

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Bail App 21/2026

Asif Amin Thoker Th. His Sister

...Petitioner(s)/Appellant(s).

Through: Mr. Mir Umar, Advocate

Vs.

Union Territory of J And K Th.

S.H.O P/S Qazigund

...Respondent(s).

Through: None

CORAM: HON'BLE MR. JUSTICE MOHD YOUSUF WANI, JUDGE

ORDER

09.03.2026

1. There is no representation on part of the respondent-UT.
2. Notice issued in the matter to the respondent through the office of learned Sr.AAG, Srinagar, is reported to have been sent on 05.03.2026. However, it has been reported by the Registry that the said notice has not been received back with the report of service.
3. Through the medium of the instant application, the petitioner seeks the grant of short-term bail in his favour in case FIR No. 255/2021 under section 8/15, 29 of NDPS, Act, the final report/challan culminating from the same is reported to be pending trial in the court of learned Principal Sessions Judge Kulgam, on the main ground that his minor daughter namely Aleeza, aged about 07 years, who has been suffering from a congenital cleft palate condition and has been advised to report for admission to undergo Palatoplasty (Cleft Palate Repair Surgery) at Super Specialty Hospital, Shireen Bagh, Srinagar.
4. It has been *inter alia* submitted in the application that Palatoplasty (cleft palate repair surgery) is a delicate reconstructive surgical procedure involving closure of the opening in the roof of the mouth and reconstruction of palatal muscles, requiring pre-operative preparation and post-operative parental care and supervision. That the minor child is of tender age and requires emotional, psychological, and physical support of her father before and after surgery. That the presence of the petitioner is indispensable during hospitalization and recovery of the child. That the

petitioner has already filed a regular bail application which is pending adjudication in this Court. That the provisions of the Section 37 of NDPS, Act do not operate as a bar in case where bail is sought on exclusively humanitarian grounds. That the petitioner shall abide by any conditions that may be imposed by this Court.

5. In view of the forthcoming holidays with effect from 13th March, 2026 to 22nd March, 2026, this Court is of the opinion that having regard to the exigency of the matter, the petition needs to be taken for its disposal at this time.

6. The petitioner happens to be the father and the natural guardian of the minor girl aged about 7 years, who is scheduled to get admitted at Super Specialty Hospital, Shireen Bagh, Srinagar on 25th March, as a documented case of congenital cleft palate condition for undergoing surgery (Palatoplasty). The petitioner has sought the short term concession of bail in his favour in connection with the scheduled surgery of his minor daughter on humanitarian grounds. The petitioner is alleged to be involved in case FIR No. 255/2021 of Police Station Qazigund and presently facing trial in the court of learned Principal Sessions Judge, Kulgam as a co-accused. The commercial quantity of 56 kg poppy straw is alleged to have been seized in respect of case FIR.

7. This Court is of the considered opinion that it may meet the ends of justice in case the application is allowed and the petitioner is granted short-term bail for a period of thirty days with effect from 21st March, 2026.

8. This Court can derive its authority from the provisions of the Section 483 of the BNSS read with the provisions of Article 21 of the Constitution, to address an eventuality, like the present one and pass the appropriate orders regarding temporary bail subject to some stringent conditions, under exceptional and compelling circumstances. After all, a health issue even of a relative or a family member of a detainee is of paramount consideration. All under trial and convicts have their fundamental right to claim proper medical care and treatment. However, the conditions viz. gravity of the offences charged against an accused, likelihood of his absconding at the trial and influencing the prosecution witnesses, impact of the crime charged against the accused on the society and State shall weigh the consideration of a court while overlooking the statutory bars. When bail is to be

considered on humanitarian grounds, the merits of the case do not apply. The basic power to grant bail is derived from the procedural law i.e. BNSS/ CrPC and the limitations on the power of a court imposed either by the procedural law or any other special statute, can under some compelling circumstances be read with the relevant provisions of the Constitution and some extra-ordinary provisions itself contained in the procedural law.

Otherwise while considering a bail under Section 483 BNSS in a routine manner, the statutory restrictions/limitations as laid down under Section 437 of the Code (corresponding to Section 480 BNSS) have also to be considered.

9. In its opinion this court is fortified with an authoritative judgment of the Hon'ble Karnatka High Court cited as "*Syed Abdul Ala vs Narcotic Control Bureau*", South, 2003 Cri.L.J 999 (Kar) decided on 17 December, 2002 wherein it has been authoritatively laid down that High Court under Section 439 of the Code of Criminal Procedure 1973 (corresponding to Section 483 of BNSS) is not powerless to consider bail on humanitarian grounds notwithstanding the restrictions imposed by section 37 of the NDPS Act. It has been held in the case concerned that provisions of Section 37 of the NDPS Act apply where bail is to be considered on merits. It has been agitated before the Hon'ble Court in the case that power to grant bail is basically derived from Code of Criminal Procedure and not from the NDPS Act and the latter only qualifies the power of the court vested under the code. It was held that provisions of Section 37 of NDPS Act do not clamp or cap powers of the High Court to grant bail under section 439 of the Code in its entirety. It is profitable to reproduce paras 9 and 10 of the judgment as under:-

"9. The provisions of Section 37 of the NDPS Act make a drastic departure from the conventional cannons of burden of proof of prima facie case against the accused on the prosecution even at the stage of bail. In respect of the offences under the NDPS Act, the onus is on the accused to prove the innocence/non-complicity in order to secure bail. The restrictions in Section 37 relates to prima-facie material regarding the guilt of the accused. The powers of High Court to grant bail under Section 439 are quite wide and discretionary.

Notwithstanding a prima facie case of guilt, under exceptional circumstances, the High Court in its discretion can grant bail. The embargo placed under Section 37 of the NDPS Act operates only when the Court is considering the bail application on merits. Thus, the provisions of Section 37 do not clamp or cap the powers of High Court to grant bail under Section 439 in its entirety. In other words Section 37 operates only as partial eclipse on the powers of the High Court. While deciding the application on merits with reference to prima facie material of guilt then only the provisions of Section 37 operate and they have to be read with the provisions of Section 439 of the Cr. P.C. When the bail is to be granted on other extenuating circumstances or humanitarian ground like the medical ground, the powers of the High Court under Section 439 are not curtailed. The provisions of Section 37 do not operate as a blanket ban on the powers of the High Court under Section 439 of the Cr. P.C.

10. On careful reading of the decisions of the Supreme Court in Kishan Lal's case, I find that there is no ratio laid down to the effect declaring that Section 37 of the NDPS Act, operates as a total blanket ban on the powers of High Court under Section 439 of the Cr. P.C. In the present case, the accused is seeking bail on medical grounds and the Court is considering the case of the petitioner de hors, prima facie material of guilt placed by the prosecution. On humanitarian considerations, the powers of High Court under Section 439 of the Cr. P.C., to grant bail is not eroded or affected by the provisions of Section 37 of the NDPS Act.”

10. In ***“Jasvinder Singh Vs State of J&K” B.A No: 156/2019 decided on 12.04.2021*** bail on humanitarian grounds (medical grounds) was granted by this Court to an accused who was suffering from diabetes, which had substantially affected his eye sight as per the medical records brought to the notice of the Court. It was authoritatively held in the case that the Sec 37 of the NDPS Act only prescribes the limitations on the release of a person on bail. That the powers to grant bail stand vested with the High Court under Section 439 of the Code of Criminal Procedure. That Section 37 of the NDPS Act, comes into play only when bail of a person/accused of an offence involving commercial quantity of a contraband is being considered on merits and the limitations contained therein would not apply when bail is to be granted on humanitarian grounds like medical ground. In such cases the powers of the High Court U/s 439 of the Cr.P.C are not curtailed.

Thus the provisions contained under Section 37 of the NDPS Act do not act as a blanket ban on the powers of the High Court U/s 439 of the Cr.P.C.

11. It is a settled legal position that basic human rights cannot be denied to a person regardless of the allegations of the involvement against him. Refusing to grant temporary bail on exclusive health grounds may sometimes endanger his life.

12. For the foregoing discussion, the petition is disposed of by admitting the petitioner/accused to short-term bail for a period of thirty days with effect from 21st March, 2026, to enable him to attend to his minor daughter during her pre and post-surgery period and to facilitate her emotional and psychological well-being. This order shall, however, be subject to the following conditions:

- i. That the petitioner shall not threaten or intimidate any of the unexamined prosecution witnesses so as to dissuade them from making a truthful account of the case during at the trial.
- ii. That the petitioner shall surrender before the Superintendent, District Jail Kathua on 20th April, 2026 and shall continue to be under trial in the case FIR.
- iii. The petitioner shall furnish surety and personal bonds to the tune of Rs. 50 thousand (Fifty Thousand) each respectively to the satisfaction of learned Trial Court and the Superintended of Jail concerned for assuring the conditions of this order
- iv. That in case of failure of the petitioner to surrender as directed, the SHO, Police Station Qazigund shall cause his arrest and remove him to the District Jail, Kathua for his lodgment as under-trial in the case FIR No. 255/2019 of Police Station Qazigund.

13. **Disposed of.**

(MOHD YOUSUF WANI)
JUDGE

SRINAGAR
09.03.2026
“Mubashir “