



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 235 OF 2026

Robert Gragery D'Souza,
Age: 58 years, Occ.: Business,
R/at. 2nd Floor, Gaurav Plaza,
Lamiben Chheda Marg, Nallasopara (W),
Tal. Vasai, Dist. Palghar – 401 203
(Presently lodged in Thane Central
Prison, Thane)

...Petitioner

Versus

1. The State of Maharashtra
(At the instance of Naigaon Police
Station/EOW, Mira-Bhayander,
Vasai Virar Police Commissionerate)

2. Sunil Madhukar Shinde,
Age: 53 years, Occ: Business,
R/at. Opp. Shejar Chhaya Ashram,
H. No. 229, Sagpada, Devdal, Pokaman
Tal. Vasai, Dist. Palghar.

...Respondents

Mr. Saurabh Butala i/b Regina Correia, for the Petitioner.
Mr. Hrishikesh Mundargi a/w Ms. P. Chadha, for the
Respondent No. 2.
Mr. D J Haldankar, APP for the Respondent - State.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 12th FEBRUARY 2026
PRONOUNCED ON : 11th MARCH 2026

JUDGMENT:

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

2. By this petition under Article 226 of the Constitution of India and Section 528 of the Bhartiya Nagarik Suraksha Sanhita, 2023 ("BNSS, 2023) (Section 482 of the Code of Criminal Procedure, 1973), the petitioner assails the legality and correctness of an order dated 09th December, 2025 passed by the learned Magistrate, Vasai whereby an application preferred by the petitioner to enlarge him on default bail under the provisions of Section 167(2) of the Code of Criminal Procedure, 1973 ('the Code, 1973'), came to be rejected.

3. Shorn of superfluties, the background facts can be stated as under:-

3.1 Shejar Chhaya Trust, Devdal (the trust) is a public charitable trust. The Trust was formed in the year, 1984 with the object of providing shelter and education to orphan children. On 28th December, 2019, the petitioner became the Secretary of the Trust.

3.2 Father Francis Peter Gonsalves, the Chief Trustee of the Trust had entrusted the responsibility of obtaining the sanction of the Charity Commissioner for the sale of trust property i.e. 21 Guntha land out of 40 Guntha land, situated at Survey No. 63, Hissa No. A/1.

3.3 The prosecution alleges on 14th December, 2020, the petitioner filed an application before the Charity Commissioner to sale the entire Survey No. 63, A/1 admeasuring 40 Guntha and another Survey No. 16 admeasuring 76.60 Guntha. False statements were made in the said application. On the basis of such false statements and false documents on 24th September, 2023, the petitioner obtained the sanction of the Charity Commissioner for the sale of 116.60 Guntha land of the Trust in favour of the R. K. Developers for a consideration of Rs. 6,21,00,000/- (Rupees Six Crores Twenty One Lakhs). Out of the said amount, on 22nd July 2021, the petitioner obtained an advance consideration of Rs. 1,20,00,000/- (Rupees One Crore Two Lakhs) and instead of depositing the said amount in the account of the Trust maintained with the Federal Bank, Vasai Road Branch, the

petitioner opened a new account with Basin Catholic Co-operative Bank by forging the signatures of the chief trustees and other trustees and got credited the said amount in the said account. Subsequently, the petitioner transferred the said amount to the account of petitioner's D'Souza Education and Charitable Trust and thereby committed offences of cheating and forgery.

3.4 F.I.R was registered on 27th December, 2024, initially for the offences punishable under Sections 471, 468, 465 and 420 of the Penal Code. Subsequently, the offence punishable under Sections 409 came to be added.

3.5 The petitioner was detained on 06th October, 2024 by the Immigration Officers at IGI Airport, New Delhi. The petitioner was produced before the learned Magistrate, Patiala House Court, New Delhi on 07th October, 2025 and transit remand was obtained. The petitioner was produced before the learned Magistrate at Vasai on 10th October, 2025, and was remanded to Police custody.

3.6 On 09th December, 2025, the petitioner preferred an application before the learned Magistrate seeking his release under the provisions of Section 167(2) of the Code.

It was *inter alia* asserted that, the petitioner has been arraigned for the offences punishable under Section which entail punishment not exceeding seven years. As the 60 days period expired on 07th December, 2025 and the Investigating Agency has not filed the charge-sheet, the petitioner has an indefeasible right to be enlarged on statutory bail.

3.7 By the impugned order, the learned Magistrate was persuaded to reject the application observing *inter alia* that, the petitioner has been arraigned for offences punishable under Sections 420, 409, 465, 468 and 471 of the Penal Code. The offence punishable under Section 409 entails punishment of imprisonment for life or imprisonment for a term which may extend to ten years. Thus, the case would be governed by sub-clause (ii) of clause (a) of the proviso to Section 167(2) of the Code.

3.8 Being aggrieved the petitioner has invoked the writ jurisdiction.

4. I have heard Mr. Saurabh Butala, the learned Counsel for the petitioner, Mr. D J Haldankar, the learned APP for the Respondent – State (R-1) and Mr. Hrishikesh

Mundargi, the learned Counsel for the Respondent No. 2 – first informant.

5. With the assistance of learned Counsel for the parties, I have perused the material on record.

6. Mr. Butala, the learned Counsel for the petitioner would urge that, the learned Magistrate has rejected the application for statutory bail in a mechanical manner. It was submitted that, initially the F.I.R was lodged for offences punishable under Sections 420, 465, 468 and 471 of the Penal Code, only. Section 409 of the Penal Code, came to be subsequently added vide report dated 13th May, 2025. Though initially, the petitioner has assailed the addition of the said offence, yet, in view of the fact that on the date the petitioner came to be apprehended, the offence punishable under Section 409 of the Penal Code was already added, the petitioner restricts the challenge to the non-application of mind by the learned Magistrate and, even otherwise, the non-applicability of the provisions contained in Section 409 of the Penal Code.

7. Elaborating the submission Mr. Butala would urge, it was incumbent upon the learned Magistrate to examine

whether the provisions contained in Section 409 of the Penal Code were at all attracted. Mere reference to the provisions of the particular section by the Investigating Officer in the F.I.R and the remand report cannot be determinative of the offences for which an accused has been detained. To this end, Mr. Butala placed reliance on a judgment of this Court in the case of *Alnesh Akil Somji Vs. State of Maharashtra*¹, wherein it was enunciated that, though the investigation is within the province and domain of the Investigating Agency, yet, it does not imply that, in almost all cases, the court would be bound by the invocation of a particular section against the accused by the prosecuting agency. The label of the section or the provision invoked would not be decisive.

8. Mr. Butala further submitted that, the learned Magistrate simply proceeded on the premise that, an offence punishable under Section 409 was added against the petitioner. Whether the petitioner satisfied the description of one of the seven eight specified categories of persons against whom only the offence punishable under Section 409 of the Penal Code could be invoked was not at

¹ 2022 SCC OnLine Bom 11566

all examined. In the absence of the material to demonstrate that, the alleged breach of trust was committed, in any of those seven specified capacities, the learned Magistrate could not have rejected the application by mechanically observing that since an offence punishable under Section 409 of the Penal Code was invoked, the authorized period of detention would be 90 days.

9. Mr. Butala, laid emphasis on the fact that if the entire tenor of the prosecution is considered, at best, it can be alleged that, the petitioner was a trustee of the Trust. In the capacity of the Secretary of the Trust the petitioner was entrusted with the responsibility of obtaining the sanction of the Charity Commissioner for sale of certain portions of the property of the Trust. However, even if the prosecution case is taken at par, the indictment against the petitioner does not fall within the ambit of any of the seven categories of the persons who only can be prosecuted for having committed an offence punishable under Section 409 of the Penal Code. Amplifying the submission Mr. Butala would urge, a trustee can, in law, never be said to

be an agent of the trust. The property of the trust, according to Mr. Butala, vests in the trustees. Therefore, the invocation of the provisions contained in Section 409 of the Penal Code was clearly unsustainable.

10. To buttress this submission, Mr. Butala placed a very strong reliance on a three-Judge Bench judgment of the Supreme Court in the case of *W. O. Holdsworth & Ors. Vs. State of Uttar Pradesh*², and another judgment of the Supreme Court in the case of *Robert John D'Souza & Ors. Vs. Stephen V. Gomes & Anr*³.

11. Per contra, Mr. Haldankar, the learned APP for the Respondent – State supported the impugned order. It was submitted that, after having been entrusted with the property of the Trust, the petitioner has committed criminal breach of the trust. Not only the petitioner sold a larger area of the Trust property but even wrongfully converted a portion of the sale proceeds for his use. In this view of the matter, it cannot be said that the offence punishable under Section 409 of the Penal Code has not been made out.

2 1957 SCC OnLine SC 94

3 (2015) 9 SCC 96

12. Mr. Mundargi, the learned Counsel for the Respondent No. 2 supplemented the submissions of Mr. Haldankar. Taking the Court through the allegations in the F.I.R and the material on record Mr. Mundargi would submit that, an open and shut case of breach of trust which falls within the tentacles of the offence punishable under Section 409 of the Penal Code has been made out. According to Mr. Mundargi reliance on the decision in the case of *W. O. Holdsworth (supra)*, which arose out of a taxing statute is of no assistance to the petitioner. In the case at hand, the petitioner was, indisputably, a trustee of the trust. Mr. Mundargi submitted that, even the persons who hold the position akin to the trustees have been held liable for punishment under Section 409 of the Penal Code, if they commit breach of trust. Mr. Mundargi banked upon a three-Judge Bench judgment of the Supreme Court in the case of *R. K. Dalmia Vs. Delhi Administration*⁴.

13. At the outset, it is necessary to note, the nature of the right to statutory bail under Section 167(2) of the Code, 1973. The right to be enlarged on bail under Section 167(2)

4 1962 SCC OnLine SC 83

of the Code, flows from the constitutional guarantee of protection of life and personal liberty against unlawful and arbitrary detention. Section 167(2) enshrines a fair procedure and is a subset of overarching fundamental right guaranteed under Article 21. It becomes an infeasible right once the default in filing the charge-sheet within the stipulated period is demonstrated. It cannot be defeated by resorting to the technicalities and subterfuge.

14. The duty of the Magistrate in examining albeit *prima facie* whether a particular offence arrayed against the accused is made out cannot be debated. A Magistrate is not expected to mechanically proceed to order the detention of an accused on the basis of the offences invoked by the prosecution. It is the bounden duty of the Magistrate to carefully examine whether an offence punishable under a particular section is *prima facie* made out to determine the entitlement to bail; regular or statutory. The sections invoked by the Investigating Agency in the F.I.R or remand report cannot be the be all and end all of the matter. If the Magistrate does not bestow deserving consideration on the aspect of the applicability of a particular section of the Penal Code, on which the

entitlement to bail often hinges, the personal liberty of the accused would be a casualty. As the right to be released on statutory bail, being a part of the fair procedure, is a facet of the protection of right to life and personal liberty, Mr. Butala is thus wholly justified in canvassing a submission that, the authorized period of detention under the proviso to Section 167(2) cannot be determined merely on the basis of the sections invoked by the Investigating Agency.

15. In the case at hand, evidently apart from the offence under Section 409 of the Penal Code, rest of the offences do not entail punishment which exceeds 10 years. The controversy thus boils down to the question, whether, in the facts of the case, the offence punishable under Section 409 of the Penal Code, can be said to have been *prima facie* made out.

16. The offence of criminal breach of the trust is defined in Section 405 of the Penal Code. From the text of Section 405 of the Penal Code, to constitute the offence of criminal breach of trust, the following ingredients ought to be satisfied:

- i) A person is entrusted with property or with any

dominion over property;

ii) That person dishonestly misappropriates or converts that property to his own use; or

iii) That person dishonestly uses or disposes of that property or willfully suffers any other person so to do, in violation of any direction of law or a legal contract.

17. The entrustment of the property and dishonest misappropriation, conversion or use thereof, in the manner proscribed under Section 405 of the Penal Code, are the principal components of the offence of criminal breach of trust. Section 409 of the Penal Code is an aggravated form of the offence of criminal breach of trust. It punishes criminal breach of trust by a public servant or the specified person in respect of the property entrusted to the former. To fall within the dragnet of the offence punishable under Section 409 of the Penal Code, the following elements need to be satisfied:-

a) The accused must be a public servant, or a banker, merchant, factor, broker, attorney or agent;

b) He must have been entrusted with the property or any dominion over property, in such capacity;

c) He must have committed breach of trust in respect of such property.

18. In the case of *N. Raghavender Vs. State of Andhra Pradesh, CBI*⁵, a three-Judge Bench of the Supreme Court enunciated that, unless it is proved that, the accused, a public servant or a banker, etc. was, “entrusted” with the property which he is duty-bound to account for and that such a person has committed criminal breach of trust, Section 409 IPC may not be attracted. “Entrustment of property” is a wide and generic expression. While the initial onus lies on the prosecution to show that the property in question was “entrusted” to the accused, it is not necessary to prove further, the actual mode of entrustment of the property or misappropriation thereof. Where the “entrustment” is admitted by the accused or has been established by the prosecution, the burden then shifts on the accused to prove that the obligation vis-a-vis the entrusted property was carried out in a legally and contractually acceptable manner.

5 (2021) 18 SCC 70

19. In the case of *The Superintendent & Rememberancer of Legal Affairs, West Bengal Vs. S K Roy*⁶, another three-Judge Bench of the Supreme Court enunciated that, the “entrustment” within the meaning of Section 409 of the Penal Code may arise “in any manner whatsoever”. The observations in Paragraph No. 12 of the said judgment read as under:

“12. To constitute an offence under Section 409, I.P.C., it is not required that misappropriation must necessarily take place after the creation of a legally correct entrustment or dominion over property. The entrustment may arise in “in any manner whatsoever”. That manner may or may not involve fraudulent conduct of the accused. Section 409, I. P. C., covers dishonest misappropriation in both types of cases ; that is to say, those where the receipt of property is itself fraudulent or improper and those where the public servant misappropriates what may have been quite properly and innocently received. All that is required is what may be described as “entrustment” or acquisition of dominion over property in the capacity of a public servant who, as a result of it, becomes charged with a duty to act in a particular way, or, atleast honestly.”

(emphasis supplied)

6 (1974) 4 SCC 230

20. In the aforesaid judgment it was further clarified that, the obligation to act in a certain manner with regard to or to deal honestly with the property, over which a public servant obtains dominion or control by the use of his official capacity, may arise either expressly or impliedly.

21. In the case at hand, there is *prima facie* material to show that, the petitioner was a trustee and secretary of the trust. At this juncture, the allegations with regard to the manner in which the petitioner dealt with the trust property or the sale proceeds thereof would be required to be taken at their face value.

22. The core controversy revolves around the question whether the entrustment of the Trust property and the sale proceeds with the petitioner was in the capacity of one of the seven persons who fall within the ambit of Section 409 of the Penal Code.

23. Under Section 2(18) of the Maharashtra Public Trusts Act, 1950, a trustee means a person in whom either alone or in association with persons the trust property is vested, and includes a Manager. The trustee is said to be a legal owner of the trust property, but he has no beneficial

interest in it. The trustee holds the property for the benefit of the persons for whom the trust is created. Thus, the trustee cannot be said to be the owner of the property in the real sense of the term. The legal ownership of the property vests in the trustee for the purpose of the trust or for the benefit of the persons for whom the trustee is settled.

24. In the case of *W. O. Holdsworth & Ors. (supra)*, the nature of the interest of the trustee in the trust property arose in the context of the provisions contained in U.P. Agricultural Income Tax Act, 1948. In that context, the Supreme Court after adverting to the provisions contained in Section 3 of the Indian Trusts Act, 1882, expounded the nature of the vesting of the property in the trustees, in the following words :

“21. Whatever be the position in English Law, the Indian Trusts Act, 1882 (2 of 1882) is clear and categorical on this point. Section 3 of that Act defines a Trust as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner : the person who accepts the confidence is called the

‘trustee’ : the person for whose benefit the confidence is accepted is called the “beneficiary” : “the beneficial interest” or “interest of the beneficiary is his right against the trustee as owner of the trust property; the subject matter of the trust is called “trust property” or “trust money”.

22. These definitions emphasize that the trustee is the owner of the trust property and the beneficiary only has a right against the trustee as owner of the trust property. The trustee is thus the legal owner of the trust property and the property vests in him as such. He no doubt holds the trust property for the benefit of the beneficiaries but he does not hold it on their behalf. The expressions “for the benefit of” and “on behalf of” are not synonymous with each other. They convey different meanings. The former connotes a benefit which is enjoyed by another thus bringing in a relationship as between a trustee and a beneficiary or *cestui que trust*, the latter connotes an agency which brings about a relationship as between principal and agent between the parties, one of whom is acting on behalf of another.....”

25. In the case of *R. K. Dalmia Vs. Delhi Administration (supra)*, the Supreme Court was confronted with a question as to whether Dalmia, Appellant therein, being

the Chairman and Principal Officer of the company, was an agent within the meaning of Section 409 of the Indian Penal Code. It was urged before the Supreme Court that Dalmia was not an agent within the meaning of Section 409 of IPC and only that person could be such agent who professionally carries on the business of the agency. The Supreme Court did not accede to the submission that the word 'agent' in Section 409 refers to a professional agent i.e. a person who earns on the profession of agency and that since Dalmia did not carry on such profession, he could not be covered by the expression "agent" in the said section.

26. The Supreme Court after adverting to the previous pronouncements and the commentary in Palmer's Company Law that the directors are not only agents but they are in some sense and to some extent trustees or in the position of trustees, repelled the contention that the term "agent" in Section 409 of IPC is restricted only to those person who carry on the profession of agent. The Supreme Court expounded the import of the term "agent" under Section 409 IPC, as under :

"What section 409, Indian Penal Code requires is that the person alleged to have committed

criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression in the way of his business' means that the property is entrusted to him in the ordinary course of his duty or habitual occupation or profession or trade'. He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of Section 409, Indian Penal Code, if any breach of trust is committed by that person.”

27. In the case of **CBI V/s. Duncans Agro Industries Ltd.**⁷, the Supreme Court postulated that the expression “entrusted with property” appearing in Section 409 is not necessarily a term of law. It has wide and different implications in different context. The said expression connotes that the property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or that the beneficial interest in, or ownership thereof, must be in the

7 (1996) 5 SCC 591

other person, and the accused must hold such property in trust of such other person or for his benefit. The observations of the Supreme Court in para 27 read as under :

“27. In the instant case, a serious dispute has been raised by the learned counsel appearing for the respective party as to whether on the face of the allegations, an offence of criminal breach of trust is constituted or not. In our view, the expression 'entrusted with property' or 'with any dominion over property' has been used in wide sense in Section 405 I.P.C. Such expression includes all case in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression 'entrusted appearing in Section 405 I.P.C. is not necessarily a term of law. It has wide and different implication in different context. It is, however, necessary that the ownership or beneficial interest in the ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. The expression 'Trust' in Section 405 I.P.C. is a comprehensive expression and

has been used to denote various kinds of relationship like the relationship of trustee and beneficiary, bailer and bailee, master and servant, pledger and pledgee. When some goods are hypothecated by a person to another person. the ownership of the goods still remains with the person who has hypothecated such goods. The property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in other person and the offender must hold such property in trust for such other person or for his benefit. In a case of pledge, the pledged article belongs to some other person or for his benefit. In a case of Pledge, the pledged article belongs to some other person but the same is kept in trust by the pledgee.”

28. Applying the aforesaid principles to the case at hand, I find it difficult to accede to the submission on behalf of the Petitioner that the Petitioner cannot be said to be an agent qua the trust or the beneficiaries of the trust property. As noted above, it is not imperative that the property should come in the hands of the accused in the business of an agency. It would suffice, if the accused is

entrusted with the property for execution of a particular task.

29. In the case at hand, in the capacity of the trustee of the trust, the Petitioner was entrusted with the task of obtaining the sanction of the Charity Commissioner for the sale of the trust property, execute the instrument and receive the consideration. In breach of the duties of the trustee and specific engagement, the Petitioner allegedly sold a larger area of the property of the trust than resolved to by the trust, and converted to his own use a part of the consideration dishonestly. The payment of the consideration to the Petitioner was by way of entrustment in the capacity of the accused as an agent of the trust. Thus, prima facie, the acts attributed to the accused fall within the tentacles of the offence punishable under Section 409 of the IPC.

30. It is true, the learned Magistrate did not examine the applicability of the provisions contained in Section 409 of IPC to the extent desired and proceeded to reject the application by simply observing that, since offence punishable under Section 409 of IPC was arrayed against the accused, the case would fall under sub-clause (i) of

clause (a) of the proviso to Section 167(2) of the Code. However, having examined the matter in the light of the legal provisions and the judicial precedents, this Court prima facie finds that the provisions contained in section 409 are attracted to the facts of the case at hand, at least at the stage of consideration of the prayer for statutory bail. Thus, the Writ Petition deserves to be dismissed.

31. Hence, the following order:-

:: O R D E R ::

- i] The Writ Petition stands dismissed.
- ii] Rule discharged.
- iii] It is, however, clarified that the consideration in this judgment is confined to determine the prayer for statutory bail and this Court may not be understood to have expressed any opinion on the merits of the matter and the learned Magistrate shall not be influenced by any of the observations in the further proceedings arising out of C.R.No.639 of 2024.

[N. J. JAMADAR, J.]