

Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.- 131 OF 2024

Asharaf Azgar Sayyed ... Applicant

Vs.

The State of Maharashtra ...Respondent

BAIL APPLICATION NO.- 3917 OF 2023

**SAYALI
DEEPAK
UPASANI**

Raisingh Kheytya Pawara ... Applicant

Vs.

The State of Maharashtra ...Respondent

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BAIL APPLICATION NO.- 3382 OF 2022

Saysing Bharat Pawara ... Applicant

Vs.

The State of Maharashtra ...Respondent

Mr. Taraq Sayed i/b Mr. Vivek Arote, for Applicant in BA Nos. 3917 of 2023 and 3382 of 2022.

Mr. Atul Sarpande with Mr. Nilesh Bangar, Mr. Kamlesh Satre, for Applicant in BA No. 131 of 2024.

Mr. R. M. Pethe, APP for State/Respondent.

Mr. Suraj Ravi, API, Dindoshi Police Station, Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 22nd APRIL, 2024.

ORDER:-

1) The applicants, who are arraigned in CR No. 90 of 2022 registered with Dindoshi Police Station, Mumbai, for the offences punishable under Sections 20 (b)(ii)(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the NDPS Act”), have preferred these applications to enlarge them on bail.

2) On 4th February, 2022, while the Dindoshi police were on a patrolling duty on Gen. A. K. Vaidya Marg, Goregaon (E) in front of Dindoshi Court, a person was found moving in suspicious circumstances. He was accosted. He identified himself as Momin Mehbood Sayyad (A1). In the search of Momin Sayyad (A1) in the presence of Pancha witnesses, two packets containing contraband

substance were found. The said substance turned out to be Ganja. It weighed 10 grams.

3) Upon interrogation, Momin Sayyad (A1) disclosed that he had purchased the said Ganja from a person named Asharaf Azgar Sayyed (A2), who had stored a huge quantity of Ganja at Sundarnagar, Andheri (East). Momin Sayyad (A1) led the police party to a room at Sundarnagar, Andheri (East). Four persons including Asharaf (A2), the applicant in BA No. 131 of 2024, were found in the said room. The empowered Officer apprised them of their right to be searched before the nearest Magistrate or Gazetted Officer. Those persons declined to acknowledge the appraisal memo. In the search of the said room, two white Gunny Bags were found. The said Gunny Bags contained flowering or fruiting tops of the cannabis plant, leaves, stalks and seeds accompanied by the flowering or fruiting tops. The contraband article was seized. It weighed 22 kg and 550 grams. Asharaf (A2) came to be arrested.

4) During the course of investigation, it transpired that Asharaf (A2) and the other co-accused were procuring the contraband substances from Bhimsing Movasha Pawara and Saysing Bharat

Pawara (A6), the residents of Jalgaon District. Raisingh Kheytya Pawara (A8), the applicant in BA No. 3382 of 2022, and Saysing Pawara, the applicant in BA No. 3917 of 2023, came to be arrested. It transpired that the applicants Saysing (A6) and Raisingh (A8) were, in turn, procuring the contraband substance 'Ganja' from the agriculturists in Jalgaon District, who were cultivating the Ganja on a large scale. There were financial transactions which indicated that Saysing (A6) and Raisingh (A8) were members of the drug cartel. In the house search of Raisingh (A8), the applicant in BA No. 3917 of 2023, a number of passbooks of various persons including Saysing Pawara (A6), the applicant in BA No. 3382 of 2022, came to be recovered. It further transpired that Asharaf (A2) had transferred an amount of Rs.25,000/- to the account of the applicant Saysing (A6) from the mobile phone of Fatima Mohammad Shaikh @ Aafrin @ Makku, the co-accused.

5) Mr. Atul Sarpande, the learned Counsel for the applicant- Asharaf (A2) in BA No. 131 of 2024 submitted that the premises from which the contraband substance was allegedly recovered did not belong to the applicant- Asharaf (A2). Nor the said room was in the possession of the applicant - Asharaf (A2). The mere

presence of the applicant - Asharaf (A2) in the room, wherefrom Ganja was allegedly recovered, does not amount to conscious possession of the contraband substance. Attention of the Court was invited to the statement of the owner of the premises, which indicates that the said premises was given on rent to Amrapali Limbaji Gambhire. Thus there is no nexus between the applicant - Asharaf (A2) and seized contraband substance, submitted the learned Counsel for the applicant.

6) Mr. Sarpande further submitted that the presence of the applicant at the time of the alleged raid pursuant to the intimation given by Momin Sayyad (A1) cannot be said to have been established as the seizure panchanama does not bear the signature of the applicant Asharaf (A2). Nor the photographs of the seized articles are attached to the inventory carried out by the Magistrate under Section 52A of the Act, 1985.

7) Mr. Taraq Sayed, the learned Counsel for the Applicants Saysing Bharat Pawara (A6), the applicant in BA No. 3382 of 2022, and Raisingh Kheytya Pawara (A8), the applicant in BA No. 3917 of 2023, submitted that the applicants are sought to be roped in on the basis of the statements of the co-accused and a Bank statement

which indicates that there were some transactions in the account of Saysing Pawara (A6), especially on 10th and 11th January, 2022. Laying emphasis on the fact that even if the prosecution case is taken at par, a sum of Rs.25,000/- only can be said to have been credited to the account of Saysing Pawara (A6) when the approximate value of the contraband article allegedly seized from the said room was Rs.2,05,000/-. Thus there is no co-relation between possession of the contraband article and the credit of the sum of Rs.25,000/- in the account of the applicant - Saysing Pawara (A6).

8) As regards, the Raisingh Kheytya Pawara (A8), the applicant in BA No. 3917 of 2023, it was submitted that apart from the fact that few passbooks including the passbook of Saysing Pawara (A6) were allegedly recovered from the premises of Raisingh Pawara (A8), there is no other material to connect the applicant- Raisingh Pawara (A8) with the alleged offences.

9) Mr. Pethe, the learned APP, stoutly submitted that the applicant Asharaf (A2) has criminal antecedents. Co-accused Momin Sayyad (A1) has specifically named the applicant as the person from whom he had procured the contraband article.

Cumulatively there is a very strong prima facie case against Asharaf (A2). The recovery has been effected in compliance with the mandatory provisions of the NDPS Act, 1985, and inventory under Section 52A of the NDPS Act, 1985 has also been conducted before the jurisdictional Magistrate. In the circumstances, a very strong prima facie case is made out against Asharaf (A2).

10) As regards the claim for bail of Raisingh Pawara (A8), Mr. Pethe would urge that the very factum of recovery of a number of passbooks, including that of Saysing Pawara (A6), from the possession of Raisingh Pawara (A8), establishes the necessary nexus between the applicant Raisingh Pawara (A8) and the alleged offences.

11) Mr. Pethe would submit that the complicity of Saysing Pawara (A6), can be said to have been prima facie established as there is clinching evidence to show that a sum of Rs.25,000/- was credited to the account of Saysing Pawara (A6) purportedly from the account of Fatima Shaikh (A5). Reliance was placed on the statement of Yuvraj Haridas Aade, a money transfer agent. Yuvraj Aade stated that on 2nd February, 2022, Asharaf (A2), whom he had known before, had transferred the sum of Rs.25,000/- to the

account of Saysing Pawara (A6) purportedly from the account of Fatima Shaikh (A5). He further submitted that he maintained a rough diary wherein the names of the persons who transferred the amounts were mentioned.

12) Evidently, the applicant Asharaf (A2) came to be implicated in on the basis of the statement of the co-accused Momin Mehbood Sayyad (A1). The seizure panchanama records that on 4th February, 2022, Momin Mehbood Sayyad (A1) led the police party to the room wherein the applicant Asharaf (A2) was found along with the co-accused. 22Kg and 550 grams Ganja was found in two white gunny bags and the said contraband substance was seized. It further appears that the empowered Officer had submitted an application to the jurisdictional Magistrate to certify the inventory and accordingly the Inventory panchanama was conducted on 24th October, 2022. Prima facie, it appears that the search and seizure of the contraband substance has been effected in adherence to the procedural safeguards. As is evident, the raid was conducted while the police were on patrolling duty and co-accused Momin Sayyad (A1) had led the police party to the said premises.

13) The thrust of the submission on behalf of the applicant Asharaf (A2) that there is no material to show that the said premises belongs to the applicant - Asharaf (A2) or it was in the possession of the applicant, prima facie, appears alluring. However, on close scrutiny, the said submission does not merit acceptance.

14) There is material to indicate that it was Momin Sayyad (A1), who led the police party to the house of Asharaf (A2). In the house search commercial quantity of Ganja came to be recovered. The circumstances in which the contraband substance and the accused were found, justifies a prima facie inference that applicant Asharaf (A2) was found in conscious possession of the contraband substance.

15) In my view, having regard to the interdict contained in Section 37 of the NDPS Act, 1985, the applicant Asharaf (A2) can be attributed with the conscious possession of the contraband substance as the absence of the document to show that the said room belongs to the applicant does not constitute a substantial probable cause to hold that there is a reasonable ground to believe that the applicant - Asharaf (A2) may not be guilty of the offences punishable under the NDPS Act, 1985.

16) As regards the complicity of Raisingh Pawara (A8), prima facie, the prosecution banks upon the disclosure made by the co-accused Asharaf (A2) and the recovery of the passbooks including that of Saysing Pawara (A6) in the house search of Raisingh Pawara (A8). Incontrovertibly, no contraband was recovered from the possession of Raisingh Pawara (A8). A statement made by one co-accused is not legal evidence against another though at the stage of investigation, the Investigating Officer may get leads from the statement made by the co-accused.

17) In the case at hand, pursuant to the disclosure allegedly made by the Asharaf (A2), a house search was conducted at the house of the applicant - Raisingh Pawara (A8). Apart from the recovery of the pass books including that of Saysing Pawara (A6), nothing incriminating could be recovered from the house search of applicant – Raisingh Pawara (A8).

18) Even if the prosecution case is taken at par, the recovery of the pass books, in itself, cannot constitute an incriminating circumstance. The situation, which thus obtains is that there is prima facie no evidence to connect the applicant Raisingh Pawara (A8) with the alleged offences. I am unable to accede to the

submission on behalf of the prosecution that since there was no business transaction between applicant - Raisingh Pawara (A8) and Saysing Pawara (A6), the Court would be justified in drawing an inference that the applicant Raisingh Pawara (A8) was privy to the alleged offences.

19) Saysing Pawara (A6) is sought to be roped in on the basis of the credit of a sum of Rs.25,000/- purportedly from the mobile phone of Fatima Shaikh (A5) on 10th January, 2022 and 11th January, 2022. Reliance is placed on the statement of Yuvraj Aade, to bolster up the case that it was Asharaf (A2) who credited the said amount, a part of which was proceeds of illicit trade, to the account of Saysing Pawara (A6).

20) First and foremost, it is material to note that there is no credible material to show that the said amount of Rs.25,000/- was, in fact, credited from the account of Fatima Shaikh (A5) or for that matter Asharaf (A2). Yuvraj Aade states that he has known Asharaf (A2) since long. Asharaf (A2) used to frequently transfer money through Pay One App, operated by Yuvraj Aade. He claimed that on 2nd February, 2022, the applicant had transferred a sum of Rs.25,000/- from the account of Fatima Shaikh (A5), the co-

accused. Prima facie, it appears that Yuvraj Aade was indulging in hundreds of transactions of transfer of money. There is no particular reason for Yuvraj Aade to recollect that on a particular day, it was Asharaf (A2) who had transferred the money to the account of SAYSING PAWARA (A6) .

21) The reliance sought to be placed on the loose sheet of paper allegedly containing entries to evidence the said transaction also does not advance the cause of the prosecution. It appears that the said entries are made on a loose sheet of paper. There is no element of continuity, system and repetition. In the absence of any other material, random entries made on a loose sheet of paper are not sufficient to bear the weight of the accusation.

22) Mr. Pethe submitted that the applicant SAYSING PAWARA (A6) has been indulging in illicit drug trade. The instant offences were committed while he was on bail in NDPS Special Case no. 912 of 2021, arising out of CR No.5 of 2021, registered with DCB CID Unit-III, Mumbai for the offences punishable under Sections 22 (a) and 29 of the NDPS Act, 1985. Therefore, the second condition that the applicant - SAYSING PAWARA (A6) will not indulge in similar offences, if released on bail, cannot be said to have been fulfilled.

23) Mr. Sayed joined the issue by canvassing a submission that in the said case the applicant has been released on bail. The Court has in terms recorded that there was no evidence showing the involvement of the accused- Saising Pawara (A6) in the said crime and he was arrested solely on the basis of the statement of the co-accused recorded under Section 67 of the NDPS Act, 1985, which has no evidentiary value.

24) I have perused the order dated 22nd September, 2022, passed by the learned Special Judge in Special Case No 912 of 2021. Prima facie, it appears that in the said case as well, the special Judge found that there was no material to connect the applicant Saising Pawara (A6) with the alleged offences.

25) In the aforesaid view of the matter, the antecedents of the applicants cannot be said to such as to disentitle the applicants from bail, especially having regard to the nature of the material pressed into service against the applicants in this case.

26) The conspectus of aforesaid consideration is that a case for grant of bail to Raisingh Pawara (A8), the applicant in BA No. 3917 of 2023 and Saising Pawara (A6), the applicant in BA No. 3382 of 2022 can be said to have been prima facie made out as there is no

credible material to connect the applicants with the alleged offences. However, as Asharaf (A2) was found in possession of a commercial quantity of Ganja and the search and seizure appears to have been conducted in conformity with the statutory requirements, in the absence of any ground to question the search and seizure, in my view, the bar under Section 37 (1) (b) (ii) operates with full and vigour.

27) Hence, the following order:-

: ORDER :

- (i) Bail Application No. 131 of 2024 stands rejected.
- (ii) Bail Application Nos.- 3917 Of 2023 and 3382 Of 2022 stand allowed.
- (iii) The applicants Raisingh Kheytya Pawara and Saysing Bharat Pawara be released on bail in CR No.133 of 2023 registered with Versova Police Station, on furnishing a P.R. Bond in the sum of Rs. 50,000/-, each with one or two sureties in the like amount to the satisfaction of the learned trial Court.
- (iv) The applicants Raisingh Kheytya Pawara and Saysing Bharat Pawara shall mark their presence at Varsova Police

Station on the first Monday of every alternate month between 11.00 am. to 1.00 pm. till the conclusion of the trial.

(v) The applicants Raisingh Kheytya Pawara and Saysing Bharat Pawara shall not tamper with the prosecution evidence and/or give threat or inducement to the first informant and any of the persons acquainted with the facts of the case.

(vi) The applicants shall not indulge in the identical activity for which they have been arraigned in this case.

(vii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicants and co-accused and the trial Court shall not be influenced by any of the observations made hereinabove.

Applications stand disposed

[N. J. JAMADAR, J.]