D/L. 1.
May 3, 2024.

CRM (DB) 1205 of 2024

In Re: - An application for bail under Section 439 of the Code of Criminal Procedure filed on 09.04.2024 in connection with Hare Street Police Station Case No. 116 of 2023 dated 16.04.2023 under Sections 120B/406/408/409/420/403/467/477A of the Indian penal Code, corresponding to Charge Sheet No. 68/24 dated 01.04.2024 under Sections 120B/406/403/408/409/420/477A of the Indian Penal Code.

And

In the matter of: Krishna Damani

…. Petitioner

Mr. P. Chidambaram,
Mr. Himangshu De,
Mr. Kaushik Gupta,
Mr. Sabyasachi Banerjee,
Mr. Ayan Bhattacharya,
Ms. Pritha Basu,
Mr. Avik Ghatak,
Mr. Anirban Dutta,
Mr. Rajeshwar Chakraborty,
Mr. D. Dutta,
Mr. Neil Basu,
Mr. Suhrid Sur,
Mr. Debartha Chakraborty,
Mr. Kritin Saraf,
Mr. Bhawna Parasramka,
Mr. Surojit Saha

… for the petitioner.

Mr. Rudradipta Nandy,
Ms. Sanjana Saha

… for the State.

Mr. Ranjan Bachawat,
Mr. Sandipan Ganguly,
Mr. Gopal Halder,
Mr. Sourav Chatterjee,
Mr. Amitava Mitra,
Mr. Sayan Roy Chowdhury,
Mr. Somopriyo Chowdhury,
Mr. Satyaki Mukherjee,
Mr. Sounya Nag,
Mr. Avinab Rakshit,
Ms. Antara Choudhury

...for the de facto complainant.

1. The applicant in the present bail petition has been at all relevant times a trustee of the Society which runs the school-in-question, member of the Governing Council and a member of the Managing Committee of the concerned School, which is an eminent educational institution in the city of Kolkata.
2. The allegations against the petitioner pertain to alleged defalcation of funds by the petitioner from the concerned school, siphoning off the said funds and misappropriating the same by channelizing the said funds to entities controlled primarily by his family members. The approximate quantum of funds alleged to have been defalcated is to the tune of Rs. 30 Cr.
3. On the basis of a complaint lodged against the petitioner, a First Information Report (FIR) has been registered and charges have been framed under Sections 120B, 406, 408, 409, 420 and 403 of the Indian Penal Code (IPC).
4. Learned senior counsel for the petitioner submits that at the relevant point of time, the petitioner was not the sole trustee or member of the Governing Council or the Managing Committee of the School. It is argued that as such, the liability for the management of the school funds cannot be attributed to the petitioner alone.
5. It is argued that the complaint which led to the arrest of the petitioner and the filing of the FIR is the outcome of malice on the part of the de facto complainant, who is an agent of one H.V. Lodha. It is argued that there has been prolonged litigation between the said H.V. Lodha on the one hand and of the Birla Group on the other, to the latter of which the petitioner belongs. There is a pending application for grant of letters of administration

regarding the estate of Smt. Priyambada Devi Birla, where interim orders were passed by this Court from time to time. It is argued that as a result of such civil disputes between the parties, the complaint was lodged at the behest of the said H.V. Lodha.

6. Learned senior counsel contends that the charges levelled against the petitioner are of a minor nature and do not justify further incarceration of the petitioner. It is argued that no notice under Section 41-A of the Code of Criminal Procedure (Cr.P.C.), which is a statutory mandate, was served on the petitioner before arrest, thereby vitiating the very arrest of the petitioner. It is argued that a composite reading of Sections 41 and 41-A of the Code shows that only in case of offences where the term of imprisonment is more than seven years can a notice under Section 41-A be dispensed with. Out of the Sections of the IPC clamped against the petitioner, only Section 409 carries punishment of more than seven years. However, the very premise of applicability of the said Section is assailed, inasmuch as the said Section pertains to criminal breach of trust by public servant or by banker, by merchant or agent. It is contended that the petitioner does not fall within any of the said categories and, as such, clubbing the said Section against the petitioner is palpably violative of law. Thus, it was necessary that a prior notice under Section 41-A of the Cr.P.C. was to be served on the petitioner, which has not been done in the present case.

7. In support of his contention, learned senior counsel cites *W.O. Holdworth and others vs. State of Uttar Pradesh, reported at (1958) 33 ITR 472*, where the Supreme Court observed that a common manager, receiver, administrator or the like should hold the land *on behalf of* these persons and not on his own behalf. The very words

"on behalf of" predicate that the land is held by such common manager, etc. not as the owner but as the agent or the representative of these persons. There is no vestige of ownership in him and all that he is entitled to do is to manage or administer the land *on behalf of* persons who are jointly interested in the agricultural income derived therefrom. This could be predicated by receivers, managers, administrators or the like but cannot be predicated of owners or trustees who are equally with the manager, receiver, administrator or the like, included within the definition of "person" contained in Section 2(11) of the UP Agricultural Income Tax Act, 1948.

8. Thus, it is argued, the petitioner not being an agent, does not come within the ambit of Section 409 of the IPC.

9. Learned senior counsel for the petitioner next cites *Shri Gurbaksh Singh Sibbia and others Vs. State of Punjab, reported at (1980) 2 SCC 565,* where the Supreme Court, while considering the question as to whether denial of bail amounts to deprivation of personal liberty, where the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in terms of that Section. It was held, *inter alia*, by the Supreme Court that the grant of bail is a rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

10. Learned senior counsel next cites *P. Chidambaram Vs. Directorate of Enforcement*, reported at *(2020) 13 SCC 791* in support of the proposition that it is not a rule that bail should be denied in case of economic offences. The basic jurisprudence relating to bail, it was reiterated in the said report, is that bail is the rule and refusal is the exception.
11. The same principle was reiterated in *Sanjay Chandra Vs. Central Bureau of Investigation, reported at (2012) 1 SCC 40*, which is also cited by the petitioner. It was held there that since the jurisdiction of grant of bail is discretionary, it has to be exercised with great care and caution by balancing the valuable right of liberty of an individual and the interest of society in general. Refusal of bail is a restriction on personal liberty of the individual guaranteed under Article 21 of the Constitution and bail is a rule and committal to jail is an exception.
12. Learned senior counsel next argues that the petitioner's involvement in the alleged offences has not been established even *prima facie*. It is submitted that the Managing Committee of the school comprised of several eminent persons all along. On March 29, 2001, the said Managing Committee, of which the petitioner was merely one of the members, passed a resolution for entering into a contract with one Vaishno Technical Services, which was renewed from time to time. Subsequent agreements were also entered into with different entities. On April 11, 2022, when the said H.V. Lodha and others were also a part of the Managing Committee along with the petitioner, an agreement was entered into with Global Stuffing, a unit of Pastille Merchandise Pvt. Ltd. for computer classes of junior students. Another agreement was

entered into on the same date for similar classes of senior students as well. Thus, the entire transactions were above-board and resolutions to that effect were duly taken by the entire Managing Committee.

13. It is argued that not an iota of evidence has been produced to implicate the petitioner in defalcating or misappropriating funds. It is further contended that there has been no allegation from any quarter, be it the Principal of the School, the teachers, the students and/or their guardians and/or from anywhere else that the services for which the said entities were appointed were not duly given. It is mere happenstance that the family members, being the wife and daughter of the petitioner, are Directors of the said companies and in a controlling position in those. Such fact, in the absence of anything else, does not vitiate the transactions or indicate towards any misappropriation of funds.

14. It is argued that the transfer of hands with regard to the alleged amount of Rs. 30 Cr. happened over 24 years and not overnight. It is an admitted position, the petitioner contends, that only about Rs. 7 Cr. changed hands during the relevant period covered by the complaint. Thus, the magnitude of the offence sought to be portrayed by the de facto complainant is entirely misplaced.

15. The petitioner argues that the gravity of the offence is a prime determinant of whether bail should be granted to the accused. Such test having not been met, the petitioner ought to be enlarged on bail.

16. Learned senior counsel for the de facto complainant places reliance on *Salmond on Jurisprudence (11th Edition)* where it was propounded that the trustee is destitute of any right of beneficial

enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance and nominal rather than real. It was further opined that having regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent. In legal theory, however, he is not a mere agent but an owner and a person to whom the property of someone else is fictitiously attributed by the law to the extent that the rights and powers vested in a nominal owner shall be used by him on behalf of the real owner. As between trustee and beneficiary, the law recognizes the truth of the matter.

17. Leaned senior counsel thus argues that the petitioner, in his capacity as a trustee of the School Board, was very much acting in the capacity of an agent and thus comes within the purview of Section 409, obviating the need of issuance of any prior notice under Section 41-A of the Cr. P.C.

18. Learned senior counsel next cites *Naveen Singh Vs. State of Uttar Pradesh and another, reported at (2021) 6 SCC 191*, for the proposition that when the accused is charged for the offences under Sections 420, 467, 468, 471 and 120B, IPC and the maximum punishment for the offence under Sections 467, IPC is ten years and fine / imprisonment for life, the High Court ought to be more cautious / serious in granting bail to such a person who is alleged to have forged / manipulated court-records.

19. Highlighting the gravity of the petitioner's offences, learned senior counsel cites *Virupakshappa Gouda and another Vs. State of Karnataka and another, reported (2017) 5 SCC 406*, where it was observed by the Supreme Court that the Trial Court was swayed by the factum that when a charge-sheet is filed, it amounts to change

of circumstance. Needless to say, it was observed, filing of the chargesheet does not in any manner lessen the allegations made by the prosecution. On the contrary, filing of the chargesheet establishes that after due investigation the investigating agency, having found materials, has placed the charge-sheet for trial of the accused persons. Thus, in the present case, the mere filing of charge-sheet does not alleviate the offence committed by the petitioner.

20. Learned counsel for the de facto complainant next cites *Prasanta Kumar Sarkar Vs. Ashis Chatterjee and another, reported at (2010) 14 SCC 496*, where the factors to be borne in mind while considering an application for bail were set out. Such factors include whether there is any prima facie or reasonable ground to believe that the accused had committed the offence, nature and gravity of the acquisition, severity of the punishment in the event of conviction, danger of the accused absconding or fleeing if released on bail, character, behaviour, means, position and standing of the accused, likelihood of the offence being repeated, reasonable apprehension of the witnesses being influenced and danger of justice being thwarted by grant of bail. Thus, the nature and gravity of the acquisition is not the sole consideration. It is submitted that even leaving aside the gravity of the offence in the present case, all the other conditions are satisfied, requiring this Court to refuse the application for bail. Mechanical grant of bail without adverting to the relevant considerations was deprecated by the Supreme Court in the said judgment.

21. Learned senior counsel appearing for the de facto complainant points out that the accused-petitioner was in control over the funds

of the school during the relevant period of time and resorted to making payments from his one hand to the other. The payments were made by siphoning off the funds of the school and directing them towards multiple entities which are totally controlled by the family members of the accused.

22. It is argued that the statements of one of the witnesses under Section 161 of the Cr.P.C. indicates that he is a driver of the accused but was put on the payroll of the School through the agency which was tasked for appointment of staff by the accused person himself. The said agency is controlled by the family members of the accused as well. Inducting his personal employees as staff members of the school is only one of the components of the offence of the petitioner.

23. It is further argued that in the event the petitioner is let out on bail, he would obliterate all traces of the money trail and influence witnesses. Thus, the application for bail is seriously opposed by the de facto complainant.

24. Learned counsel for the State argues that the State has applied for and obtained leave from the concerned Magistrate for further investigation. Although charge-sheet has been filed, it is apprehended that further investigation shall reveal other witnesses and accounts where the defalcated money has been parked.

25. Moreover, as evident from the statements taken from different staff members of the School, it is clear that many of the employees including the Principal of the School are not cooperating with the investigation, being under the sway of the accused. If enlarged on bail, the State apprehends that the accused shall adversely

influence the witnesses and tamper with evidence. The chance of the petitioner fleeing justice cannot also be ruled out.

26. Upon hearing learned counsel, what is evident is that the chance of the present complaint being a backlash of a civil dispute of commercial nature cannot be ruled out altogether. In the complaint, which was the basis of the FIR, the complainant admits that he is a close acquaintance of Mr. H.V. Lodha, one of the trustees of the Society running the School and that sometime back Mr. Lodha had reported that the assets, properties and funds of the society are being consistently siphoned off / dishonestly misused by a section of the trustees, including the present accused, in a conspiracy. The complaint contains several allegations of a civil nature, clearly evidencing the enmity and animosity between the said H.V. Lodha, who has been alleged to have been sidelined and controls of the schools and the funds taken over by the accused persons, who have allegedly misappropriated the funds of the school blatantly and in a criminal manner.

27. However, the mere fact that the complaint might have been the outcome of a prior dispute between two factions, the Lodha and the Birla Groups, itself does not vitiate the FIR, registered on the basis of such complaint. An FIR is the product of investigation by the law enforcement agencies and goes beyond the complaint itself. Upon a preliminary investigation, the investigating agency in the present case has registered the FIR where allegations have been made against the accused person including the petitioner about a deep-rooted criminal conspiracy, pursuant whereto they allegedly started siphoning and fraudulently diverting the funds of the society in order to direct the funds in different accounts under their control and then

created several ghost companies, thereby misappropriating a huge fund of the society for their wrongful gain, causing loss to the society. Thus, it cannot be said that the personal animosity between the said Mr. Lodha and the petitioner's faction is the sole basis of arresting the petitioner. Even otherwise, a *prima facie* case has been made out, which resulted in the FIR being registered in the first place and having culminated in the filing of a chargesheet.

28. Undoubtedly, the civil disputes between the parties cannot have any bearing in the present context. What is to be seen is whether the tests for grant of bail are satisfied.

29. Before going into the said discussion, the objection as to non-service of notice under Section 41-A of the Cr.P.C. is required to be dealt with. Section 41-A (1) commences with the sentence that the police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may have been specified in the notice.

30. Thus, a prerequisite of applicability of Section 41-A is that the arrest of the accused is not required under Section 41(1), which provides for several circumstances where any police officer may without an order from a Magistrate and without a warrant arrest any person. Clause (ba) thereof stipulates that such arrest can be made of any person against whom a credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven

years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence.

31. Section 409 of the IPC contemplates punishment with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and also fine. Thus, allegations under Section 409 come squarely within the purview of Section 41(1)(ba), thus precluding the applicability of Section 41-A. Hence, the argument of the petitioner as to non-service of notice under Section 41-A is *prima facie* ruled out.

32. With regard to the question as to whether Section 409 of the IPC is *prima facie* attracted to the present case, a remarkable feature of the instant case is that the accused / petitioner has been wearing three hats in his involvement with the school – he is simultaneously a member of the Governing Council, a member of the Managing Committee and a trustee of the Society controlling the school.

33. As a trustee, applying the test laid down in Salmond on Jurisprudence, the petitioner is not merely a nominal owner holding the properties in trust for the beneficial owners, but also acts as an agent for the latter in the day-to-day transactions of the school, thus partaking the character of an agent.

34. That apart, in his juxtaposed capacity as a Governing Council and Managing Committee member, he has also been functioning as an agent. The role of the petitioner in the affairs of the school and his control over its funds, particularly in recent times when the Lodha faction was kept out of the functioning of the Society by the orders passed in connection with the Letters of Administration proceeding, and his all-pervasive influence over the appointments of staff of the

school creates a presumption that he comes within the ambit of an "agent", thus attracting the provisions of Section 409 of the IPC. Of course, a final call in that regard can only be taken by the jurisdictional criminal court upon a full-fledged trial and it would be premature to conclusively arrive at any finding in that regard, but the fact remains that there is sufficient material on record and the Case Diary to point towards the petitioner having acted as an agent during the relevant period of time.

35. As to whether the police office had reason to believe on the basis of the information that the accused had committed the said offence, which is one of the components of Clause (ba) of Section 41(1), this Court cannot enter into the merits of such question at the stage of adjudicating a bail prayer. It would amount to pre-judging the merits of the trial before the same even commences.

36. In the present case, the gravity of the offence does not lie in the quantum alleged to have been defalcated but in the modus operandi of the petitioner as alleged in the FIR. The allegation against the petitioner constitutes charges of misappropriation of huge amounts from the School trust, appointing entities run by his own family members and henchmen and siphoning off huge amounts from the School funds to several accounts which are controlled by the accused petitioner and/or his family members. Such channelization of funds directly affects the functioning of the eminent educational institution-in-question, having obvious repercussions on the fate of its students. Hence, it cannot be said that the offence is not serious in nature.

37. In order to be grave, an offence need not constitute of crimes akin to murder or rape. The manner in which the petitioner allegedly

siphoned off the funds prima facie puts the offences on a serious footing.

38. In the present case, the mere filing of charge-sheet cannot mitigate the nature of the offence. As held in *Virupakshappa Gouda (supra)*, filing of charge-sheet does not in any manner lessen the allegation made by the prosecution; rather, filing of charge-sheet establishes that after due investigation the investigating agency has placed the charge-sheet for trial of the accused persons. More importantly, in the present case the State has sought and obtained leave for further investigation, on the apprehension that there are further leads and witnesses which are yet unexplored. Thus, grant of bail at this juncture might prejudice the investigation itself.

39. The bail sought by the petitioner, as such, ought to be refused on several counts.

40. Since there is an alleged money trail, the enormity of which is yet to be discovered in its entirety, the petitioner, if enlarged on bail, may very well efface such money trail before the investigating agencies even get a clue of the same. In the modern days of online transactions, it would be a matter of minutes for a free person to obliterate such money trails and take appropriate action to smudge the links between the accounts where the money is parked and the original source of the funds.

41. Secondly, the State clearly alleges that there is non-cooperation on the part of the employees of the School, including high officials, apparently due to the influence exerted by the accused person over the said employees. If the petitioner is enlarged on bail, there would be nothing to prevent the accused-petitioner to influence

witnesses all the more, as most of the witnesses have been associated with the petitioner for quite a long time.

42. The argument that the petitioner is not in control at the present moment is itself arguable, since there are pending litigations challenging the removal of the petitioner from the Board, thus casting a doubt as to whether the petitioner still retains control over the Board, the Governing Council and the Managing Committee as well as the employees of the School, who might comprise the bulk of witnesses in the prosecution case.

43. The very fact that an unknown number of leads, witnesses and accounts where the money might have been parked is yet to come out to light in the investigation creates a reasonable apprehension in the mind of the court that if the petitioner is enlarged on bail at this juncture, further investigation could be adversely affected, witnesses could be influenced and hushed up, the money trail leading to the allegedly misappropriated funds would be removed and evidence, particularly online evidence, might be tampered with, even without the prosecution having a clue as who are the witnesses and which are the accounts which are being dealt with in such manner. At least till the further investigation is complete, it would not, thus, be prudent to release the petitioner on bail.

44. The general principles of grant of bail cited by the petitioner do not come to the aid of the petitioner much in the facts of the case. Although it is an established legal principle that bail is the rule and jail is the exception, the same is merely a broad proposition, premised on the doctrine that a man is deemed to be innocent unless proved guilty. However, on a careful consideration of the

facts and circumstances of the present case, there is no reason why the said general doctrine should be extended to the petitioner.

45. Taking into consideration all the factors to the borne in mind while considering the an application for bail, as laid down by the Supreme Court in *Prasanta Kumar Sarkar*'s case, it is found that there is sufficient prima facie reasonable ground to believe that the accused petitioner had committed the offence. Considering the danger of the accused absconding if released on bail and the means, position and standing of the accused vis-à-vis the prospective witnesses in the case as well as likelihood of the offence being repeated and evidence being tampered with, this Court deems the prayer for bail of the petitioner untenable. There is no reason why the petitioner should be granted the benefit of bail, since the petitioner is in custody only for about 85 days and further investigation is still to be completed.

46. In view of the above considerations, we deem it fit to refuse the petitioner's prayer for bail. Accordingly, CRM (DB) 1205 of 2024 is dismissed.

47. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)

(Sugato Majumdar, J.)