Crl. M.C. no. 1495/2025, decided on 2 April, 2025 the Hon'ble High Court of New Delhi also held that there is no need of issuing notice to the accused in NI Act Cases as prescribed under section 223 of BNSS by stating that the Negotiable Instruments Act is a special statute. Further, the Hon'ble Apex Court in Mohd. Abdul Sammad Vs The State of Telangana and another, reported in 2024 INSC 50620, observed that provisions of special law prevail over general law. — In Suresh Nanda Vs CBI, 2024 INSC 506, the Hon'ble Supreme Court observed that the Passport Act is a Special Law, whereas Cr.P.C/BNSS is a General Law. It is well settled that the special law prevails over the general law The very recent Judgment of the Hon'ble Karnataka High Court held in Ashok S/O Siddappa Bankar Vs Fayaz Ahmad S/O Aurangzeb Naikar decided on 28-04-2025 has decisively settled the controversy, holding that section 223(1) of BNSS does not apply to proceedings under section 138 of NI Act. Hence, from the above discussion, it is clear that there is no need to issue a notice to the accused at the pre-cognisance stage in NI ACT cases.

JUDICIAL PRONOUNCEMENTS:

***Kushal Kumar Agarwal v. Enforcement Directorate*¹⁷**

The Supreme court held that 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.

***Suby Antony v. Judicial First-Class Magistrate-III*¹⁸**

Kerela High Court being guided by the precedents on Sections 200 and 202 of the Code and the plain language of the proviso to Section 223(1) of the BNSS, this Court is of the opinion that, after the complaint is filed, the Magistrate should first examine the complainant and witnesses on oath and thereafter, if the Magistrate proceeds to take cognizance of the offence/s, opportunity of hearing should be afforded to the accused.

***Basanagouda R. Patil v. Shivananda S. Patil*¹⁹**

Karnataka High Court The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates the grant of an opportunity of being heard.

***Prateek Agarwal v. State of U.P., 2024*²⁰**

Allahabad High Court held that, a complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate/concerned Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused, who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage, and after hearing the accused, take cognizance and regulate its procedure thereafter.

***Nitish Kumar vs The State of Bihar*²¹**

After reproducing Section 223, the High Court in para 19 of its Judgement held: "Having such a legal position, without examining the complainant on oath and prosecution witnesses, the finding of learned Magistrate as to proceed further and therefore to issue notice to the petitioner as 'proposed accused' is totally unfounded and misconceived." Interpretation of section 223 by the hon'ble court.

¹⁷ 2025 SCC OnLine SC 122121

¹⁸ 2025 SCC OnLine Ker 532,

¹⁹ 2024 SCC OnLine Kar 96

²⁰ SCC OnLine All 821222

²¹ 2025 SCC OnLine Pat 2212 (India).

In para 20 of the Judgment; "Indeed, a radical change in procedure is brought about by the proviso to Section 223(1) of BNSS. Pertinently, in spite of the proviso to Section 223(1) making it mandatory to provide opportunity of hearing to the accused before taking cognisance..." When notice is to be issued;

"The Magistrate, while taking cognizance of an offence, should have with him the statement on oath of the complainant and, if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement; at that juncture, a notice is required to be sent to the accused, as the proviso mandates the grant of an opportunity of being heard." Procedure to be followed; In para 20 the Hon'ble Court held "A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate... to examine the complainant on oath...

The question of taking cognizance would not arise at this juncture. The Magistrate has to, in terms of the proviso, issue a notice to the accused... after hearing the accused, take cognizance and regulate its procedure thereafter." Violation of Section 223 can vitiate the proceedings; This can be validly understood by the judgment of the court under para 28 which is as follows; "The entire complaint, along with notice dated 04.04.2025 issued to 'proposed accused'... appears contrary to established principles of law, by ignoring legal provisions as available under sections 223 & 226 of the B.N.S.S.... accordingly, the entire complaint with notice... is hereby set-aside/quashed." Therefore, the Patna High Court held that the first proviso to Section 223(1) BNSS makes it mandatory to give the proposed accused an opportunity of hearing before taking cognizance; however, such notice is to be issued only after the complainant and witnesses have first been examined on oath under the main provision of Section 223(1).

CONCLUSION

cognizance notice provision under Section 223 of the BNSS cognizance notice provision under Section 223 of the BNSS represents a significant legal reform in India's criminal procedure law. It introduces a crucial safeguard by ensuring that the accused has an opportunity to be heard before being subjected to criminal proceedings. This new procedural safeguard aims to filter out frivolous complaints while ensuring that genuine grievances continue to receive the pre-cognizance notice provision under Section 223 of the BNSS represents a significant legal reform in India's criminal procedure law. It introduces a crucial safeguard by ensuring that the accused has an opportunity to be heard before being subjected to criminal proceedings. This new procedural safeguard aims to filter out frivolous complaints while ensuring that genuine grievances continue to receive proper legal attention. The proviso in Section 223 (1) of the

BNSS is a double-edged sword in its current iteration without significant jurisprudence. While on one hand the proviso solves the issues of malicious prosecution and overburdening of appellate courts, at the same time it increases the judicial workload of the trial court prior to the initiation of the trial itself. The lacunae in the possible options for hearing of the accused and technicalities therefore require addressing either by the Courts or the legislature through subsequent amendments.