2026:GAU-AS:16879

THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Bail Appln. No. 3279/2026

1. **Sri. Debeswar Bora**, S/o-Lt. Tulshi Ram Bora, R/o-House No. 35, K.K. Bhatta Road, Chenikuti, P.O.-Silpukhuri, P.S.-Chandmari, Kamrup, Assam.

……*Accused-applicant*

VERSUS

1. **The State of Assam**, represented by the Standing Counsel of CM Vigilance, Assam.

……*Respondent*

For the Applicant(s) : Mr. A.M. Bora, Senior Advocate
Mr. D.K. Baidya, Advocate

For the Respondent(s) : Mr. P. Kataki, Senior Advocate/Special PP.
Mr. P. Dutta, Addl. P.P.

BEFORE
HON'BLE MR. JUSTICE ANJAN MONI KALITA

Date(s) of Hearing :- 11.11.2026

Date on which judgment is reserved :- 11.11.2026

Date of pronouncement of judgment :- 17.11.2026

Whether the pronouncement is of the operative part of the judgment? :- N/A

Whether the full judgment has been :- Yes

pronounced?

JUDGMENT & ORDER (CAV)

(A.M. Kalita, J)

Heard Mr. A.M. Bora, learned Senior Counsel, assisted by Mr. D.K. Baidya, learned counsel appearing for the accused-applicant. Also heard Mr. P. Kataki, learned Senior Counsel/Special PP, assisted by Mr. P. Dutta, learned Addl. PP, CM's Special Vigilance Cell.

2. This is an application, under Section 483 of the BNSS, 2023, praying for grant of bail to the accused-applicant in connection with C.M. Vigilance P.S. Case No. 14/2026, registered under Sections 120(B)/403/419/420/468/471/406/409/166 of the Indian Penal Code, read with sections 13(1)(a)/13(2) & 12 of the Prevention of Corruption Act, 1988.

3. The gist of the facts involved in the instant case are that a preliminary enquiry was registered as Allegation No. 59/2026 with the Chief Minister's Special Vigilance Cell, Assam, on 30.05.2026, on the basis of a complaint petition submitted by one Sri Romen Chandra Borthakur. The aforesaid enquiry was conducted by one Sri Nipu Kalita, Inspector of Police, who submitted an Enquiry Report dated 22.07.2026, wherein he had recommended registration of a criminal case against the accused-applicant. Accordingly, the enquiry report was placed before the Hon'ble Chief Minister, Assam, and sanction approval was accorded under Section 17(1)(a) of the Assam Prevention of Corruption Act, 1988, vide, File No. CMS(V)18/2026 dated 29.08.2026.

Thereafter, on receipt of the sanction and approval and under strength of the enquiry report, the Officer-in-Charge, CM Vigilance Police Station, Assam, registered C.M. Vigilance P.S. Case No. 14/2026 dated 29.02.2026, under Sections 120(B)/403/419/420/ 468/471/406/409/166 of the Indian Penal Code, read with Sections 13(1)(a)/13(2) & 12 of the Prevention of Corruption Act, 1988, against the accused-applicant and others.

The FIR primarily sets out eight distinct heads of allegation against the accused-applicant, which are as follows:

> (i) fraudulent manipulation of tender processes and extortion in connection with 'Gratuitous Relief Tender 2026'; (ii) extortion from businessmen of Arunachal Pradesh; (iii) cheating and extortion of local contractors; (iv) medical department supplies scam involving alleged impersonation of a senior officer by a co-accused; (v) receiving money for effecting official transfers; (vi) fraud against a construction firm; (vii) embezzlement of an allowance meant for a personal staff member; (viii) fraudulent use of telecommunication connections.

4. The accused applicant was arrested on 07.09.2026 at 12:40 PM in Dhemaji and vide, order dated 07.09.2026, passed by the learned CJM, Dhemaji, who allowed transit remand of the accused-applicant till 08.09.2026 for the purpose of producing him before the learned Special Judge, Assam, Guwahati. Accordingly, the accused-applicant was produced before the learned Special Judge on 08.09.2026, and on the very same date, the learned Special Judge remanded the accused-applicant to police custody. Upon expiry of

the period of police custody, the accused-applicant was remanded to judicial custody, and since then the accused-applicant, for the last 66 days, is in judicial custody.

5. Mr. A.M. Bora, the learned Senior Counsel, submits that no material, whatsoever, has been found out to show that any part of the amount allegedly paid by Sri Romen Chandra Borthakur was ever credited to any account held by the accused-applicant or any of his family members. He submits that the amount in question, i.e., about Rs. 10 lakhs, was admittedly transferred to the SBI account of M/S K.K. Enterprise, a private business concern of one Sri Takak Riddi, who is a third party with no connection to the accused-applicant's official duties. He further submits that the accused-applicant was not a member of the Tender Evaluation Committee constituted for the tender in question wherein the aforesaid Romen Chandra Borthakur had purportedly paid the money in question. He submits that the tender was already finalized by a committee constituted under the tender process wherein the accused-applicant had no participation at all in his official capacity. He submits that there was no decision-making role or receipt of any pecuniary benefit by the accused-applicant in the aforesaid offence. The learned Senior Counsel specifically emphasized on the fact that the offences against which the accused-applicant has been alleged, except Section 409 of the IPC, all other sections involved of the IPC are such offences wherein maximum period of judicial custody, in the event of not filing of a charge-sheet/FR, is 60 days and only against the offence under Section 409 IPC, the same period is prescribed as 90 days. He submits that the accused-applicant has already spent 66 days and only due to the fact that Section 409 has

been alleged against him, he is statutorily not entitled to default bail. He submits that in the instant case, from all the materials available which have come to the fore till date, those materials can at best be said involving certain elements of cheating, but in no account, there is any criminal breach of trust under Section 409 of the IPC can be made out. He submits that to make out a case of criminal breach of trust, the entrustment of a property or dominion over a property is a precondition to make out an offence under Section 409 of IPC. However, in the instant case, there is no material of any entrustment of property to the accused-applicant which he is allegedly to have been misappropriated by committing criminal breach of trust. Therefore, he submits that since there is no case made out against the accused applicant under Section 409 of the IPC and other sections which have been added against the accused-applicant are of 60 days period, the accused-applicant, at this stage, on that ground alone, should be released on bail.

6. The learned Senior Counsel further submits that the allegations made under remaining heads in the FIR are not related to Section 409 of the IPC and those are allegations specifically relating to cheating and exploitation of contractors as well as extortion, which do not have any element of Section 409 of IPC. The learned Senior Counsel further submits that though a separate case, i.e., Doimukh PS Case No. 0075/2026 has been registered at the instance of one Sri Takak Riddi before Doimukh Police Station, under Sections 61(2)/318(4)/ 316(2) of BNS, 2023, the FIR itself has been challenged before the Gauhati High Court, Itanagar Bench in Criminal Petition No. 241/2026 and the same has been stayed in an interim order. He submits that since there is no offence made out

against the accused-applicant under Section 409 IPC, and since he is behind the bars for the last 66 days, further custodial detention of the accused-applicant may not be required in the instant case. He submits that for the last 20 days, no interrogation has taken place, and therefore, he submits that the accused-applicant should be released on bail, who will cooperate with the investigation. In support of his submission that no offence has been made out in the instant case against the accused-applicant, under Section 409 IPC, he referred to the case of **Jiwan Dass Vs State of Haryana with Mittarpal Yadav Vs State of Haryana**, reported in **(1999) 2 SCC 530**.

7. Mr. P. Kataki, the learned Special Public Prosecutor, CM's Vigilance Cell, on the other hand, opposes the prayer of bail. He submits that the accused-applicant is a senior Assam Civil Service Officer who, in conspiracy with many co-accused and others, involved in inducing contractors and other people to pay him money through different accounts belonging to different persons in the name of helping them with government contracts or any other government favors and thereby, amassed huge properties totally disproportionate to his income. He submits that the accused-applicant while serving as DDC Dhemaji, fraudulently shared a completed tender, named "Gratuitous Relief Tender 2026" via WhatsApp with intermediaries to lure contractors. In such manner, he induced victim Sri Romen Chandra Borthakur with a promise of Rs. 50 crore Disaster Management supply contract though, he was not a member of the tender evaluation committee. He demanded Rs. 2.5 crore as "Earnest Money" for the contract and the aforesaid victim namely, Romen Chandra Borthakur was induced and forced

to transfer Rs. 10 lakhs to the SBI account of M/S K.K. Enterprise which he falsely presented as a government account. He submits that, in fact, the contract was never awarded nor was the transferred money of Rs. 10 lakhs was ever returned back to the aforesaid Romen Chandra Borthakur. It is submitted that the accused-applicant has also abused his official position to extort Rs. 3 crore from businessman Takak Riddi, the proprietor of M/S K.K. Enterprise and one Talok Bui, proprietor of M/S D.B. Enterprise under the guise of offering Assam government contracts and other benefits to them. It is further submitted that the accused-applicant forced the aforesaid persons to route substantial sums to various third party bank accounts, including one account belonging to his brother, namely, Kiran Bora. It is also submitted that the accused-applicant compelled them to pay luxury goods, including multiple luxury mobile phones, laptops, etc. for himself and his family members. It is submitted that that the aforesaid Takak Riddi had already registered the Doimukh police station case, i.e., Doimukh PS Case No. 0075/2026, under Sections 61(2)/318(4)/316(2) of BNS, 2023 against the accused-applicant.

8. The learned Senior Counsel/Special PP has also referred to the other heads of allegations made in the FIR and has submitted that many complaints are still coming in against the accused-applicant, wherein, there are apparent allegations against the accused-applicant regarding his inducement and exploitation of the official position to lure various contractors to part with their monies in lieu of providing government contracts and other favors. The learned Special PP has specially referred to the statement of one R. Arul Selvan, a resident of Chennai, Tamil Nadu, wherein the aforesaid Mr.

Selvan alleged that on instruction of the accused-applicant, he had deposited around Rs. 1.5 crores in the SBI account provided by the accused-applicant, on promise of the accused-applicant that the contract was about Rs. 145 crores for supply of utensils, made of stainless steel, under disaster management, would be given to him and other companies. It is submitted that though Mr. Selvan invested money in manufacturing the sample utensils, the contracts were not given to him. Rather, on repeated requests, an amount of Rs. 40 lakhs was returned to him. However, the remaining amount was not returned to him. In view of the aforesaid, the learned Special PP submits that the accused-applicant, in his official capacity, induced various persons like Mr. Selvan to pay him huge amounts on the promise of giving work to them. He submits that since he has exploited his official capacity as a public servant and thereafter, induced various people to part with their monies against various contracts, out of which some did actually exist, the element of criminal intent required for an offence of criminal breach of trust, under Section 409 is available in the instant case. He submits that in the instant case, the accused-applicant has clearly induced Romen Chandra Borthakur to pay Rs. 10 lakhs as "Earnest Money" for a contract which has already been completed, but retained the amount and never returned the same to the aforesaid Romen Chandra Borthakur and thereby, he has exploited the official position, he being a senior public servant. Therefore, his act of taking the money is actually can be termed as property entrusted on him by the aforesaid Romen Borthakur and the same has been misappropriated by him. Therefore, he submits that the ingredients of Section 409 of IPC are found in the allegations and materials available in the instant

case against the accused-applicant, and therefore, since the investigation is still going on, he submits that the accused-applicant should not be granted bail. To support his submissions, the learned Special PP has relied on the case of **Superintendent & Remembrancer of Legal Affairs of West Bengal Vs S.K. Ro**y, reported in (**1974) 4 SCC 230**.

9. Case Diary in the instant case has been produced and the same is perused by the court. This court has also considered the submissions made by the learned counsel appearing for the respective parties.

10. At this point of time, it may be relevant to have a look into the allegations made in the FIR on the basis of a preliminary enquiry.

11. From the FIR, it is seen that the instant case has been registered on the basis of findings of a preliminary enquiry conducted in Allegation No. 59/2026 of CM's Special Vigilance Cell, Assam, which was made on the basis of a complaint petition submitted by Romen Chandra Borthakur. It is seen that the accused-applicant, who was working as the District Development Commissioner (DDC) in Dhemaji, induced Sri Romen Chandra Borthakur to secure the government contract worth approximately Rs. 50 crore for supply of Disaster Management items in Dhemaji district. It is alleged that during their meeting at DDC's office, the accused-applicant assured Romen Chandra Borthakur that the contract could be allotted to him and that an advance payment of Rs. 36 crore would be released by the department. It is alleged that the accused-applicant demanded an amount of Rs. 2.5 crore as "Earnest Money" for facilitating the allotment of the contract. It is alleged that

the amount was directed to be paid to one SBI Account No. 42327726188 of M/S S.K. Enterprise. It is alleged that during the enquiry, it is established that the accused-applicant systematically and habitually abused his official position as a public servant to extort money, misappropriate government funds, and involved in large-scale fraudulent activities. The FIR also alleged as many as eight heads of allegation against the accused-applicant, which are summarily provided herein below:

The first being the fraudulent manipulation of tender processes and extortion wherein it has been alleged that the accused-applicant while serving as DDC, fraudulently shared completed tender named "Gratuitous Relief Tender 2026" via WhatsApp with intermediaries to lure contractors. And as stated earlier, due to such assurances of the accused-applicant, the victim namely, Romen Chandra Borthakur paid Rs. 10 lakh to the accused-applicant through one SBI account of M/S K.K. Enterprise, which he falsely presented as a government account. The contract was never awarded to the aforesaid Romen Chandra Borthakur.

The second allegation is regarding extortion from Arunachal Pradesh businessmen, which basically relates to inducing one Takak Riddi and Talok Bui, two businessmen from Arunachal Pradesh wherein, the accused-applicant allegedly extorted Rs. 3 crore by giving assurance of providing Assam government contracts. It is also alleged that several luxurious items, gadgets, apparrels were also provided to the accused-applicant by the aforesaid two persons.

The third allegation relates to inducement of a local businessman named Navajit Gogoi to invest about Rs. 50 lakhs in a

fictitious partnership school in Golaghat. Also, inducement and defrauding of T.J. Biswajit Maheangia of Rs. 45.22 lakhs and Abinash Deuri of Rs. 50 lakhs under false pretexts of providing supply contracts and liquor licenses etc.

The fourth allegation against the accused-applicant is regarding Medical Department supply scheme and criminal conspiracy during his tenure as Joint Secretary, Medical Education & Research Department (MERD), Assam, when he allegedly cheated a businessman Pranjal Daga and his father Naveen Daga of Rs. 40 to 50 lakhs approximately. It is alleged that he lured them with promise of Rs. 50 crore supply contracts in hospitals. It is also alleged that to execute his plan, he conspired with one of the co-accused, namely, Sri Amit Swargiary, who impersonated a senior officer over the phone to deceive the victims.

The fifth allegation is about receiving money for official transfers when it has been alleged that the accused-applicant extorted sum of Rs. 5 lakh, in cash, from one Dr. Goutam Choudhury, professor & HOD of Orthopedics Department, Kokrajhar Medical College, under the false assurance of facilitating his transfer to Guwahati.

The sixth allegation is about fraudulent extraction of Rs. 14.5 lakh from Sri Nath Building & Housing Company Private Limited, Guwahati, by promising to provide cheap construction materials, though no materials were supplied, and he forced the aforementioned Daga family to repay the fund under duress to cover his tracks.

The seventh allegation is about misappropriation of government allowances earmarked for his personal Computer Operator, whereby, the accused-applicant siphoned of the government allowance of Rs. 16,000/- per month approximately.

The eighth allegation is about fraudulent use of telecommunications wherein he has allegedly operated multiple connections, registered fraudulently in the name of his former domestic workers, cooks, drivers, etc., and unsuspecting citizens without their knowledge or consent, in order to conceal his unlawful operations.

12. From the above allegations, it is seen that the primary allegations against the accused-applicant is that he has exploited his position as a high-ranking civil servant of Government of Assam, and thereby, induced various victims to part with their monies and pay him in different accounts on the promise of giving them government contracts/works, however, the same were never given to them.

13. Now, as has been argued by the learned counsel appearing for the parties, the question comes as to whether there is any offence made out under Section 409 IPC, i.e., criminal breach of trust by public servant, or by banker, merchant, or agent in the instant case.

14. It may be relevant herein to refer to Section 409 of IPC.

> "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 imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall also be to fine."

15. Criminal breach of trust has been defined under Section 405 of the IPC, which is extracted herein below:

"405. Criminal breach of trust.—

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

16. So, from the above provisions, it is seen that Section 409 IPC caters to the provision wherein a public servant or a banker, or a merchant, or an agent is involved committing criminal breach of trust.

17. From the reading of Section 405 IPC, the following can be formed:

1. There must be entrustment with person for property or dominion over property, and

2. The person entrusted:

(a) Dishonestly misappropriated or converted property to his own use, or

(b) Dishonestly used or disposed of the property or willfully suffers any other person to do so in violation of:

(i) Any direction of law prescribing the methiod in which the trust is discharged; or

(ii) Legal contract touching the discharge of trust.

18. So, for criminal breach of trust, property must have been entrusted to the accused, or he must have dominion over it. The property in respect of which the offence of breach of trust has been alleged must be a property of some other person, or the beneficial interest in the property or ownership of it is with some other person who is not the accused person. So, an important factor is that the accused person must hold the property on trust of an another person. Cheating is also alleged in the instant case, which is a separate offence. There is a distinction between criminal breach of trust and cheating. For commission of an offence under cheating, the criminal intention is necessary at the very inception, i.e., at the time of making a false or misleading representation. However, in criminal breach of trust, a mere proof of entrustment is sufficient. Therefore,

in a case of criminal breach of trust, the accused person may have been lawfully entrusted with the property, but he subsequently, dishonestly misappropriates the same. So, in criminal breach of trust, the ingredients of initial dishonest inducement may not be required, which is otherwise required in a case of cheating. In a criminal breach of trust, a property may be genuinely given to the accused person in trust. However, the same is dishonestly misappropriated by the person on a later stage.

19. Section 409 IPC also uses the term "any manner entrusted with property" or "with any dominion over property in his capacity of a public servant", which shows that a precondition is present for effecting Section 409 IPC and the precondition is "entrusted with property or with any dominion over property". The Hon'ble Supreme Court in the case of **State of Gujarat Vs Jaswantlal Nathalal**, reported in **1967 SCC OnLine SC 58**, discussed the term "entrusted" found in Section 405 IPC. It has been observed by the Hon'ble Supreme Court that the term "entrusted" found in Section 405 IPC governs not only the words "with the property" immediately following it, but also the words "or with any dominion over the property" occurring thereafter. It is observed that before there can be any entrustment, there must be a trust, meaning thereby an obligation annexed to the ownership of the property, and a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another or the owner. But that does not mean that such entrustment needs to conform to all technicalities of the law of trust. The expression "entrusted" carries with it the implication that the person handing over any property, or on whose behalf that property is handed over to another, continues

to be its owner. Further, the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. Similarly, in the case of **CBI Vs Duncans Agro Industries Ltd.**, reported in **(1996) 5 SCC 591**, the Hon'ble Supreme Court held as follows:

> "27. In the instant case, a serious dispute has been raised by the learned counsel appearing for the respective parties 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 a wide sense in Section 405 IPC. Such expression includes all cases 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 IPC is not necessarily a term of law. It has wide and different implications in different contexts. 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 hold in some way for his benefit. The expression "trust" in Section 405 IPC is a

comprehensive expression and has been used to denote various kinds of relationship, like the relationship of a trustee and beneficiary, bailor 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 the ownership of it must be in the other person, and the offender must hold such property in trust for such other person or for his benefit. In case of pledge, the pledged article belongs to some other person, but the same is kept in trust by the pledgee."

20. From the above exposition of law, it is clear that there should be some entrustment of property to the accused person wherein the ownership is not transferred to the accused, but the same remains with the person who has entrusted the property, or the accused person is holding the same for some other party.

21. Now coming to the facts of the case in hand, it is seen that the aforesaid Romen Chandra Borthakur, the victim, has been lured by the accused-applicant representing himself as a senior government official (public servant) with the promise of giving him a particular contract. A contract which is in existence and not a fake contract.

The accused-applicant mentioned about the value of the contract, and intimated the victim that he can arrange the contract to be allotted to him, provided he pays an "Earnest Money" of Rs. 2.5 crores. From the findings of the preliminary enquiry, it is seen that Sri Romen Chandra Borthakur received the tender notice through one Dhruvjyoti Bora, who is an acquaintance of the accused-applicant and the notice was given to him by the accused-applicant. The aforesaid Romen Chandra Borthakur, thereafter, went to Dhemaji and met the accused-applicant, the DDC Dhemaji and discussed about the tender. It is also seen that that the accused-applicant provided the Account No. 42327726188 of M/S K.K. Enterprise through WhatsApp to Romen Chandra Borthakur and requested for payment of Rs. 10 lakhs by Romen Chandra Borthakur. Accordingly, the said amount was paid by Romen Chandra Borthakur from his Axis Bank account to the account of M/S KK Enterprise. It is also seen that the District Commissioner, Dhemaji, verified the tender notice circulated by the accused-applicant and the District Commissioner submitted a report on 10.06.2026 which stated that the tender notice was issued from the office of the District Commissioner, Dhemaji on 18.03.2026 for the procurement and distribution of Gratuitous Relief (GR) materials among the affected people and livestock of Dhemaji district during floods and other natural disasters for the year 2026-2027. In the report, it is stated that the tender notice was uploaded on the district website portal on 21.03.2026. It is also reported that Tender Evaluation Committee was constituted with Additional District Commissioner-cum-CEO, DDMA, Dhemaji as Chairman, Branch Officer DDMA, Dhemaji, Treasury Officer-cum-FAO, Dhemaji and Assistant Director,

FCS & CA, Dhemaji as the members. It is reported that tender applications were opened on 04.04.2026 wherein 10 nos. of tender applications were received against the tender notice, out of which 9 nos. of applications were found eligible and accepted.

22. From the above, it is seen that the accused-applicant shared the tender notice with another person after the expiry of the original tender process, and it is also seen that the accused-applicant was not in the tender evaluation committee, however, he intentionally shared the tender notice misusing his official position to get the money illegally from the aforesaid Romen Chandra Borthakur, which was subsequently misappropriated by him. From the above facts, it is clear that the accused-applicant, though neither a member of a Tender Evaluation Committee, nor the authority who has issued the tender, portrayed himself as a person in authority who can facilitate and allot the contract to the victim and thereby, induced the victim to believe that the accused-applicant being a person in authority (public servant), has shown the tender notice, which was actually in existence at that point of time, to pay him Rs. 10 lakhs as "Earnest Money". The victim Romen Chandra Borthakur, accordingly, paid him Rs. 10 lakhs on an account given by him, trusting him and therefore, entrusting him with the money so that he can get the contract, however, only to realize later on that the money paid was, in fact, misappropriated by the accused-applicant, since the same was not returned to Romen Chandra Borthakur, the victim, on a later stage. Therefore, in the instant case, the fact that the accused-applicant used his position as a public servant is beyond doubt and by using his position, he has convinced the victim by showing the genuine tender notice which was in existence at that point of time

and thereby, convinced him to pay him Rs. 10 lakhs as "Earnest Money".

23. Now, the important question which comes to the fore is whether the money was parted with by the victim and the same was entrusted to the accused-applicant by the victim person in his official capacity as a public servant or not. In the instant case, as has been discussed, the accused-applicant was neither involved in issuing of the tender process nor he was a member of the Tender Evaluation Committee, but he was a senior public servant at that point of time, who had the details of the tender and other important information regarding the tender. It is seen from the finding and report from the District Commissioner, Dhemaji, that tender was, in fact, in existence at that point of time and was completed at a point of time. Therefore, it can be inferred that it was relatively easy for the accused-applicant to convince the victim about the genuineness of the contract, as the contract was in existence which was floated by Government of Assam, wherein the accused-applicant is a senior public servant. Section 409 IPC applies when property is entrusted to a public servant "in his capacity as a public servant". So there must be a nexus between the official duties to authorities of the public servant and the receipt of money. The section also requires that the property be handed over lawfully and voluntarily to be held in a fiduciary duty followed by a subsequent misappropriation. It is also seen that Section 409 IPC, since applicable to a public servant and others named in the Section, the public servant meant thereby, has to be in authority in the department to accept any legitimate statutory deposits such as earnest money, deposits for tender fees etc., and the same is subsequently misappropriated.

24. A similar issue came before the Hon'ble Supreme Court in the case of **Superintendent & Remembrancer (supra)**, wherein the Hon'ble Supreme Court has discussed the issue regarding criminal breach of trust by a public servant and when it can be said that the public servant is acting in the capacity of a public servant. In this regard, paragraph nos. 10, 11, 12, 13 & 14 being relevant, are extracted herein below:

> "10. The only question which arises for decision in the case before us is: could the respondent be said to be acting in his capacity as a public servant when he received the monies from policy holders which he misappropriated? Obviously, the offence punishable under Section 409 IPC is not within the scope of the prescribed duties or authority of the public servant. The law does not authorize any public servant ..…. or, for that matter, anybody else …… to commit a criminal breach of trust. There are, however, two distinct parts involved in the commission of the offence of criminal breach of trust. The first consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is a misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created. In the case of an offence by a public servant punishable under Section 409 IPC, the

acquisition of dominion or control over the property must also be in the capacity of a public servant. This is not the same thing as having the authority, as a public servant, to get the control or dominion over property annexed with an obligation. The gravamen of the misappropriation of the money or property which comes into the offence is the dishonest possession or under the control of a public servant who has the ostensible authority to receive it even though, technically speaking, from the point of view of the distribution of departmental duties under internal rules of an office, it may not be within the scope of his authority or duty to accept the money. The fact that a public servant acts fraudulently in the exercise of his duties as a public servant to get dominion or control over some property will be an aggravating and not an exculpating circumstance. The "entrustment" resists from what the person handing over money or property is made to think, understand, and believe about the purpose for which he hands over money or property to a public servant. If this takes place because of and due to the exercise of the official authority the requirements of Section 409 IPC, are satisfied. There may be cases in which a person who parts with property to a public servant may have done so for

reasons or in a manner so completely disconnected with the official capacity of the public servant that it may not be reasonably possible to conceive of it as an offence connected with or committed in the course of performance of any official duty at all so that official capacity becomes really irrelevant. Ordinarily, it is the ostensible or apparent scope of a public servant's authority when receiving property and not its technical limitations, under some internal rules of the department or office concerned, and the use made by the servant of his actual official capacity which would, in our opinion, determine whether there is a sufficient nexus or connection between the acts complained of and the official capacity so as to bring it within the ambit of Section 409 of the Penal Code, 1860.

11. It is true that there is the finding of the Special Court, quoted by the High Court and set out above by us that Pakistani policy-holders could not have made any transfer of their policies to the Indian Unit of the Hindustan Insurance Society without producing certificates of migration and obtaining the permission of both Indian and Pakistani Governments. But, there is evidence and there are findings on it given. by the Special Court that the

respondent was actually representing to the policy holders that they could make their payments in Calcutta to him and he issued receipts purporting to act in his official capacity. In other words, he misused his official capacity, and, under its garb and the colour of his office, obtained payments and issued receipts. The policy-holders did not know the correct position and would not have made payments to the respondent but for the possession and use by him of his official capacity. We think that there is sufficient ostensible nexus between the actual official capacity and the conduct of the respondent for us to hold that the entrustment or dominion was obtained by the respondent over monies of policy-holders in his official capacity or as a public servant who, consequently, became charged with the duty, as a public servant, and, indeed, even more so as a public servant, to act honestly with regard to sums thus received by him.

12. To constitute an offence under Section 409 IPC, 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 "any manner whatsoever". That manner may or may not involve

fraudulent conduct of the accused. Section 409 IPC, 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, at least honestly.

13. A case cited before us, to support the contention that acquisition of dominion or possession and control over property by an accused would, even if wrongful, be an "entrustment" or create an obligation the violation of which, by misappropriation, would be punishable under Section 409 IPC, if the accused used his official capacity to obtain the property, was: State of U.P. v. Babu Ram Upadhya.

14. Again, in Som Nath Puri v. State of Rajasthan this Court, after referring to decisions of different High Courts on the subject, held, that: "the expression 'entrusted' is used in Section 409 IPC, in a wide sense and includes all cases in which property is voluntarily handed over for a specific purpose and

is dishonestly disposed of contrary to the terms on which possession has been handed over."

25. From the above discussions and observations by the Hon'ble Supreme Court, what transpires is that, to attract Section 409 IPC, the public servant does not need to possess strict, legally valid authority to collect the money. When there is a reasonable nexus between the capacity as a public servant and their conduct, they can be said to have dominion or control over property by purporting to act in their official capacity or under color of their office. Therefore, a public servant may not be in the actual position wherein he has been authorized by some authority or government or statute or rule to receive the money, but being a public servant in their official capacity or under the color of their office they receive the money, the same can be termed as receiving the money in terms of Section 409 IPC. It is also seen that the term "in any manner whatsoever" present in Section 409 IPC means that a typical legal entrustment is not a pre-requisite and even if the receipt of the property by itself is improper or obtained through fraudulent representation made in an official capacity, an implied obligation arises to deal with it honestly. Therefore, it is discernible from the above that if any money or property is entrusted to the public servant due to his fraudulent inducement also, once he receives the money, he has a fiduciary duty to act honestly and refrain from acting dishonestly. Therefore, if the money is received due to certain false information or inducement also, however, the same is received by the public servant being entrusted by the victim which the public servant subsequently misappropriates the same will attract Section 409 IPC. It is also held by the Hon'ble Supreme Court in the aforesaid case that a public

servant who acts fraudulently while exercising their official position to gain control over money, commits an aggravated offence under Section 409 of IPC. It is observed that that allowing a technical lack of departmental authority to seal them would defeat the purpose of Section 409, which is meant to protect members of the public dealing with public servants or officers purporting to act within their authority. It is also observed by the Hon'ble Supreme Court that it is enough if the payment is made by a person dealing with a public servant in his capacity as a public servant, even if it is made on an erroneous assumption which the public servant concerned does nothing to remove. It is also observed that a legal defect in the scope of the ostensible authority of a public servant does not prevent an entrustment to or an obligation to be fastened upon a public servant in his capacity as a public servant in the facts of the case established, the required nexus or connection between the acts which create the obligation and the capacity.

26. On the above-mentioned background of what Hon'ble Supreme Court has observed, if the facts of the instant case is taken into account, it is seen that there is a creation of an implied obligation in relation to the money over which a control or dominion was acquired by the accused-applicant due to his official capacity, though he was not the actual issuer of the tender in question. Due to his holding of office as a senior public servant, the victim was forced to believe him to be an authority in the instant case who has the capacity to give him the contract if he parts with some money as requested by the accused-applicant in the instant case. Accordingly, he has paid an amount of Rs. 10 lakhs, with the belief that on such payment, he will be getting the whole or portion of the government

contract which was in existence at that point of time. This clearly shows that there was an entrustment of money upon the public servant by the victim which the victim thought would be utilized honestly by the accused-applicant.

27. Secondly, in the instant case, it is not disputed that though the money amounting to Rs. 10 lakhs was paid to the designated account of M/S K.K. Enterprises Enterprises, though the contract was not given to the victim and in spite of requests, the same was not returned to the victim, which clearly established the fact of dishonest misappropriation or breaching of the trust of the victim by the accused-applicant.

28. This Court has also considered the case of **Jiwan Dass (supra)**, as referred to by the learned Senior Counsel appearing for the accused-applicant. What is discernible from the aforesaid case is that the Hon'ble Supreme Court observed that to bring home a charge under Section 409, what is necessary to be proved is that the accused is a public servant, and in such capacity, he was entrusted with the property in question, or with dominion over it, and he has committed criminal breach of trust in respect of it. This aspect of the matter has already been discussed in the earlier case of **Superintendent & Remembrancer (supra)**, wherein the Hon'ble Supreme Court has discussed about the issue about being a public servant and in such capacity, entrusted with property in question or with dominion over it. The facts of the instant case are distinguishable from the case referred, and it doesn't help the cause of the accused-applicant in the instant case.

29. This Court has also taken into consideration of the fact that the investigation is still going on, and several other complaints have been made against the accused-applicant, and statements of the victims are being recorded, though separate cases may not have been filed.

30. Taking into account the above-discussed, and having found *prima facie* materials for commission of an offence under Section 409 of the IPC, and since the investigation is still going on, this Court is not inclined to grant any relief to the accused-applicant at this stage.

31. Needless to mention that the discussions and observations made in the case is solely for the purpose of consideration of the prayer of bail of the accused-applicant.

32. Accordingly, the instant bail application is rejected.

JUDGE

Miriam Degu
(SPA)