

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

Reserved on: 30.05.2025
Pronounced on: 06.06.2025

Bail App No. 19/2025

TOUSEEF AHMAD KHAN

...PETITIONER(S)

Through: - Mr. Abu Owais Pandit, Advocate.

Vs.

UT OF J&K

...RESPONDENT(S)

*Through: - Mr. Faheem Nisar Shah, GA.
Ms. Maha Majeed, Assisting Counsel.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioners have invoked jurisdiction of this Court under Section 483 of BNSS seeking bail in a case arising out of FIR No.37/2023 for offences under Section 8/21, 29 of NDPS Act registered with Police Station, Batamaloo, which is pending before the Court of Special Judge (NDPS Cases), Srinagar.

2) As per the prosecution case, on 02.04.2023, an information was received by Police Station, Batamaloo, Srinagar, from reliable sources to the effect that the petitioner is indulging in illicit trade of drugs and that co-accused Jasid Manzoor and Sunil Kumar are also involved in the said trade. It was also informed that the aforesaid three persons have concealed the drugs and that they are indulging in sale of narcotic drugs and psychotropic substances to children. It was further reduced into

writing that if the requirements of provision contained in Section 41 of the NDPS Act are adhered to, there is every likelihood that the aforesaid three accused persons may transfer the illicit drugs to some other place for concealment thereof. On the basis of this report, FIR No.37/2023 for offences under Section 8/21, 29 of NDPS Act was registered by the police and investigation of the case set into motion.

3) During investigation of the case, the Executive Magistrate concerned was informed on telephone and he was requested to accompany the police party. Accordingly, under the leadership of Executive Magistrate, Shalteng, Srinagar, police party proceeded to conduct the search of the house of the petitioner/accused. During the search operation 11 bottles of codeine were recovered and the same were seized. The statements of the witnesses under Section 161/164 of Cr. P. C were recorded. The sample of the seized drugs was sent to FSL for obtaining the opinion. After getting the opinion of the FSL, it was found that the offences under Section 8/21, 29 of the NDPS Act were established against the petitioner and co-accused. Accordingly, the challan was laid before the learned trial court.

4) Vide order 14.10.2023, learned trial court framed charges for offences under Section 8/21/29 of NDPS Act against the accused persons. They denied the charges, as such, the prosecution was directed to lead evidence in support of the charges. A perusal of trial court record would reveal that as many as eight, out of ten witnesses listed in the challan, have been examined by the trial court. It also appears that the

learned trial court during trial of the case has declined the concession of bail to the petitioner in terms of its order dated 13.12.2024.

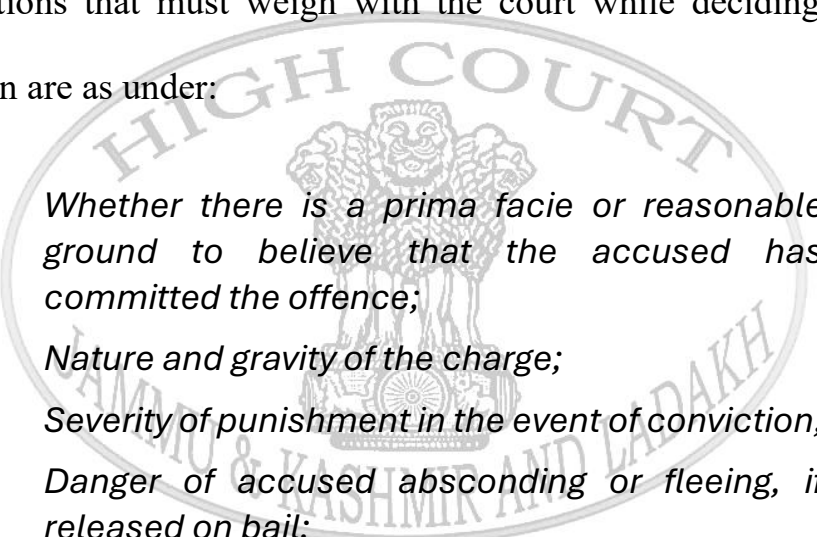
5) The petitioner has sought bail on the grounds that all the material witnesses of the case have already been examined and only the statements of Investigating Officer and FSL expert are to be recorded. It is being contended that the evidence recorded before the trial court does not make out a case against the petitioner and from a perusal of the statements of the prosecution witnesses recorded so far, it can safely be stated that petitioner is not guilty of the offences for which he has been charged. It has also been contended that the Executive Magistrate, under whose leadership the house of the petitioner is alleged to have been raided by the police party, has clearly stated that he did not accompany the police party at the relevant time and that he has only sealed the samples. This according to the petitioner, falsifies the prosecution story. It has been further contended that there is nothing on record to suggest that the petitioner has any previous history of committing similar offences or that he is likely to commit similar offences.

6) The respondent-State has resisted the bail petition by filing objections thereto. In its objections, the respondent-State has, besides narrating the allegations made in the charge sheet against the petitioner, contended that the petitioner is involved in a serious offence relating to sale and possession of codeine which is a narcotic drug. It has been submitted that the petitioner is part of a drug mafia and if he is enlarged on bail, it is going to spoil the life and career of young generation as there

is likelihood that he would indulge in similar activities. It has been contended that Section 37 of the NDPS Act creates a statutory embargo on grant of bail in case involving possession of commercial quantity of contraband drugs. Therefore, the petitioner is not entitled to concession of bail.

7) I have heard learned counsel for the parties and perused record of the case.

8) So far as the principles regarding grant or refusal of bail to an accused are concerned, the same are more or less settled. The considerations that must weigh with the court while deciding a bail application are as under:

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- (i) *Whether there is a prima facie or reasonable ground to believe that the accused has committed the offence;*
 - (ii) *Nature and gravity of the charge;*
 - (iii) *Severity of punishment in the event of conviction;*
 - (iv) *Danger of accused absconding or fleeing, if released on bail;*
 - (v) *Character, behavior, means, position and standing of the accused;*
 - (vi) *Likelihood of the offence being repeated;*
 - (vii) *Reasonable apprehension of the witnesses being tampered with;*
 - (viii) *Danger of course of justice being thwarted by grant of bail;*

9) When it comes to offences punishable under NDPS Act, particularly those which involve possession of commercial quantity of contraband substance, the court has to keep in view something more

than aforesaid principles. Section 36C of the NDPS Act makes Code of Criminal Procedure applicable to the proceedings before a Special Court which includes the provisions as to bail and bonds. However, Section 37 of the NDPS Act stipulates additional conditions before a person accused of committing an offence involving commercial quantity of contraband substance is released on bail. It would be apt to refer to the provisions contained in Section 37 of the NDPS Act:

“37. Offences to be cognizable and non-bailable.:

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974):

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless:

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

10) From a perusal of the aforesaid provision, it is clear that Section 37 of NDPS Act is not a complete bar to grant of bail in a case where recovery of contraband drug falls within the parameters of commercial

quantity. It only provides that bail in such cases cannot be granted unless the Public Prosecutor has been given an opportunity to oppose the application and that there are reasonable grounds to believe that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

11) In the light of aforesaid legal position, let us now consider the facts of the present case. According to the petitioner, the evidence led by the prosecution prima facie goes on to show that he is not guilty of offence relating to possession of commercial quantity of contraband drugs. In this regard, learned counsel for the petitioner has taken me through the statements of eight prosecution witnesses that have been recorded during trial of the case

12) Before testing the merits of the contention raised by learned counsel for the petitioner, it has to be borne in mind that at the stage of considering bail application of an accused, the evidence led by the prosecution cannot be meticulously examined. It is only if from a cursory look at the evidence recorded during trial of the case it is possible to frame an opinion that accused is not guilty of offence involving commercial quantity of drugs that he can be enlarged on bail. If such an opinion can be framed only after meticulous examination and appreciation of the evidence on record, the same is impermissible in law.

13) In the present case, the prosecution has alleged that a team headed by the Executive Magistrate concerned raided the premises of petitioner

wherefrom 11 bottles of codeine were recovered from his bedroom. The Executive Magistrate, whose statement has been recorded during trial of the case, has categorically stated that he did not accompany the raiding party and he only sealed the samples which were brought to his office by the police. Prima facie, the aforesaid statement of the head of the raiding team creates a dent in the prosecution story.

14) Another aspect of the matter that has come the light upon perusal of the trial court record is that out of 11 recovered bottles of codeine, only three bottles have been sealed and sent to FSL for examination, regarding which the Chemical Examiner has rendered his opinion. Thus, there is no opinion of the FSL expert in respect of other eight recovered bottles. Learned counsel for the petitioner has contended that in the absence of the opinion of the FSL expert with regard to contents of eight recovered bottles, it cannot be stated that the petitioner was found to be in possession of commercial quantity of contraband drugs.

15) In view of the what has been discussed hereinbefore, it appears that there are reasonable grounds for believing that the petitioner is not guilty of offence of possessing commercial quantity of contraband drugs. The respondents have not placed on record any material to show that the petitioner has any previous history of having indulged in trade of illicit drugs nor have they placed on record any material to show that in case he is admitted to bail, he is likely to commit similar offences. Thus, the petitioner has succeeded in carving out a prima facie case for grant of bail in his favour.

16) Apart from the above, the petitioner is in custody since 02.04.2023, meaning thereby he has spent more than two years in custody but the trial of the case has not been completed as yet. It appears that two witnesses, FSL expert and Investigating Officer, are yet to be examined. In case the petitioner is enlarged on bail, there is no scope for him to tamper with the prosecution witnesses having regard to the fact that both the witnesses yet to be examined happen to be Government officials.

17) For the foregoing reasons, the petition is allowed and the petitioner is admitted to bail subject to the following conditions:

- (i) *That he shall furnish personal bond in the amount of Rs.50,000/ with two sureties of the like amount to the satisfaction of the learned trial court;*
- (ii) *That he shall appear before the learned trial court on each and every date of hearing.*
- (iii) *That he shall not leave the territorial limits of the Union Territory of J&K without prior permission of the learned trial court;*
- (iv) *That he shall not intimidate or tamper with prosecution witnesses/evidence.*
- (v) *That he shall not indulge in similar activities;*

18) The bail application shall stand **disposed** of.

(Sanjay Dhar)
Judge

SRINAGAR

06.06.2025

"Bhat Altaf-Secy"

*Whether the **Judgement** is reportable:* **Yes/No**