

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CRM (M) No. 598/2026

Batool Omais

.....Applicant(s)/Petitioner(s)

Through :- Mr. Zulker Nain Sheikh, Advocate

v/s

UT of J&K and Others

.....Respondent(s)

Through :-

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

ORDER

22.06.2026

1. By the present petition, the petitioner calls in question the order dated 25.04.2026 passed by the Court of the Special Municipal Mobile Magistrate, Jammu (hereinafter referred to as "the trial Court"), whereby her application seeking permission to engage a private counsel to assist the prosecution in the case titled "*UT of J&K vs. Omais-ul-Mehraj and Others*", arising out of FIR No. 42/2024 registered under Sections 85, 316(2), 352, 351(2) and 3(5) of the Bharatiya Nyaya Sanhita, 2023 (BNS), and Sections 3 and 4 of the Muslim Women (Protection of Rights on Marriage) Act, came to be dismissed.
2. Briefly stated, the case of the petitioner before the trial Court was that she is the legally wedded wife of respondent No. 2, who, after the solemnization of their marriage, subjected her to continuous domestic violence, physical cruelty and emotional abuse. It was

further alleged that respondent No. 2 and the other private respondents persistently demanded dowry after the marriage solemnized on 15.09.2022 and the subsequent *Rukhsati* held on 27.08.2023.

3. Acting upon the complaint lodged by the petitioner, FIR No. 42/2024 came to be registered initially under Sections 85, 115(2), 126(2), 316(2), 352, 351(2) and 49 of the BNS. Upon completion of investigation, a charge-sheet was laid before the trial Court against the private respondents. The petitioner also alleged matrimonial fraud, threats of pronouncement of triple *talaq* through telephonic communication, and criminal misappropriation of her *Haq-Mehar* and bridal gold ornaments collectively valued at approximately ₹22.83 lakhs. During the pendency of the proceedings, she filed an application under Section 338 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), seeking permission to engage a private counsel to assist the prosecution.
4. The trial Court declined the said prayer primarily on the ground that the petitioner had failed to point out any specific circumstance demonstrating either deficiency in, or prejudice arising from, the manner in which the prosecution was being conducted by the State. On the contrary, the trial Court recorded a finding that the learned Assistant Public Prosecutor was diligently prosecuting the case.
5. The trial Court further observed that grant of permission in a routine manner, in the absence of any exceptional circumstance, would

amount to permitting parallel participation in the prosecution, which, according to the trial Court, was not the legislative intent underlying Section 338 of the BNSS. On the said reasoning, the application came to be dismissed.

6. Learned counsel appearing for the petitioner submits that the application filed under Section 338 of the BNSS merely sought permission to engage a private counsel to assist the learned Public Prosecutor in the conduct of the prosecution and did not seek permission to independently conduct the prosecution on behalf of the complainant. It is contended that the trial Court has fallen into manifest error by misconstruing the scope and ambit of Section 338 of the BNSS.
7. It is further submitted that a complainant is not required to obtain prior permission of the Court merely to engage a private counsel for the purpose of assisting the Public Prosecutor. According to the learned counsel, the requirement of obtaining permission arises only where the complainant seeks leave to independently conduct the prosecution or where the pleader engaged by the complainant intends to submit written arguments after the closure of evidence with the permission of the Court. Since no such prayer had been made in the present case, the dismissal of the application is stated to be legally unsustainable.
8. During the course of hearing, learned counsel for the petitioner fairly submitted that the petitioner's prayer was confined only to engaging a

private counsel to assist the prosecution and not to supplant or substitute the role of the learned Public Prosecutor. It is urged that the trial Court proceeded on an erroneous assumption that the petitioner intended to independently conduct the prosecution, whereas no such relief had ever been sought.

9. Given the aforesaid submissions, this petition is taken up for disposal. Section 338 and 339 of BNSS are relevant for consideration and areas under: -

“338. Appearance of Public Prosecutors: -

- 1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.
- 2) If in any such case any private person instructs his advocate to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the advocate so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.”

“339. Permission to conduct prosecution

- 1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:
Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.
- 2) Any person conducting the prosecution may do so personally or by any advocate.”

10. A conjoint reading of Sections 338 and 339 of the Bharatiya Nagarik Suraksha Sanhita, 2023, leaves no manner of doubt that the two provisions operate in distinct spheres. Section 338, which is substantially *pari materia* with Section 301 of the Code of Criminal Procedure, 1973, contemplates a situation where a pleader engaged by a private person merely assists the Public Prosecutor in the conduct of the prosecution. Section 339, corresponding to Section 302 of the Code of Criminal Procedure, empowers the Magistrate to permit the prosecution itself to be conducted by any person other than a police officer, subject to the limitations engrafted therein. The distinction between *assisting the prosecution* under Section 338 and *conducting the prosecution* under Section 339 is fundamental and cannot be obliterated.

11. A Public Prosecutor is a statutory officer who represents the State and is expected to act fairly, objectively and in aid of justice, uninfluenced by any private interest. A pleader engaged by a private complainant, on the other hand, represents the interest of the complainant. It is for this reason that the legislature has consciously restricted the role of such pleader under Section 338 to assisting the Public Prosecutor, who alone remains in charge of, and responsible for, the conduct of the prosecution. Where, however, the complainant seeks to have the prosecution conducted by a person other than the Public Prosecutor or Assistant Public Prosecutor, the matter falls

within the ambit of Section 339, and such a course can be adopted only with the permission of the Magistrate.

12. Sub-section (2) of Section 338 further fortifies the legislative intent by providing that a pleader instructed by a private person may, with the permission of the Court, submit written arguments after the closure of evidence. Significantly, the requirement of obtaining the Court's permission is confined to the submission of written arguments and not to the mere engagement or appearance of a counsel for assisting the Public Prosecutor. The expression "with the permission of the Court" occurring in sub-section (2) qualifies only the filing of written arguments and cannot be extended to read into the provision a requirement that the complainant must first obtain leave of the Court merely to engage a counsel for rendering assistance to the Public Prosecutor. To construe the provision otherwise would amount to importing into Section 338 a restriction which the legislature has consciously omitted.
13. Thus, the statutory scheme clearly envisages that while a privately engaged counsel cannot independently conduct the prosecution under the guise of Section 338, no prior permission of the Court is required merely for engaging such counsel to assist the Public Prosecutor during the course of the trial. The control and conduct of the prosecution nevertheless continue to vest exclusively in the Public Prosecutor.

14. In *Anthony D'Souza v. Mrs. Radhabai*, 1984 (1) Bom CR 157, it was held that the assistance contemplated under the corresponding provision of the Code is subject to the control of the Public Prosecutor and that, if the Public Prosecutor declines to permit such assistance, the complainant or his advocate cannot insist upon participating in the proceedings. The decision thus recognises that the discretion to accept the assistance of a privately engaged counsel primarily rests with the Public Prosecutor. The Court's permission becomes necessary only when such counsel seeks leave to submit written arguments in terms of sub-section (2) of Section 338. The provision does not envisage any prior permission of the Court merely for engaging a counsel to assist the Public Prosecutor.
15. In the present case, the petitioner's application was confined to seeking permission to engage a private counsel to assist the learned Public Prosecutor during the trial. There was no prayer seeking permission to independently conduct the prosecution. Once the learned Public Prosecutor had raised no objection to the appearance of such assisting counsel, there existed no legal impediment to the petitioner engaging an advocate for the limited purpose contemplated under Section 338. The trial Court, therefore, proceeded on an erroneous understanding of the statutory provision in treating the application as one seeking permission to conduct the prosecution independently.

16. It was never the petitioner's case that her counsel intended to supplant the role of the Public Prosecutor or to assume independent conduct of the prosecution. Even otherwise, such a course would fall within the ambit of Section 339 and not Section 338. The trial Court, by conflating the scope of the two provisions, declined a relief which the petitioner was otherwise entitled to under law. The impugned order, therefore, suffers from a patent misinterpretation of the statutory scheme and consequent non-application of mind, rendering it legally unsustainable.
17. Consequently, the impugned order dated 25.04.2026 is set aside. The petitioner shall be at liberty to engage a counsel of her own choice to assist the learned Public Prosecutor/Assistant Public Prosecutor in the conduct of the prosecution before the trial Court. Such counsel shall function strictly under the supervision, guidance and control of the learned Public Prosecutor/Assistant Public Prosecutor and shall not independently conduct the prosecution. However, if such counsel seeks to submit written arguments on behalf of the complainant after the closure of evidence, the same shall be permissible only with the leave of the trial Court in terms of Section 338(2) of the BNSS.
18. The petition is, accordingly, allowed in the aforesaid terms along with pending applications if any.

(Sanjay Parihar)
Judge