

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 24th July, 2017*

+ **BAIL APPLN. 1230/2017**

PRAKASH GUPTA

..... Petitioner

Through: Mr. Ramesh Gupta, Sr. Advocate with
Ms.M. Begum, Mr. Bharat Sharma and Mr. Ajay P.
Tushir, Advocates.

versus

STATE OF DELHI

..... Respondent

Through: Mr. Amit Chadha, APP for the State with
SI R.P. Yadav, PS Vasant Kunj South, New Delhi.
Mr. Vijay Kumar Aggarwal, Advocate with
Mr.Neeraj Kumar Jha and Ms.Barkha Rastogi,
Advocate for Complainant.

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. Apprehending his arrest, the petitioner has invoked the jurisdiction of this court under Section 438 of the Code of Criminal Procedure, 1973 (in short 'Cr.PC') praying for grant him anticipatory bail in a case registered vide FIR No. 62/2017, under Section 409 of Indian Penal Code, 1860 (in short 'IPC') with Police Station Vasant Kunj (South), New Delhi.
2. This bail application was considered by the learned Vacation Judge on 30.06.2017 when it was contended by the petitioner that he had paid an amount of Rs.54,04,400/- to the complainant's firm. This was disputed by the learned counsel for the Complainant.
3. Status report has been filed.

4. As per the case of the prosecution, the complainant Rajiv Kumar Gupta, a Cost Accountant by profession, had 06 Kgs. of gold bars i.e. 03 pieces of 01 Kg. each and 30 pieces of 100 grams each as his ancestral property. He had good relationship with accused Nikesh Gupta, a gold merchant, dealing in sale and purchase of raw gold with whom he had met through a close acquaintance. On 07.12.2016, the complainant expressed his intention to Nikesh Gupta to sell his 06 Kgs. gold bars to some good buyers. Nikesh Gupta assured him that he would arrange/facilitate the same within a span of one or two hours with the assistance of his partner/business associate Prakash Gupta (the accused/petitioner herein). Pursuant to this discussion, he received a telephonic call from the petitioner at about 02.30 PM, who claimed to have a buyer for gold bars and told him that he would sell the said gold bars at the rate of Rs.3,140/- per gram. Believing the assurance of the petitioner, the complainant called him at his office to collect the gold bars and at about 04.00 PM, after due confirmation with Nikesh Gupta, the complainant entrusted the said 30 gold bars of 100 gram each i.e. 03 Kgs. to the petitioner at his office at Laxmi Nagar, Delhi. He also entrusted remaining 03 gold bars of 1 Kg. each to the petitioner in front of the gate of Santushti Apartment, Vasant Kunj, New Delhi. The petitioner assured the complainant that he would deliver the gold consignment to his and Mr. Nikesh Gupta's associate at Vasant Kunj and would make total payment of Rs.1,88,60,000/- by cheque. The complainant specifically asked the petitioner not to sell the gold in cash and receive the payment only through cheque and only on his positive response, he entrusted 06 Kgs. of gold bars to the petitioner. The petitioner confirmed to the complainant that he would deliver the

cheque of Rs.1,88,60,000/- at about 07.00 PM. However, at about 06.00 PM, the complainant received a call from Nikesh Gupta and the complainant informed him about the delivery of 06 Kgs. gold bars to the petitioner and requested him to take care of the transaction, which was in his knowledge as he was the person, who was facilitating the entire deal.

5. The complainant was waiting for his cheque at his office and when the petitioner did not turn up till 07.00 PM, the complainant made several calls to the petitioner, who informed the complainant at about 09.00 PM that the party, who had purchased the gold bars paid him cash instead of cheque and he would deliver him the same in his office within one hour's time. At about 09.30 PM, the petitioner again called the complainant and put up a concocted story that he had been robbed by 2/3 persons near Mehrauli-Vasant Kunj Road, New Delhi. The complainant called up Nikesh Gupta about the incident, who told him that the petitioner was also carrying his cash and that too was robbed which amounted to Rs.3,00,00,000/-. Later on, the complainant met Nikesh Gupta at Hotel Shangrila, Ashok Road, New Delhi, who assured the complainant that he will go in depth of the story of the petitioner and solve his problem. The complainant made some inquiries and found that they have made false and frivolous story of robbery and in fact they have misappropriated his 06 Kgs. of gold bars amounting to Rs.1,88,60,000/- and converted the same to their personal use. The complainant had expressed his apprehension that both these accused have hatched a conspiracy and with common knowledge cheated him and misappropriated his gold worth Rs.1,88,60,000/-. The complainant

further claimed that the accused persons had deliberately with ulterior motive have caused wrongful loss to him and wrongful gain to themselves.

6. This complaint was lodged in the Police Station Vasant Kunj (South), New Delhi on 07.01.2017 and a DD No. 46B was entered into. The said FIR was registered under Section 409 of IPC on 10.02.2017.
7. It is submitted that before registration of the FIR, the petitioner filed an application for grant of bail before the learned Additional Sessions Judge (in short 'ASJ'), which was dismissed as withdrawn being premature. His second application is also stated to have been dismissed. Mr. Gupta, learned senior counsel for the petitioner, submitted that the petitioner had filed another application for grant of anticipatory bail before the court of learned ASJ and the petitioner was granted interim protection subject to his joining investigation. He further submitted that the petitioner has joined the investigation thrice, however his bail application and that of the co-accused Nikesh Gupta were dismissed by the learned ASJ on 30.05.2017 by a common order.
8. Mr. Gupta submitted that in the bail application before the learned ASJ, a reply dated 24.01.2017 was filed by the Investigating Officer (in short 'IO') in which it was stated that the complainant delivered 06 Kgs. gold to the petitioner at his office. He submitted that as per the allegations in the FIR gold bars weighing 03 Kgs. were delivered at Laxmi Nagar Office Delhi to the petitioner and remaining gold bars weighing 03 Kgs. were delivered in front of Santushti Apartment, Vasant Kunj, New Delhi. He submitted that there are contradictory versions and the

complainant is not truthful. He further submitted that the alleged gold bars were given without any receipt. He also submitted that the complainant has claimed that the gold bars were his ancestral property but the complainant has not submitted any evidence as to his title. He also submitted that the petitioner has joined the investigation thrice pursuant to the interim protection granted to him by the learned ASJ in his bail application, which is not reflected in the present status report.

9. Mr. Gupta further submitted that no case under Section 409 of IPC is made out against the petitioner since the Section 409 of IPC applies only to the public servants. He has relied upon a judgment of the Apex Court in the case of **“R. Venkatakrishnan v. Central Bureau Of Investigation, (2009) 11 SCC 737.** He submitted that since the petitioner is not a public servant, the provisions of Section 409 of IPC are not attracted.
10. Based on this arguments, Mr. Gupta submitted that at the most offence under Section 406 of IPC is attracted to which the imprisonment is only up to three years and under Section 41A of Cr.PC, the IO is required to issue a notice to the petitioner and since the petitioner has joined the investigation thrice pursuant to the directions of the learned ASJ, the petitioner cannot be put to arrest under the guise of custodial interrogation. He also submitted that under Section 41 (1) (b) of Cr.PC, a police officer may without an order from a Magistrate or without a warrant arrest any person against whom reasonable complaint has been made or a credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years and

with or without fine unless such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the offence; or to prevent the accused from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or to prevent any such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer or to ensure his presence in the Court. Mr. Gupta submitted that the law further requires that the police officer to record the reasons in writing which led him to arrest the accused. In this regard, Mr. Gupta has relied upon a judgment of the Hon'ble Supreme Court in **“Arnesh Kumar v. State of Bihar & Anr., (2014) 8 SCC 273.**

11. Mr. Gupta submitted that in one version the complainant had allegedly entrusted 6 Kgs of the gold bars at his Laxmi Nagar Office to the petitioner whereas in the other version, the complainant has alleged that he entrusted 3 Kgs of gold bars at his Laxmi Nagar Office and 3 Kgs in front of the gate of Santushti Apartment, Vasant Kunj, New Delhi. The police jurisdiction of both the places are different and it is only the Police Station Laxmi Nagar who has the jurisdiction for investigation whereas the FIR is registered at Police Station Vasant Kunj. He further submitted that neither the FIR could have been registered at Police Station Vasant Kunj nor the IO of the said Police Station Vasant Kunj has jurisdiction to investigate.
12. Mr. Gupta further relied upon the judgment of the Apex Court titled as **Siddharam Satlingappa Mhetre Vs. State of Maharashtra & Ors. (2011) 1 SCC 694.** The Apex Court delineated the following factors

and parameters that need to be taken into consideration while dealing with the anticipatory bail: -

- “(a) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- (b) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
- (c) The possibility of the application to flee from justice;
- (d) The possibility of the accused’s likelihood to repeat similar or other offences;
- (e) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;
- (f) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;
- (g) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution, because overimplication in the cases is a matter of common knowledge and concern;
- (h) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and full investigation, and there should be prevention of harassment, humiliation and unjustified detention of the accused;
- (i) The Court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(j) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

13. Mr. Gupta submitted that **Siddharam Satlingappa Mhetre (supra)** was reiterated in **Bhadresh Bipinbhai Seth Vs. State of Gujarat & Anr., AIR 2015 SC 3090** . He relied upon para 96 of **Siddharam Satlingappa Mhetre (supra)** which reads as under:-

“96. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.”

14. Mr. Gupta has also relied upon the judgment of this court in “**Jagdish Nautiyal v. State, 2013 (1) AD (Delhi) 475**, wherein the incident was purported to have taken place on 17.09.2010 while the FIR was registered on 15.09.2011 i.e. after more than one year and the contention of the learned APP that the “telephone instruments” were required to be recovered did not convince as being special ground to deny grant of anticipatory bail as recovery of ‘telephone instrument’ was not an important matter and the conversation between the parties using certain telephone numbers were never denied by either of the parties.

15. Mr. Gupta has further relied upon the judgment of Hon'ble Supreme Court in **"Babubhai v. State of Gujarat & Ors., (2010) 12 SCC 254**, wherein it was held that investigation into criminal offences must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused when the investigation was unfair and carried out with an ulterior motive. It is also the duty of the IO to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The IO should be fair and his impartial conduct must dispel any suspicion as to its genuineness. The IO is not to bolster up a prosecution case with such evidence as may enable the court to record conviction but to bring out the real unvarnished truth.
16. Mr. Gupta has also relied upon a judgment of the Supreme Court in the case of **Shri Gurbaksh Singh Sibbia and Ors. v. State of Punjab, (1980) 2 SCC 565**, and a judgment of the coordinate Bench of this Court in Bail Application No.53/2017, titled as **Keshav Sharma v. State**, decided on 20th January, 2017.
17. On these submissions, learned senior counsel for the petitioner prayed for grant of anticipatory bail to the petitioner in the event of his arrest by the IO.
18. Per contra, learned APP Sh. Amit Chadha for the State submitted that there was only one complaint by the complainant which was reduced into writing on the basis of which DD 46B was recorded and there is only one version of the complainant to the effect that the 30 gold bars of 100 gms each i.e. 3 Kgs were entrusted to the petitioner at his office at

Laxmi Nagar, Delhi and remaining 3 gold bars of 1 Kg each i.e. 3 Kgs was entrusted to the petitioner in front of the gate of Santushti Apartment, Vasant Kunj, New Delhi on 07th December, 2016.

19. He further submitted that even the notice under Section 41A was issued to the petitioner and despite notice he failed to respond. He further submitted that under sub-section (4) of Section 41A of the Code, it is provided that where such person (accused), at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may be passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.”
20. Learned APP for the State further submitted that the petitioner has been on the run and proceedings under Section 82 of the Cr.P.C. have already been initiated against the petitioner. He submitted that the complainant had entrusted 6 Kgs of the gold bars to the petitioner who is a gold merchant. The petitioner has dishonestly misappropriated or converted to his own use that property or disposed of the same and committed criminal breach of trust punishable under Section 409 of the IPC. He submitted that simple joining of the investigation by the petitioner will not at all be fruitful to recover the gold bars or the sale proceeds thereof. He further submitted that custodial interrogation of the petitioner is required to unearth the conspiracy and since the investigation of the case is at very initial stage, the petitioner is not entitled to the discretionary relief of anticipatory bail. He also pointed out that the petitioner has wrongly alleged in his application and also on the first date of hearing of this application, misrepresented to the

learned Vacation Judge that a sum of Rs.54,04,400/- has been paid to the firm of the complainant in November, 2016. He further submitted that in fact this amount has been credited in the account of a firm M/s.Disha Enterprises which is owned by Atul Tyagi and the complainant has no concern with the said firm or Atul Tyagi. This contention of the learned APP for the State is not disputed by the learned Senior counsel for the petitioner in his submissions in rebuttal.

21. It is submitted by Mr.Aggarwal, learned counsel for the complainant, that although there is only one version of the complainant regarding entrustment of the gold bars i.e. 3 Kgs of gold bars at his Laxmi Nagar office and remaining 50% i.e. 3 Kgs of gold bars in front of the gate of Santushti Apartment, Vasant Kunj, New Delhi, yet the Apex Court in **Kamal Kapoor v. Sachin Kartar Singh, 2001 (5) Supreme 225**, has held:

“We do not think that it is proper for us to consider at this stage when pre-arrest order is sought for, by making a comparison between those two statements. Of course that aspect can also be considered by the Court when the accused apply for regular bail after surrendering.”

22. Mr.Aggarwal has further relied upon the judgment of the Hon’ble Supreme Court in **Vilas Pandurang Pawar and Anr. v. State of Maharashtra and Ors., (2012) 8 SCC 795**. Relevant extract of para 10 of the said judgment reads as under:

“10.Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. The court is not expected to indulge in critical analysis of the evidence on record.....”

23. He submitted that the court cannot decide the merits of the case while dealing with the application for grant of anticipatory bail. He relies upon the judgment of the Apex Court in the case of **Alchemist Holdings Ltd. v. Ram Kumar Garg & Anr.**, *Crl.Appeal No.2527/2014*, decided on 01.12.2014. Relevant extract of the judgment reads as under:

“Having heard the learned counsel for the parties, we are of the view that the High Court was not supposed to decide the merits of the case while dealing with application for anticipatory bail. It was not open to the High Court to observe that no criminal offence is made out, in a petition filed under Section 438 of Cr.P.C.”

24. Mr.Aggarwal further submitted that a co-ordinate Bench of this Court has considered the judgment of the Hon’ble Supreme Court in **Siddharam Satlingappa Mhetre (supra) in Abhishek Verma & Anr. v. State, 2016 (3) JCC 2131**. He referred paras 13, 18 and 20 of the said judgment which read as under:

“13. Mr. Mittal has placed reliance on **Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.**, (2011) 1 SCC 694 in support of his submissions. He submits that the petitioners are ready and willing to join the investigation and cooperation in every way. He submits that the petitioners have deep roots in the society and there is no likelihood of them absconding. Arrest of the petitioners, and in particular petitioner no.1, would lead to abnormally, humiliation and disgrace. He submits that arrest cannot be exploited as a measure of recovery from the accused.

18. The Supreme Court clarified that the aforesaid are only some of the factors, and by no means they are exhaustive. They are only illustrative in nature because it is difficult to visualize the facts and circumstances in which a person may pray for anticipator bail. Arrest has to be last option, and it

has to be restricted to those exceptional cases where arresting an accused is imperative in the facts and circumstances of the case.

20. **The investigation is at the preliminary stage and the jewellery of the complainant delivered to the petitioners is yet to be recovered.** Thus, their custodial interrogation, in my view, is necessary. The allegations against the petitioners are that they have threatened the complainant with dire consequences if he demands the jewellery and money. Thus, the possibility of the complainant and other witnesses being threatened and the investigation being scuttled cannot be ruled out.”

25. To meet the argument of the learned Senior counsel for the petitioner on the point of lack of jurisdiction, Mr. Aggarwal has relied upon the judgment of the Hon’ble Supreme Court in **Satvinder Kaur v. State (Govt. of N.C.T. of Delhi) and Anr., AIR 1999 SCC 3596**. Relevant extract of para 15 of the said judgment reads as under:

“15. ...At the stage of investigation, the material collected by an investigating officer cannot be judicially scrutinized for arriving at a conclusion that police station officer of particular police station would not have territorial jurisdiction. In any case, it has to be stated that in view of Section 178(c) of the Criminal Procedure Code, when it is uncertain in which of the several local areas an offence was committed, or where it consists of several acts done in different local areas, the said offence can be inquired into or tried by a Court having jurisdiction over any of such local areas. Therefore, to say at the stage of investigation that S.H.O., Police Station Paschim Vihar, New Delhi was not having territorial jurisdiction, is on the face of it, illegal and erroneous. That apart, Section 156 (2) contains an embargo that no proceeding of a police officer shall be challenged on the ground that he has no territorial power to investigate....”

26. Learned counsel submitted that the judgment of the Hon’ble Supreme Court in **R. Venkatkrishnan** (supra), is misread and in fact in para 146 after adverting to Section 409 of IPC, the Hon’ble Supreme Court held

that this section **classes together** public servants, bankers, merchants, factors, brokers, attorneys and agents.

27. Mr. Aggarwal has also relied upon the judgment of the Supreme Court in **R.K. Dalmia and Ors. v. The Delhi Administration, AIR 1962 SC 1821**. He submitted that in this case the accused R.K. Dalmia was not a “public servant” but an “agent”, in his capacity as chairman of Board of Directors of a limited company and was charged under Section 409 of IPC. Para 96 of the judgment reads as under:

“What S. 409 I.P.C. 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.**”

28. **R.K. Dalimia (supra)** was followed by Hon'ble Supreme Court in **Shivanarayan Laxminarayan Joshi and Ors. v. State of Maharashtra and Ors., (1980) 2 SCC 465**. Para 5 of the said judgment reads as under:

“5. In R. K. Dalmia v. Delhi Administration Court while relying on authorities of the Lahore Court and other courts has clearly found that a director is not only an agent but is in the position of trustee. This has been held in People Bank v. Harlkishan

Lal AIR 1936 Lah. 408 at p. 409 which was approved by this Court.”

29. Mr. Aggarwal further relied upon a judgment of the Hon’ble Supreme Court in **Raj Kumar Maheshwari v. Jyoti Gupta & Anr.**, SLP (Crl.) No.6139/2006, decided on 7th May, 2007, in which the amount involved was Rs.1,00,00,000/- and the Hon’ble Supreme Court has held that while granting bail in non-bailable offence the primary consideration is the gravity and the nature of the offence and the order of this Court granting bail to the accused was set aside.
30. Mr. Aggarwal submitted that in the present case, the value of the gold bars in question is worth Rs.1,88,60,000/- and as such the petitioner is not entitled for anticipatory bail.
31. Learned counsel has also relied upon a judgment of a co-ordinate Bench of this Court in **Del Agha v. Directorate of Revenue Intelligence, 2001 (2) JCC (Delhi) 110**. Relevant para 10 of the said judgment reads as under:

“10. The judgments of the Apex Court, referred to above, clearly lay down that for invoking the powers of the Courts under Section 438 of the Code for grant of anticipatory bail, an accused has to show something more than what he is required to show for exercising discretion under Section 439 of the Code. **The reason is that a pre-arrest bail order puts the Investigating Agency into a disadvantageous position by reducing the efficacy of custodial interrogation. It also emboldens the accused and demoralises the complainant and general public, who feel that inspite of serious allegations, the accused remains beyond the reach of law. Such orders sometimes have the tendency of eroding public faith in the administration of justice. The seriousness of the offence and gravity of the**

allegations is always an important factor for an order under Section 439 of the Code if something more is required to be shown for exercise of discretion under Section 438 of the Code, it is obvious that seriousness of offence and the gravity of the allegations remains a relevant factor for orders under Section 438 of the Code also.”

32. Mr. Aggarwal has also relied upon a judgment of a single Bench of this Court in **K.C. Chibber v. State, 51 (1993) DLT 581**, wherein it was held that the petitioner must make out a special case for getting anticipatory bail. An indirect use of the power to grant bail would be an abuse of the judicial process and would shake the confidence of the general public in judiciary. While granting anticipatory bail the Court must strike a balance so that individuals may be protected from unnecessary humiliation and the faith of the public in the administration of justice is not shaken.
33. I have heard the learned Senior counsel for the petitioner, learned APP for the State and learned counsel for the complainant.
34. As per the allegations the complainant had entrusted 6 Kgs of gold bars worth Rs.1,88,60,000/- with the petitioner on asking of co-accused Nikesh Gupta in order to sell the same. The petitioner was to pay the sale consideration of Rs.1,88,60,000/- of the gold bars by way of the cheque to the complainant on the same day.
35. Mr. Gupta argued that there is contradictory version of the complainant with regard to entrustment of the gold bars and initially it is alleged that all 6 Kgs gold was handed over at Laxmi Nagar Office and later on stand has been taken that 3 Kgs gold was delivered in Laxmi Nagar Office and 3 Kgs gold in front of the gate of Santushti Apartment,

Vasant Kunj, New Delhi. As per the complainant and prosecution, there has been only one version of the complaint that 3 Kg gold was entrusted at Laxmi Nagar Office and 3 Kg gold at Vasant Kunj. On this ground, Mr.Gupta has submitted two arguments; one that complainant is not truthful and another limb of argument is lack of jurisdiction with Police Station Vasant Kunj where FIR was registered.

36. Though as per the prosecution and the complainant 3 Kg gold was entrusted to petitioner at Laxmi Nagar Office of the complainant and 3 Kg gold at Vasant Kunj, yet this cannot be evaluated and appreciated at this stage of investigation. Reference can be made to three judgments of the Apex Court in **Kamal Kapoor (supra)**, **Vilas Pandurang Pawar (supra)** and **Alchemist Holdings Ltd. (supra)**. So far as the jurisdiction is concerned, Section 156 (2) of Cr.P.C. puts an embargo and the power of IO to investigate cannot be challenged. Section 156(2) Cr.P.C. reads as under:

“156 (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.”

37. Moreover, Apex Court has held in **Satvinder Kaur (supra)** that at the stage of investigation, territorial jurisdiction of Police Officer cannot be judicially scrutinized.
38. The position of law with regard to applicability of Section 409 to the accused, who is a merchant and not being a public servant, is explained by the Hon'ble Supreme Court. In a judgment **Kailash Kumar Sanwalia v. State of Bihar and Anr., (2003) 7 SCC 399**. Para 7 of the said judgment reads as under:

“Section 409 IPC deals with criminal breach of trust by public servant, or by banker, merchant or agent. In order to bring in application of said provision, entrustment has to be proved. In order to sustain conviction under Section 409, two ingredients are to be proved. They are:

(1) the accused, a public servant, or banker or agent was entrusted with property of which he is duty bound to account for; and

(2) the accused has committed criminal breach of trust.”

39. In fact Section 409 applies to (i) public servants, (ii) banker, (iii) merchant, (iv) factor, (v) broker, (vi) attorney and (vii) agent whenever any such class of accused is entrusted with the property to which he is duty bound to account for and accused commits criminal breach of trust. Even **R. Venkatakrishnan (supra)** used the words “**classes together**” and held that this section **classes together** public servants, bankers, merchants, factors, brokers, attorneys and agents. The duties of **such persons** are of a highly confidential character, involving great powers of control, over the property entrusted to them and a breach of trust by such persons may often induce serious public and private calamity. High morality is expected of **these persons. They are to** discharge their duties honestly. Section 409 reads as under:

“409. Criminal breach of trust by public servant, or by banker, merchant or agent.—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

40. The title of Section 409 of IPC, categorizes the persons as public servant, banker, merchant or agent. As per the body/contents of Section 409 of IPC, it includes public servant whenever property is entrusted to him in his capacity as public servant and commits criminal breach of trust. Similarly it applies to banker, merchant, agent, factor, broker or attorney as the case may be, whenever the property is entrusted to either of them and he commits criminal breach of trust.
41. In view of this, there is no force in the argument of the learned senior counsel for the petitioner that to attract Section 409 of IPC accused should have been a 'public servant'.
42. The requirement of the offender for custodial interrogation in serious and grave offences should be assessed from a practical approach. The conduct, demeanour, tone and tenor, body language of the accused on anticipatory bail is entirely different. The accused on such liberty always shrugs off his shoulders to the commission of crime or being privy to it in any manner. Law treats him as innocent unless he is convicted. Knowing it well the accused even in grave offences travel beyond truth. He is not expected to reveal the truth. It is only the custodial interrogation which leads to vital clues in recovering the case property, involvement of other persons, criminal conspiracy, place of concealment of case property etc. Persons accused of grave offences cannot be permitted to take the administration of justice for a ride. No doubt, arrest of a person, accused of an offence, may tarnish his image and that of his family members, relatives, friends, nears and dears. Because of this, sometimes some harsh steps are taken by the accused as such accusation brings bad name to him and his family. However,

court must not be oblivious to the fact as to trauma, pain, sufferings of the victims and their family members. Sometimes, harsh steps are also taken by the victims out of frustration or due to loss of life or on account of loss of valuables or properties. The court has to strike a balance and to examine meticulously in the facts and circumstances of each case as to whether custodial interrogation of the accused is required or not. Allowing a person who is accused of such a grave offence out on bail even before he is arrested would not only interfere with investigation process but also may erode the faith of the citizens in the justice delivery system. Offences where such a large quantity of gold/amount of money is involved, it should be investigated in a thorough and fair manner.

43. Here it will not be out of place to mention the concern shown by Hon'ble Supreme Court in its various judgments while considering request for bail. Hon'ble Supreme court in **Parvinderjit Singh & Anr. v. State (U.T. Chandigarh) & Anr., 2008 (4) SCC 2873**, held in para 17 as under:

“17. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance to maintain law and order in the locality. For these or other reasons, arrest may become inevitable part of the process of investigation. The legality of the

proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. **The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence.** An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code. The above position was highlighted in *Adri Dharan Das v. State of West Bengal* (2005 (4) SCC 303).

44. On the similar points there is another judgment of the Apex Court in **State Rep. by the CBI v. Anil Sharma, (1997) 7 SCC 187**, on the requirement of the accused for custodial interrogation. Para 6 of the said judgment reads as under:

“6. We find force in the submission of the CBI that **custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconced with a favorable order under Section 438 of the code.** In a case like this **effective interrogation of suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulted by a pre-arrest bail during the time he is interrogated.** Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The court has to presume that responsible Police Officers would conduct themselves in task of disinterring offences would not conduct themselves as offenders.”

45. Just see how the petitioner had taken a false defence to mislead in this petition and in his first submission before the learned Vacation Judge to

the effect that he deposited Rs.54,04,400/- in the firm of the petitioner M/s. Disha Enterprises, which admittedly belongs to Atul Tyagi and the complainant has no concern with it. Such person who is accused of dishonestly misappropriating 6 Kgs. of gold bars valuing Rs.1,88,60,000/- who had already taken a false plea of deposit of Rs.54,04,400/- with M/s.Disha Enterprises, with which the complainant has no concern, is not at all expected to reveal the truth or co-operate during investigation, if given discretion of pre-arrest bail under Section 438 of Cr.PC.

46. The petitioner being the gold merchant has committed criminal breach of trust by dishonestly misappropriating the valuable property of the complainant. The prime consideration is gravity and serious nature of the offence. The custodial interrogation of the petitioner is required to unearth the conspiracy and to recover the gold bars or the sale proceeds thereof and to find out to whom the said gold bars were sold out by the petitioner and sharing of gold bars or proceeds thereof by his co-accused Nikesh Gupta.
47. Keeping in view the serious nature of the offence committed and gravity of the accusation and the possibility of the petitioner to tamper with the evidence or flee from the justice, the petitioner has no ground with him for his entitlement to grant of anticipatory bail.
48. The application is dismissed.

VINOD GOEL, J.

JULY 24, 2017

“sk/_{jitender}”