IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.5326 OF 2025

Viral Pravin Parekh and Ors. ... Petitioners
versus
The State of Maharashtra … Respondent

Ms. Mrunmai G. Kulkarni with Mr. Sujay Shingode, for Petitioners.
Mrs. M.M.Deshmukh, Chief Public Prosecutor with Mr. P.P.Malshe, APP for State.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 15 OCTOBER 2025
PRONOUNCED ON : 17 OCTOBER 2025

JUDGMENT :

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

2. By this Petition under Article 227 of the Constitution of India and Section 528 of the Bhartiya Nyaya Suraksha Sanhita, 2023 (BNSS of 2023), the Petitioners seek orders to quash and set aside the remand order dated 7 October 2025 passed by the learned Magistrate, 37th Court, Esplanade, Mumbai, in connection with the FIR No.777 of 2025, initially registered with Kandivali Police Station, and, subsequently, transferred to DCB, CID, thereby remanding the Petitioners to police custody, on account of non-compliance of the mandate under Section 35(3) of the BNSS (Section 41-A of the Code of Criminal Procedure, 1973) and the initiation of prosecution in violation of the

provisions contained in the Securities Contract (Regulation) Act, 1956.

3. The background facts can be stated, in brief, as under :

3.1 On 6 October 2025, DCB, CID Police, pursuant to an intimation that illegal trading in securities, without authorization of the NSE/BSE, was being carried out at Room No.4, Dwarkesh Co-op. Hsg. Soc. Ltd., Kandivali (W), Mumbai, called the officers of the NSE, including the first informant. Accompanied by the officers of the NSE and panch witnesses, a raid was conducted at the aforementioned premises. It was found that the Petitioner Nos.2 and 3 were engaged in trading in securities on a website *Vertexexch.net* on the instructions of Petitioner No.1.

3.2 It further transpired that, one Jack @ Raju was the Admin of the said website. The Petitioner No.1 had subscribed to the said website. The Petitioner No.1 was made a sub-broker. Username and password were given to the Petitioner No.1. On the strength of the said username and password, the Petitioner No.1 was engaging in unauthorized trading in stocks. There were around 22 clients of the Petitioners. Brokerage @ 0.33% was charged on the transactions through the said unauthorized platform, and, after deducting his brokerage, Jack @ Raju paid the amount to the Petitioners.

3.3 Alleging that the illegal trading exchange resulted in loss to the State Exchequor on account of evasion of Securities Transactions Tax, State Government Stamp Duty Tax, SEBI Turnover Fee and Exchange Trading

Revenue to the tune of Rs.8,05,985/-, the first informant lodged the report against the Petitioners for the offences punishable under Sections 318(4) and 316(2) and 62(2) of the Bharatiya Nyaya Sanhita, 2023 (BNS of 2023).

3.4 The Petitioners were arrested on 7 October 2025. By the impugned order dated 7 October 2025, the learned Magistrate remanded the Petitioners to police custody till 14 October 2025. A grievance was raised before the learned Magistrate that there was non-compliance of the mandate contained in Section 35(3) of the BNSS and the directions of the Supreme Court in the cases of **Arnesh Kumar V/s. State of Bihar and Anr.**[1] and **Satender Kumar Antil V/s. Central Bureau of Investigation and Anr.**[2], and, therefore, the arrest was illegal. The learned Magistrate did not accede to the submission as the grounds of arrest were duly communicated to the Petitioners.

3.5 In regard to the challenge that the prosecution could not have been initiated at the instance of the police in view of the bar contained in the Securities Contracts (Regulation) Act, 1956, the learned Magistrate observed that the question whether the offences were punishable under Sections 318(4) and 316(2) of the BNS of 2023 cannot be determined at that stage. Thus, repelling the challenge, the Petitioners were remanded to police custody.

1 (2014) 8 SCC 273
2 (2022) 10 SCC 51

3.6 Being aggrieved, the Petitioners have invoked the writ jurisdiction.

4. I have heard Ms. Mrunmai G. Kulkarni, learned Counsel for the Petitioners, and Mrs. Deshmukh, learned Public Prosecutor for the State, at some length. Learned Counsel took the Court through the remand report and the material on record.

5. Ms. Kulkarni, learned Counsel for the Petitioners, canvassed a two-fold submissions. Firstly, there was a clear breach of the mandate contained in Section 35(3) of the BNSS of 2023. The offence of criminal breach of trust punishable under Section 316(2) of the BNS of 2023 entails punishment which may extend to five years. Whereas, the offence of cheating punishable under Section 318(4) of BNSS of 2023 entails punishment which may extend to seven years. In this view of the matter, it was incumbent upon the Investigation Officer to comply with the mandate contained in Section 35(3) of BNSS of 2023. Admittedly, no notice as envisaged by Section 35(3) of the BNSS of 2023, was issued to the Petitioners. On the contrary, the material on record would indicate that, post haste the Petitioners were arrested and produced before the learned Magistrate.

6. Ms. Kulkarni would urge, in view of the decisions of the Supreme Court in the cases of **Arnesh Kumar (supra)** and **Satender Kumar Antil (supra)**, it is the duty of the Magistrate while authorizing detention of the accused to examine whether there is compliance of the provisions contained in Section

35(3) of BNSS of 2023 (Section 41-A of the Code, 1973). The Magistrate is not expected to authorize the detention of the accused casually and mechanically.

7. Secondly, Ms. Kulkarni submitted that the initiation of the prosecution itself suffered from manifest illegality. A very strong reliance was placed by Ms. Kulkarni on a judgment of this Court in the case of **Khanhaiya Ramchand Thawrani V/s. State of Maharashtra, through Dy. Commissioner of Police, EOW, Nagpur**[3], wherein this Court, after an elaborate consideration, has ruled that the complaint alleging commission of any offences punishable under Section 23 of the Securities Act of 1956 can only be filed by the Central Government and no authority has been given under the Act 1956 to a police officer of any rank to file complaint under Section 26 of the Act, 1956 and the police officer can neither make investigation into the offences punishable under the Act, 1956 nor effect arrest for them till the time the requisite conditions discussed in the said order, were complied with.

8. Ms. Kulkarni would urge, the facts in the instant case, are, by and large, similar to the facts in the case of of **Khanhaiya R. Thawrani (supra)**, wherein the Applicant – accused had allegedly dealt in securities and carried on illegal business of trading in shares without being a registered member of a

3 Cri.Appln (ABA) No.445 of 2016 dated 24 Oct. 2016

recognized stock exchange or having been issued licence by the Central Government to deal in securities.

9. Ms. Kulkarni would lastly urge, though on 14 October 2025 the Petitioners have been remanded to Judicial custody, yet, in view of the very arrest being illegal, the Petitioners deserve to be enlarged on bail.

10. Mrs. Deshmukh, learned Public Prosecutor, countered the submissions on behalf of the Petitioners. It was submitted that the Investigating Officer had satisfied himself about the necessity of arrest. The reasons ascribed in the remand report would indicate that the IO had satisfied himself that, to facilitate further investigation the arrest of the Petitioners was necessary. Mrs. Deshmukh laid emphasis on the provisions contained in Section 35(b)(ii) of BNSS, 2023 to buttress her submission that in the case at hand, the arrest cannot be said to be illegal.

11. Reliance was placed on a judgment of the Supreme Court in the case of **Vihaan Kumar V/s. State of Haryana and Anr.**[4], wherein the Supreme Court indicated the circumstances in which a police officer can arrest a person under clause (c) of sub-section (1) of Section 35 of the BNSS, 2023.

12. Mrs. Deshmukh would further urge, having regard to the nature and magnitude of the alleged illegal trading in securities, it cannot be said that the investigation was not necessary. Lastly, Mrs. Deshmukh would urge, the

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4 AIR 2025 SC 1388

judgment of this Court in the case of **Khanhaiya R. Thawrani (supra)**, has been assailed before the Supreme Court and the Petition is pending.

13. The gravamen of indictment against the Petitioners is that the Petitioners entered into transactions in securities without being a member of the recognized stock exchange and without authorization envisaged by the provisions of the Act, 1956. In effect, the Petitioners indulged in illegal trading in securities. Section 23 of the Act, 1956, provides for penalties for acts or omission in relation to trading in securities in breach of the provisions of the said Act and the rules or bye-laws of the stock exchange.

14. In the case at hand, FIR does not refer to any of the offences allegedly committed by the Petitioners in contravention of the provisions of the Act, 1956, though the FIR was lodged by the legal officer of NSE. Instead, FIR proceeds on the premise that the accused have committed criminal breach of trust and cheating.

15. It is trite, the offences of criminal breach of trust and cheating may not be attracted in the same set of facts. The ingredients of the offences of criminal breach of trust and cheating are materially distinct. In the former case, there is voluntary entrustment of the property. In the latter case, there is dishonest inducement to deliver the property. Deceit coupled with injury is the linchpin of the offence of cheating.

16. The legal position as regards the compliance of the provisions

contained in Section 41-A of the Code, has been fairly crystalized. The foundational premise is that, there is an essential distinctinction between the existence of the power to arrest and the justification for the arrest. In the case of **Arnesh Kumar (supra),** the Supreme Court empathetically clarified that the endeavour of the Supreme Court in the said judgment was to ensure that the police officers do not arrest the accused unnecessarily and the Magistrates do not authorize detention casually and mechanically, and, thus, to ensure strict compliance of the statutory mandate and the protection of personal liberty, the Supreme Court issued certain directions.

17. In the case of **Satender Kumar Antil (supra)**, the Supreme Court reiterated the position in law, as enunciated in the case of Arnesh Kumar (supra), and passed, inter alia, the following directions :

> "100.2 The investigating agencies and their officers are duty-bound to comply with the mandate of Sections 41 and 41-A of the Code and the directions issued by this Court in Arnesh Kumar (supra). Any dereliction on their part has to be brought to the notice of the higher authorities by the Court followed by appropriate action.
>
> 100.3 The courts will have to satisfy themselves on the compliance of Sections 41 and 41-A of the Code. Any non-compliance would entitle the accused for grant of bail."

18. In the case at hand, from the perusal of the remand report, it does not appear that the IO has satisfied himself about the necessity of arrest, though

the grounds of arrest were stated to have been communicated to the Petitioners. From the reasons for which the police custody of the Petitioners was sought, it could be urged that, having regard to the nature of the accusation, the arrest was justified. In the facts of the case, however, this Court does not consider it necessary to base its determination on the non-compliance of the mandate contained in Section 35(3) of the BNSS, 2023.

19. The challenge to the initiation of the prosecution appears to be more fundamental. As noted above, the indictment against the Petitioners is that they were trading in securities, unauthorizedly. The Securities Contracts (Regulation) Act, 1956, was enacted to prevent the undesirable transactions in securities, by regulating business of dealings therein and to regulate the securities market. Section 23 of the Act, 1956, provides for penalties for the contravention of the provisions of the Act, Rules and Bye-laws of the stock exchange.

20. Relevant part of Section 23 reads as under :

> “23. **Penalties.—(1) Any person who—**
>
> **……….**
>
> (e) owns or keeps a place other than that of a recognised stock exchange which is used for the purpose of entering into or performing any contracts in contravention of any of the provisions of this Act and knowingly permits such place to be used for such purposes; or
>
> (f) manages, controls, or assists in keeping any place other

than that of a recognised stock exchange which is used for the purpose of entering into or performing any contracts in contravention of any of the provisions of this Act or at which contracts are recorded or adjusted or rights or liabilities arising out of contracts are adjusted, regulated or enforced in any manner whatsoever; or

(g) not being a member of a recognised stock exchange or his agent authorised as such under the rules or bye-laws of such stock exchange or not being a dealer in securities licensed under section 17 wilfully represents to or induces any person to believe that contracts can be entered into or performed under this Act through him; or

(h) not being a member of a recognised stock exchange or his agent authorised as such under the rules or bye-laws of such stock exchange or not being a dealer in securities licensed under section 17, canvasses, advertises or touts in any manner either for himself or on behalf of any other persons for any business connected with contracts in contravention of any of the provisions of this Act; or

(i) joins, gathers or assists in gathering at any place other than the place of business specified in the bye-laws of a recognised stock exchange any person or persons for making bids or offers or for entering into or performing any contracts in contravention of any of the provisions of this Act;

[shall, without prejudice to any award of penalty by the Adjudicating Officer[or the Securities and Exchange Board of India] under this Act, on conviction, be punishable with imprisonment for a term which may extend to ten years or with fine, which may extend to twenty-five crore rupees or with both]"

21. All the allegations in the FIR would fall within the dragnet of one or the other clauses of Section 23(1) of the Act, 1956.

22. Certain other provisions of the Act, 1956 also deserve to be noted.

> **25. Certain offences to be cognizable**. - Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), any offence punishable under Section 23, shall be deemed to be a cognizable offence within the meaning of that Code.
>
> 26. **Cognizance of offences by courts.**—(1) No court shall take cognizance of any offence punishable under this Act or any rules or regulations or bye-laws made thereunder, save on a complaint made by the Central Government or State Government or the Securities and Exchange Board of India or a recognised stock exchange or by any person.
>
> **26-A. Establishment of Special Courts**.—(1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.
>
> (2) A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.
>
> (3) A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately

> before such appointment, holding the office of a Sessions Judge or an Additional Sessions Judge, as the case may be.
>
> **26-B. Offences triable by Special Courts**.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), all offences under this Act committed prior to the date of commencement of the Securities Laws (Amendment) Act, 2014 or on or after the date of such commencement, shall be taken cognizance of and tried by the Special Court established for the area in which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned.
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> **26-D. Application of Code to proceedings before Special Court.**—(1) Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973(2 of 1974) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting prosecution before a Special Court shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973."

23. A conjoint reading of the aforesaid provisions would indicate that the Act of 1956 defines the offences, provides punishment for the commission of

those offences, prescribes the procedure in accordance with which those offences would be tried, envisages the machinery of Special Courts for the trial of those offences and makes the provisions of the Code of Criminal Procedure, 1973, applicable to the trial of those offences, save as otherwise provided in the said Act, 1956. The provisions contained in Section 26 prescribe a special mode of taking cognizance of the offences, in contradistinction to the modes of taking cognizance provided under Section 190 of the Code of Criminal Procedure. It provides that no court shall take cognizance of any offence punishable under the said Act or any rules or regulation or bye-laws made thereunder, save on a complaint, made by the Central Government or State Government or SEBI or the recognized Stock Exchange or by any person. The initiation of the prosecution for the offences punishable under the Act, 1956, has to be in the manner provided by Section 26, namely, complaint by the entities or person indicated therein.

24. In the light of the aforesaid provisions, at this juncture, a reference to the decision of this Court in the case of **Khanhaiya R. Thawrani (supra)**, becomes necessary. In the said case, the learned Single Judge of this Court considered, inter alia, the following question :

> “(i) Who can file a complaint alleging commission of any offence punishable under Section 23 of the Securities Act ?
>
> (ii) Whether filing of a complaint as contemplated

> under Section 26 of the Securities Act, is a must for setting the law in motion ?
>
> (iii) In what circumstances police can make arrest without warrant ?
>
> (iv) Whether police can make investigation and if so, when ?
>
> (v) What is the proper procedure to be followed for dealing with the offences punishable under Section 23 of the Securities Act ?"

25. After an extensive analysis of the provisions contained in the Act, 1956 and the Code of Criminal Procedure, 1973 and the provisions analogous to the provisions contained in the Act, 1956, the learned Single Judge answered the questions as under :

> "39. The result of the above discussion would lead to the following conclusions, which answer the questions formulated in this order thus :
>
> (a) <u>Complaint alleging commission of any offence punishable under Section 23 of the Securities Act can be filed only by the Central Government or the State Government or the SEBI or recognized stock exchange or by any person, who falls in the same category as the category of the authorities mentioned in Section 26 or who is a person affected by contravention of the provisions of the Securities Act.</u>
>
> (b) Filing of a complaint by an authority or a person contemplated by Section 26 of the Securities Act, is sine qua non for setting the law in motion.

(c) No authority has been given under the Securities Act, to a police Officer of any rank to file a complaint under Section 26 of the Securities Act.

(d) A Police Officer can neither make investigation into the offences punishable under the Securities Act nor effect arrest for them till the time the requisite conditions discussed at length in the order are fulfilled.

(e) The procedure for dealing with the offences punishable under Section 23 of the Securities Act would be governed by Sections 26, 26B and Section 26D of that Act, together with applicable and relevant provisions of the Cr.P.C., in particular, those contained in Chapters XV and XVI of the Cr.P.C." (emphasis supplied)

26. While arriving at the aforesaid conclusions, the learned Single Judge had reasoned, as under :

"13. On reading these provisions, one would realize that they present before us a clear canvas of the procedure to be followed in taking cognizance of offences punishable under Section 23 of the Securities Act, making inquiry or investigation into them and trying the offenders for the purpose of booking them under the law. By Sections 26, 26B and 26D of the Securities Act, a certain procedure has been laid down for dealing with the offences under the Act. This procedure, I must say, is special as it mandates, by making a departure from the provisions of the Cr.P.C., as to how cognizance of offences is to be taken and how they be tried. Section 26 of the Securities Act prescribes a special way of taking cognizance of the offences punishable under the Securities Act and closes the door on other ways of taking cognizance of offences, quite unlike Section 190 of the Cr.P.C. Under Section 190 of the Cr.P.C., a Magistrate of the First Class, may take cognizance of any offence either upon a complaint or a police report or upon information received from any person other than a police officer or upon his own knowledge. But Section 26 of the Securities Act restricts cognizance taking business to only one mode i.e. upon a complaint by competent authority or person. This is clear from the language employed in Section 26. This section begins with a negative prescription, “No court shall take cognizance....” and ends with an exception created to the bar imposed by saying, “save on complaint made by the Central Government.....”. This would show that cognizance of offences punishable under the Securities Act has to be taken only in the manner prescribed under Section 26 and in no other way. This would also mean that Section 190 of the Cr.P.C. would have no application to the offences under this Act. Section 25 of the Securities Act, however, is not on the procedure but on the nature of offences, with which we shall deal later on. But Sections 26A and 26D are about procedure only. They lay down that offences under the Securities Act shall be triable only by Special Courts and restrict applicability of provisions of the Cr.P.C. only to the extent that they are not inconsistent with the provisions of the Securities Act.

14. So, this procedure being special in nature would prevail upon the procedure prescribed under the provisions of the Cr.P.C. Section 26D of the Securities Act clearly lays down that except as otherwise provided in the Act, the provisions of the Cr.P.C. shall apply to the proceedings before the Special Court. Section 4(2) of the Cr.P.C. also lays down that generally

all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with, according to the provisions of the Cr.P.C., but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing such offences. These two provisions are enough for one to understand that offences punishable under Section 23 of the Securities Act are to be taken cognizance of and tried only in accordance with the provisions of the Securities Act, and in no other way, and that the provisions of the Cr.P.C. shall have application only to the extent that they are not in conflict with the provisions of the Securities Act. Then, there is another principle of law which accords primacy to the provisions of the Securities Act. The principle is that when law requires a thing to be done in a certain manner, it must be done in that manner only or not at all. A useful reference in this regard may be had to the observations of the Hon'ble Apex Court in the case of Dhanajaya Reddy vs. State of Karnataka – (2001) 4 SCC 9. So there is no escape from following the special procedure laid down under the Securities Act for dealing with the offences under it."

27. With regard to the power of the police officer to investigate into a cognizable offences, learned Single Judge observed as under :

"20. There is no doubt that a police officer can make investigation into a cognizable offence. But, he can do so either in exercise of his power under Section 156(1) of the Cr.P.C. (i.e. without order of Magistrate) or upon direction received from a Magistrate under Section 156(3) or Section 202 of the Cr.P.C.

> Here, we are concerned with power of police officer to investigate without order of Magistrate under Section 156(1) of the Cr.P.C. But this power of police officer under Section 156(1) of the Cr.P.C. comes alive only when an information or F.I.R. relating to commission of cognizable offence is received by him under Section 154 of the Cr.P.C. and not otherwise. In the absence of F.I.R. received and registered under Section 154, there would be no case called "cognizable case" to be investigated into by a police officer. Under Section 156(1) of the Cr.P.C., it is worthy to note, what can be investigated is "cognizable case" and this provision avoids use of expression "cognizable offence". We have, however, seen earlier that the complaint contemplated under Section 26 of the Securities Act is different from the F.I.R. filed under Section 154 of the Cr.P.C. and it does not include within it's fold such an F.I.R. <u>Therefore, question of a police officer exercising his power to investigate a cognizable case under Section 156(1) of the Cr.P.C. in case of any offence under the Securities Act would not arise. It would then follow that filing of a complaint by a competent authority or a person in terms of Section 26 of the Securities Act first is a sine quo non for setting the law in motion and making inquiry or investigation into the offences alleged to be committed under the provisions of this Act.</u>" (emphasis supplied)

28. In the backdrop of the aforesaid enunciation of law, when all the acts attributed to the Petitioners, taken at their face value, fall within the tentacles of the offences defined and punishable under Section 23 of the Act, 1956, the initiation of the prosecution for those very acts under the provisions of

Sections 318(4) and 316(2) of the BNSS, 2023, on the premise that those acts amount to criminal breach of trust and cheating, prima facie, appears clearly unsustainable.

29. A useful reference in this context can be made to a judgment in the case of **Ram Nath V/s. State of Uttar Pradesh and Ors.**[5], wherein in the context of the provisions contained in Food Safety and Standards Act, 2006, the Supreme Court examined the interplay between the provisions of Chapter IX of FSSA and Sections 272 and 273 of IPC and then observed, as far as the offences relating to FSS Act, are concerned, very exhaustive provisions are made in the said Act dealing with all aspects of food and food security and that there would be no question of the simultaneous prosecution under both the enactments. i.e. FSSA 2006 and the Indian Penal Code, 1860.

30. The position in law which thus emerges is that, the special law providing for the special procedure would prevail over the general law. Resultantly, the initiation of the prosecution for the offences substantially covered by the provisions of the Act, 1956 by treating them to be the offences of cheating and criminal breach of trust, defined under Section 318(4) and 316(2) of the BNSS, 2023, by resorting to the procedure which is at variance with the procedure prescribed in the Act, 1956, prima facie appears suspect.

31. For the aforesaid reasons, and in the peculiar facts of the case at hand,

5 (2024) 3 SCC 502

this Court is inclined to hold that the detention of the accused appears unsustainable, and, therefore, direct their release on bail.

32. Hence, the following order :

ORDER

(i) The Writ Petition stands partly allowed.

(ii) The Petitioners be released on bail in R.A.No.839 of 2025 in relation to FIR No.777 of 2025 registered with Kandivali Police Station on furnishing a PR bond in the sum of Rs.50,000/- each and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) In view of the ensuing holidays, the Petitioners are permitted to furnish cash security in lieu of personal surety for a period of two weeks.

(iv) The Petitioners shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(vi) The Petitioners shall regularly attend the proceedings before the jurisdictional Court.

(N.J.JAMADAR, J.)