ALLAHABAD HIGH COURT

Emperor

Vs

Bishan Sahai Vidyarthi

(Collster and Bajpai, JJ.)

21.04.1937

JUDGMENT

Bajpai, JJ.

1. Five persons, B.S. Vidyarthi, A.B. Tandon, Gopi Nath Singh, K.B. Tandon and R.B. Govind Prasad, were tried by the Additional Sessions Judge of Agra under Section 120-B on a. charge of having criminally conspired together to make money out of the public by committing offences under Sections 420, 465, 467 and 477-A, I.P.C. Against certain of the accused, there were also specific charges of cheating, attempting to cheat, forgery, falsification of accounts and criminal misappropriation, the relevant sections being Sections 420, 420/511, 465, 467, 477-A and 409, I.P.C. In all, there were 17 charges. R.B. Govind Prasad and K.B. Tandon have been acquitted by the trial Court on all charges. B.S. Vidyarthi, A.B. Tandon and Gopi Nath Singh have been convicted on charges Nos. 2 and 3 under Section 477-A and have been sentenced to two years' rigorous imprisonment on each charge, the sentences to be concurrent. B.S. Vidyarthi has also been convicted on charge No. 12 under Section 409, I.P.C., and has been sentenced to undergo two years' rigorous imprisonment and to pay a fine, the sentence of imprisonment to be consecutive with the sentence which has been imposed upon him under Section 477-A, I.P.C. These four persons have been acquitted on the remaining charges.

2. There is an appeal by the Local Government against the acquittal of B.S. Vidyarthi, A.B. Tandon, Gopi Nath Singh and R.B. Govind Prasad on charges Nos. 1, 4, 6 and 8 and there is also an application by the Local Government for enhancement of the sentences which have been inflicted on them for the offences in respect to which they have been convicted. These persons have also appealed to this Court against their conviction. R.B. Govind Prasad has however died in the meanwhile and so his case is no longer before us.

3. The case for the prosecution briefly put was that the accused conspired to float a bank with the object of defrauding the public, that certain of them committed specific offences in furtherance of the conspiracy and that certain of them committed other offences outside the conspiracy, but in the course thereof. B.S. Vidyarthi, A.B. Tandon and Gopinath Singh all pleaded not guilty at the

trial, each alleging that whatever he did was done honestly and in good faith : and it was denied that there was any conspiracy to cheat or defraud the public.

4. In 1932, a bank known as the Indian States Bank went into compulsory liquidation in this Court. On 5th September 1931 it had dosed its doors and on 10th September an injunction was issued by a civil Court in connexion with a suit which had been instituted against the Bank. Thereafter, as we have said, it was compulsorily liquidated. On 28th May 1932 a letter of the Official Liquidator was sent by the Officiating Registrar of this Court to the Inspector General of Police requesting that an investigation be made, and in the result the accused were put on their trial on the 17 charges referred to above.

5. Before considering whether the appeals and the application in revision should be decided on merits, there are certain law points which have to be dealt with and we will proceed to take them up seriatim.

6. The first plea which has been addressed to us is that the prosecution was illegal for the reason that the procedure laid down in Section 237, Companies Act, was not followed. The learned Government Advocate resists this plea on the ground : (1) that no such direction as is contemplated in that section was necessary and (2) that there was in any case a substantial compliance with the provisions of the aforesaid section. The Official Liquidator in the letter which we have already mentioned stated, inter alia, as follows:
In going through the account books and the records of the company, I find that some of its Directors and Officers have committed various acts of dishonesty amounting to criminal breach of trust and manipulation of accounts. Instances will also be found where they filed false affidavits and wrong returns with the Registrar, Joint Stock Companies. In the interest of the general public it is advisable that these persons should be prosecuted and their further activities be put an end to.

7. This letter was, as we have already said, duly forwarded to the Inspector General of Police by the Officiating Registrar of this Court under cover of a letter which reads as follows:Sir, I am directed to forward a letter in original from Mr. Bhagwati Shankar, Official Liquidator of the Indian States Bank, Ltd. (in liquidation) and to say that the Court considers it a fit case for inquiry by the police.I have the honour to be, Sir, Your most obedient servant, (Sd.) S.E.J. Mills, Officiating Registrar.

8. Thus, there can be no doubt that the Company Judges of this Court were of opinion that there was a prima facie case against the promoters of the Indian States Bank and desired that the matter be investigated and if the evidence were found to be sufficient, that the said promoters be put on their trial. Even assuming however that the provisions of Section 237, Companies Act, were not substantially complied with, it is obvious that the Act nowhere lays down that there can be no prosecution on a criminal charge otherwise than upon a direction by the Company Judge or

Judges. In our opinion, there is no force in this plea.

9. The second point taken is that the charges of forgery and falsification of accounts can only be tried under Section 236, Companies Act. That section provides that:If any director, manager, officer or contributory of any company being wound up, destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers or securities, or makes, or is privy to the making of, any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or receive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

10. Now in the first place, it will be observed that none of the accused has been awarded a sentence for forgery or falsification of accounts in excess of seven years; and in the second place, a penal enactment in a special Act is no bar to a prosecution under the Indian Penal Code. In *Kaulashia v. Emperor*[1] it was held that a single act may be both an offence under the Penal Code and may also be a contempt of Court and may be punishable in either or both capacities. In *Joti Prasad Gupta v. Emperor*[2] it was held that a person guilty of abetment of an offence under Section 9(a), Salt Act, may be convicted and sentenced under Section 117, Penal Code, where it is proved that the act amounted to an abetment of the com. mission of an offence by the public generally or by any number or class of persons exceeding ten. At p. 990 we find the following observation:...the law on the subject has been declared by the express provision of Section 26, General Clauses Act, which provides that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. It is clear therefore that where an act is punishable under a special law and also under a general statute, the offender could be proceeded with under either or both, but could not be punished twice for the same act or omission which constitutes the offence. Where there is nothing in the special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the Legislature to exclude it.

11. This is clear authority of a Bench of this Court and we have no doubt whatsoever that the prosecution of the accused for offences under the Indian Penal Code was perfectly legal.

12. The next plea taken is that inasmuch as B.S. Vidyarthi, A.B. Tandon and Gopinath Singh were parties to the liquidation proceedings, charges Nos. 6 and 8 were not triable except on complaint by the Company Judges as required by Section 195(1)(a), Criminal P.C. Similarly it is pleaded that charge No. 1 was not triable in respect to conspiracy to commit forgery except on complaint as aforesaid. The Fall Bench case in *Emperor v. Khushal Pal Singh*[3] is clear authority to the contrary. It was' held therein that Section 195(1)(a) must be read with Section 476, Criminal P.C., and that Section 195(1)(a) applies only to cases where an offence is committed by a party as such to a proceeding in any Court in respect of a document which has been produced or given in evidence in such proceeding. The. documents which are the subject of charges Nos.

1, 6 and 8 are not alleged to have been forged by a party as such to the liquidation proceedings and the offences, if any were not committed in or in relation to those proceedings. This plea also has no force and fails.

13. There is another legal plea which was not taken at the trial but which finds place in the memorandum of appeal and has been vigorously pressed before us, It is to the effect that there has been a misjoinder of charges and also of persons in violation of Section 233, Criminal P.C., and that the trial was therefore illegal. It is contended that the joinder of charges and the joinder of persons were not of the kind to which the exception to the general rule as provided in Section 235(1) and in Section 239(d), Criminal P.C., would apply.

14. As we have already shown, the first-charge was one of conspiracy under Section 120-B, Penal Code, in respect to offences under Sections 420, 465, 467 and 477-A, Penal Code. Charges Nos. 2-9 and 11 relate to specific offences under Section 477-A, 465, 467, 420 and Section 420/511, Penal Code. Charge No. 10 is concerned with a specific charge of cheating under Section 420, Penal Code, against A.B. Tandon and charges Nos. 12-17 relate to specific offences under Section 409, Penal Code, against various of the accused persons. The offences to which charges Nos. 2-9 and 11 relate are alleged to have been committed in pursuance of the conspiracy whereas charge No. 10 and charges Nos. 12-17 are alleged to have been committed in the course of the same conspiracy, but not in pursuance thereof. It is conceded before us that the joint trial of the accused on charges Nos. 1-9 and 11 was legal inasmuch as the conspiracy and the acts alleged to have been committed in pursuance thereof form part of the same transaction within the meaning of Section 235(1), Criminal P.C.; but it is contended that charge No. 10 and charges Nos. 12-17 could not legally be tried along with the other charges inasmuch as the acts with which they are concerned are alleged to have been committed individually by the various accused outside the conspiracy and not in pursuance thereof and were therefore not part of the same transaction.

15. It will be observed that the accused were not charged with having conspired to commit offences under Section 409 and the language in which the charges are drawn up shows that although, according to the prosecution, the offences under Section 409 and also the offence under Section 420, Penal Code, with which charge No. 10 is concerned were committed during the continuance of the conspiracy, they were not committed in pursuance of it. What amounts to the "same transaction" is a question of fact which has to be decided in the circumstances of each case.

16. In *Venkatadri v. Emperor*[4] six directors of a company were prosecuted for criminal breach of trust. Some of them were also charged with falsification of accounts and cheating and the others were charged with abetment of these offences. A plea of misjoinder was taken at the trial and in appeal and the plea found favour with a Bench of the Madras High Court. At p. 504 Benson, J. observed:In the present case I do not think that it can be said that the alleged misappropriations,

extending over the whole period of the company's existence, were committed in the course of the same transaction within the meaning of Section 235; for, if so, the expression would equally cover misappropriations of a similar kind extending, it may be, over 40 or 50 years. This would obviously render nugatory the provisions of the law which are designed to simplify and define within reasonable limits the charges that may be tried at one and the same time and so avoid the embarrassment of the accused and, I may add, of the jury, in attempting to deal with a multitude of charges at one and the same time.... It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code, instead of straining them to cover doubtful cases.

17. At page 506 Abdul Rahim, J. said:...generally speaking, there can be very little difficulty in arriving at a proper conclusion in a concrete case. For instance, in this case what is said to connect the different acts charged into one transaction is the allegation that these acts were committed by the six persons in pursuance of a systematic scheme for defrauding those members of the public who might subscribe to the fund. If this contention were sound, then if the Company was carried on for 10 or 20 years and a hundred acta of embezzlement were committed during that period, the accused would be liable to be tried at one trial for all these offences. Obviously this cannot be the scope of Section 235, Criminal P.C. No doubt proximity of time any more than unity of place is neither a necessary nor deoisive test of what constitutes the "same transaction", though such proximity often furnishes good evidence of the connexion which unites several acts into one transaction,...I think community of purpose or design and...continuity of action are essential elements of the connexion necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to those acts. But mere community of purpose is not sufficient; there must also be continuity of action.

18. Further on, this learned Judge observed:As regards community of purpose, I think it would be going too far to lay down that the mere existence of some general purpose or design such as making money at the expense of the public is sufficient to make all acts done with that object in view, part of the same transaction.

19. In *Ramnarayan Amarchand v. Emperor*[5] certain officers of a company were convicted upon charges of (1) cheating and criminal misappropriation in relation to the balance sheet of the Company of 1912, inasmuch as in that sheet a profit was shown as having been taken, whereas the Company had not earned a profit, and (2) wilfully making a false balance sheet of the Company for 1913. The accused were tried jointly on 5 charges, 4 of which related to the balance sheet of 1912 and one to the balance sheet of 1913. In the trial Court it was objected on behalf of the accused that there could not be a joint trial of the charges relating to the two balance-sheets, but the objection was disallowed on the ground that the offences relating to these balance-sheets

formed part of the same transaction. On appeal a Bench of the Bombay High Court held that the trial was illegal inasmuch as the different acts attributed to the accused in respect to the two balance sheets did not form part of the same transaction within the meaning of Sections 235 and 239, Criminal P.C. At p. 482 Heaton, J. observed:From the prosecution point of view, it is perfectly correct to say that both these balance-sheets were prepared in pursuance of a conspiracy. One only has to think over the matter a little carefully, however, to see that this idea of a conspiracy covers a very great deal that cannot be included in the idea of 'the same transaction'. If we were to take those words as covering a case of this kind, it would lead us to treat the same acts of misconduct or fraud, however often repeated, as constituting the same transaction, if there was the same general purpose underlying the repeated acts. But something far more definite than that is required, before separate proceedings can be brought within the meaning of the words 'the same transaction'.

20. In neither of the above two cases was there a charge of conspiracy under Section 120-B; and as we have already shown, the plea of illegality was taken at the trial in each case.

21. In Sanuman v. Emperor A.I.R. 1921 All 19 a learned Judge of this Court quoted with approval the following observations of Chandavarkar, J. in Emperor v. Sherufalli (1903) 27 Bom. 135:The real and substantial test, then, for determining whether several offences are connected together so as to form the same transaction, depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. A mere interval of time between the commission of one offence and another does not by itself necessarily import want of continuity, though the length of the interval may be an important element in determining the question of connexion between the two.

22. At page 399 the learned Judge of this Court observed:In order to establish a transaction it is necessary to have a chain. Each event must be a link in the chain. There must be no rupture in the sequence. There must be no hiatus.

23. In *Abdur Rahim v. Emperor*[6] a certain person was charged with having committed 80 separate acts of cheating. It was pleaded at the trial and also in appeal that the trial was illegal for improper joinder of charges. The learned Judge of the Patna High Court who heard the appeal observed that offences do not form the same transaction merely because they may be inspired by one and the same general object such as that of deceiving the public or plunder. He referred to the case in *Venkatadri v. Emperor (1910) 33 Mad. 502* and to the case in *Ramnarayan Amarchand v. Emperor*[7] and in connexion with them he remarked at p. 104:In the former of these oases it was held that distinct acts of embezzlement committed in the course of several years by the managers of a company formed with the object of defrauding the public cannot be said to form part of the same transaction by reason of such general object, that for separate acts to form parts of one and the same transaction, the purpose in view must be something particular and definite and that where each act is a completed act in itself and accomplishes the original general

design of defrauding the public as far as it goes, such acts cannot be tried together under Section 235(1). It was pointed out in this case that Courts should give full effect to the spirit of the provisions of the Code instead of straining them to cover doubtful oases. In Ramnarayan Amarchand v. Emperor A.I.R. 1919 Bom. 111(sUPRa) Heaton, J. pointed out the distinction between acts committed in pursuance of a conspiracy and acts committed merely in pursuance of a general policy of deception, plunder and the like the former may form one transaction, but not the latter.

24. In the case last referred to, it does not appear whether the plea of misjoinder was taken at the trial, but it was taken before the Judicial Commissioner of Chota Nagpur in appeal. It was not accepted by him, but was allowed in revision by the High Court.

25. Now in the present case it seems to us that the separate acts of criminal breach of trust which were admittedly not committed in pursuance of the conspiracy, but were isolated acts committed individually during the continuance of the conspiracy, were not part of the same transaction with the conspiracy itself and with those acts which were alleged to have been the subject of the conspiracy. In other words, a conspiracy and acts done in furtherance of its common object have no community with separate acts which may be committed by a conspirator for individual gain.

26. It follows from the above finding that the trial was illegal inasmuch as it was in violation of Section 233, Criminal P.C., and was not validated by Section 235(1) or Section 239(d) of the Code. The question now to be determined is, what consequences flow from this illegality. Section 537(a), Criminal P.C., provides that:Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Ch. 27 or on appeal or revision on account of any error, omission or irregularity in the...charge unless such error, omission or irregularity has in fact occasioned a failure of justice.

27. At the foot of the section there is an explanation which reads as follows:In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

28. It will be observed that the word "illegality" finds no place in that section; and on the other hand it will have to be borne in mind that in the present case no plea of misjoinder was taken at the trial.

29. In *Subramania Ayyar v. Emperor*[8] the accused had been tried on an indictment in which he was charged with 41 acts of the same kind. There was no question of these acts forming part of the same transaction and Section 234, Criminal P.C., had been clearly contravened. A plea of misjoinder of charges was taken at the trial and it was contended that the trial was bad for violation of Sections 233 and 234, Criminal P.C. The same plea was taken before their Lordships

of the Privy Council. At p. 97 we find the following observation: Their Lordships cannot regard this (i.e. the contravention of Sections 233 and 234, Criminal P.C.) as cured by Section 537.Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment.

30. This case was decided in 1901. It was referred to in a Lahore case *Allu v. Emperor*[9] In that case two parties had been put on their trial as the result of a fight. In each of the two cross-oases the witnesses for the prosecution were at the request of the accused and their counsel treated as defence witnesses in the other case and there was a consolidated judgment. It was held that the procedure adopted was a serious departure from the usual and proper course and the fact that the prisoners and their counsel had consented to it could not give it a legal sanction. lb was observed that:It is a well-established principle of law that a prisoner can consent to nothing which is not authorized by law and the consent of counsel for an accused person cannot validate a course of procedure which the law does not authorize.

31. It was further held that:Section 537 of the Code does not apply to an infringement of statutory requirement, but only to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute.

32. In the result the convictions were set aside and the cases were returned for retrial.

33. In 1926 there was another decision of the Privy Council. This is the case in Abdul *Rahman v. Emperor*[10]. At the trial, the depositions of the witnesses for the prosecution were recorded in English. Some of the witnesses knew English and others did not. At the conclusion of the evidence of the English knowing witnesses their depositions were handed over to them to read and the witnesses read them over to themselves. In the case of witnesses who did not know English, their depositions were handed over to the interpreter, who read over and interpreted the same to the witnesses, and while such reading over, and interpretation was going on, the Magistrate' went on recording the deposition of other witnesses. This procedure was apparently adopted at the request of counsel for the accused, but before their Lordships of the Privy Council it was objected that the trial was invalid by reason of the fact that under Section 360, Criminal P.C., it was imperative that the deposition of witnesses should have been read over and explained to them in the presence of the accused or his pleader. At p. 125 their Lordships referred to the case in Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)* (Supra)and observed:The distinction between that case and the present is fairly obvious. The procedure adopted, i.e. in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*was one which the Code positively-prohibited, and it was possible that it might have worked actual injustice to the accused.
34. In the case in Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)*, there had been a

breach of a directory provision of the Criminal Procedure Code, whereas in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*there was a breach of a positive prohibition in respect to the mode of trial and it is contended before us on the strength of their Lordships' decision in Subramania Ayyar v. Emperor (1901) 25 Mad. 61, that where there has been a violation of such a prohibition, the trial would be invalid even if it were merely possible that such violation might have worked injustice to the accused. At p. 121 of 25 ALJ their Lordships remark:...In applying Section 587 of the existing Code of Criminal Procedure, the Court is directed to have regard to the question whether the objection could and should have been raised at an earlier stage of the proceedings, but they wish it to be understood that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused.

35. In the circumstances of that case however, their Lordships held that non-compliance with the strict provisions of Section 360, Criminal P.C., only amounted to an irregularity and was cured by Section 537 of the Code.

36. In the Full Bench case in *Emperor v. Ernamali*[12] the provisions of Section 326, Criminal P.C., had not been followed by the trial Court. Before the High Court at Calcutta it was objected on behalf of the accused that the trial was bad inasmuch as the jury had not been constituted in accordance with law. The High Court held that there had been an irregularity which was technical and curable. We mention this case because of certain observations which were made in the judgment in respect to the decisions of the Privy Council in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*and in Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)*. At p. 216 Rankin, C.J. observed as follows:The Judicial Committee pointed out in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*that though in a sense the merest irregularity may be illegal, it does not follow that all illegalities are within the scope of Section 537. They did not say or suggest that nothing could be cured under the section if it was illegal and, as the Division Bench has pointed out, we now have in Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)* an express decision to the contrary. Both decisions are really a condemnation of the view that all illegalities are as such in the same category for the present purpose. In the former case it was idle to suggest that there was no prejudice. The accused had suffered in an aggravated form the very prejudice from which the Code intends to save him. In Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)* the test applied was whether there was ground for any probable suggestion of any failure of justice. The Judicial Committee in view of difference of opinion in India and of the fact that no case had come before them since 25 Mad. 619 carefully explained and applied Section 537 "for the guidance of the Courts" and this decision must now govern the interpretation of the section unless and until the Legislature shall see fit to amend the section.

37. Now the two Privy Council decisions to which we have referred, viz. the case in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*and the case in Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)* were the subject of consideration by a Full Bench of this Court in 1933. This is the case in *Kapoor Chand v. Suraj Prasad*[13] It arose out of proceedings under Section

145, Criminal P.C. There had been an irregularity in the Magistrate's order, but it was held that there had been no prejudice to the accused. After considering the case in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*the Court observed at p. 195:

In a later case, however, viz. Abdul Rahman v. Emperor, which is also reported in Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)*, their Lordships pointed out that in the earlier case "it was possible that it might have worked actual in justice to the accused." It may be that their Lordships of the Privy Council, in the later case, wanted to point out that Section 537, Criminal P.C., could not cure the defect in Subramania Ayyar v. Emperor (1901) 25 Mad. 61, because the Code contained the provision that an irregularity, which had worked injustice to the accused, could not be cured. But it is significant that although their Lordships of the Privy Council drew a distinction between an 'illegality' and an 'irregularity' in the earlier case, which was decided in the year 1901, the Legislature did not introduce the word illegality' in Section 537 or anywhere else in the Code, although it was amended after that year. This being the state of the law, we do not think that we should introduce a distinction between 'illegality' and 'irregularity.' The sole criterion given by Section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the Court to do justice, but if, in spite of even a total disregard of the rules of procedure justice has been done, there would exist no necessity for setting aside the final order which is just and correct, simply because the procedure adopted was wrong.

38. A portion of the above observations was quoted as authority by a Bench of this Court of which one of us was a member in Lala v. Emperor A.I.R. 1933 All 941 In that case it was pleaded that the jury had not been properly constituted under Section 326, Criminal P.C., and the case in Emperor v. Ernamali A.I.R. 1930 Cal. 212(Supra) was referred to.

39. The Full Bench case again fell to be considered by a Bench of this Court in *Mathuri v. Emperor*[14] Seven persona were tried together upon a number of charges. Two of them were charged with offences tinder Sections 302 and 457, I.P.C. One was charged under Section 460, I.P.C., and four were charged under Section 411, I.P.C. A plea of misjoinder of persons was taken, and it was contended that the trial was bad for the reason that under Section 239, Criminal P.C., the persons concerned could not properly be tried together and there was a violation of Section 233, Criminal P.C. It was held that there was a misjoinder of persons, but that the defect or illegality "or whatever it may be called" was curable by reason of the provisions of Section 537, Criminal P.C., if it had not in fact occasioned a failure of justice. The learned Judges gave effect to the view expressed by the Full Bench in Kapoor Chand v. Suraj Prasad A.I.R. 1933 All 264(Supra). They then proceeded to consider whether the accused had been prejudiced. At p. 528 they observed:
It would appear from the record that this contention as to misjoinder of persons was never urged in the Sessions Court and, if such only amounts to an error or irregulartiy in the proceedings, it will be difficult for the acoused at this late stage to establish...that such has occasioned a failure

of justice.

40. The Court then went on to find that in fact the accused had not been prejudiced. We must now consider the situation with which we have to deal. Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*is authority for the proposition that the trial of a person for many different offences in contravention of Section 234, Criminal P.C., is bad and incurable. In that case, as we have shown, this objection was taken at the trial; Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)* their Lordships of the Privy Council distinguished the case in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*on two grounds, viz. (1) that "the procedure adopted was one which the Code positively prohibited" (as in the present case) and (2) that "it was possible that it might have worked (actual injustice to the accused". The question emerges whether the adoption of a procedure which is positively prohibited by the Code would ipso facto invalidate a I trial even if no objection had been taken at the hearing of the case and apart from all question of prejudice. In this connexion we would refer again to the observation which occurs on p. 121 and which we have already quoted. This shows that Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)* their Lordships did con. template circumstances in which a defect in prooedure might be incurable. Per contra in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*they did not say that an illegality in the form of trial is in all circumstances incurable.

41. Now the Full Bench of this Court in Kapoor Chand v. Suraj Prasad A.I.R. 1933 All 264 has interpreted these two decisions of the Privy Council in a certain way and has explained the meaning and implications of Section 537, Criminal P.C. The views thus expressed are authoritative and are binding on us and we are accordingly relieved of the necessity of interpreting those pronouncements for ourselves or explaining the provisions of Section 537, Criminal P.C. In the present case there has been a violation of a statutory provision against a particular mode of trial. The trial was thus illegal. The Full Bench held, however, that there is no distinction between an illegality and an irregularity; both are curable under Section 537, the sole criterion being whether the defect has or has not occasioned an injustice. In these circumstances, although the trial in the present case was illegal for misjoinder, it can only be held to be vitiated if we find that the accused were prejudiced or embarrassed in their defence or if there has been otherwise a failure of justice.

42. It is to be regretted that learned Counsel for the accused did not argue this plea of illegality and of consequent prejudice at the very outset instead of waiting until we had heard the Government Advocate on merits and had been taken through all the evidence on which he relied in support of the prosecution and had also heard in part the arguments in reply of counsel for the defence. The result has been an unfortunate waste of time and labour inasmuch as, having now heard arguments at considerable length on this plea, we have arrived at the conclusion that the accused were in all probability prejudiced and embarrassed in their defence and that the convictions must be set aside.

43. As we have already shown, there were 17 charges against the accused. The first was a general charge of conspiracy under Section 120-B in respect to offences under Sections 420, 465, 467 and 477-A, I.P.C. Then there were two charges under Section 477-A against B.S. Vidyarthi, A.B. Tandon and Gopinath Singh and one charge under this seotiop against the aforementioned three persons and K.B. Tandon. The fifth charge was under Section 467 against B.S. Vidyarthi, A.B. Tandon, Gopinath Singh and R.B. Govind Prasad. The sixth was under Section 465 against B.S. Vidyarthi, A.B. Tandon and Gopinath Singh. The seventh was under Section 467 against K.B. Tandon, the eighth was under Section 467 against B.S. Vidyarthi, A.B. Tandon and R.B. Govind Prasad. The ninth was under Section 420 against B.S. Vidyarthi, A.B. Tandon and Gopinath Singh. The eleventh was under Section 420/511 against B.S. Vidyarthi, A.B. Tandon and R.B. Govind Prasad. All these charges were in respect to acts alleged to have been committed in pursuance of the conspiracy. The tenth charge was under Section 420 against A.B. Tandon and was in respect to an offence alleged to have been committed in the course of, but not in pursuance of the conspiracy. Then we have 8ix charges under Section 409, which offences are not alleged to have been the subject of the conspiracy at all. These acts are alleged to have been committed in the course of the conspiracy, but not in pursuance thereof. Two of these charges were against B.S. Vidyarthi, three against A.B. Tandon and one against Gopinath Singh.

44. We take into account the fact that no objection as regards the form of trial was taken before the Judge, but we also note that the accused appear to have been only occasionally and spasmodically represented by counsel. On the very face of things, it would appear that the accused must inevitably have been bewildered and embarrassed in having to defend them-selves against such a diversity and multiplicity of counts, at least six of which were illegally joined with the others inasmuch as they did not form part of the same transaction. The trial resulted in a conviction on three only out of the seven, teen charges. The Local Government has appealed against the acquittal on four of the remaining charges. We must therefore assume that the accused have been rightly acquitted on ten out of the seventeen charges. There is in the circumstances a clear presumption of prejudice, which is not rebutted by the omission of counsel to object in the Court below to the illegality of the trial. The learned Judge himself felt embarrassment both on his own behalf and on behalf of the accused. At p. 878 he remarks in his judgment:A very large number of instances have been cited, which, according to the prosecution, go to show that the Indian States Bank was conceived in fraud, was born in fraud, lived in fraud and died in fraud. I shall deal with these instances as briefly as possible, although the prosecution has literally flooded the record with a very large number of exhibits and lengthy statements of numerous witnesses.

45. Further on at page 888 he says:To prove conspiracy the prosecution has brought such a volume of evidence on the record and has exhibited so many documents that a sort of cloud prejudicing the accused has been raised and one finds it very difficult to view things in their true, perspective.
46. In the circumstances we find it impossible to avoid the conclusion that the accused were

prejudiced and that there-had not been a fair trial.

47. In Subramania Ayyar v. Emperor (1901) 25 Mad. 61(Supra), as we have shown, their Lordships of the Privy Council held that the trial of an accused person on a number of charges in violation of Section 234, Criminal. P.C. was illegal and in Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)* their Lordships distinguished the former case from the one which they were then considering on the ground that such misjoinder might have worked injustice to the accused. In Alimuddi Naskar v. Emperor A.I.R. 1925 Cal. 341 seven persons were charged under Section 120-B read with Section 302, I.P.C. and also under Sections 302 and 436, I.P.C. There were nine separate counts of murder and one of arson and it was alleged that all these offences had been committed in pursuance of the conspiracy or at any rate in the course of the same transaction. The allegation was that the accused persons had a quarrel with the family of one Momrez and that one night they went to his house and set fire to the hut in which Momrez and his two wives and some children were sleeping, and all the inmates were burnt to death. In other huts a person named Intaz and another person named Bibijan were sleeping and they too were murdered. At p. 342 Walmsley, J. observed:It is merely a technical defect that the seven inmates of Momrez's hut are all named in one charge of murder instead of a separate charge of murder being drawn in regard to each. To that I attach no importance. It is more serious that all the accused are charged in regard to the killing, of Intaz and in regard to the killing of Bibijan, for those deaths were caused by particular members of the attacking party, and it is possible that they lay outside the common intention, at any rate that the killing of Bibijan did so.

48. At p. 345 Mukherji, J. remarked:Applying the Exceptions in Sections 235 and 289 Criminal P.C., all these charges could no doubt be legally joined; but it should be remembered that the provisions of these sections are merely enabling ones and if there is risk of embarrassing the defence, such joinder of charges should not be resorted to.

49. Further on at p. 346 he observed:In my opinion the accused were embarrassed in their defence and the jury misled and confused, and there has not been a trial of the case upon charges properly framed in consonance with the facts alleged by the prosecution. A multitude of charges not having any proper foundation, obscuring the case which the accused had got to meet, were put forward, and therefore there was no proper trial which the accused were entitled to under the law.

50. In the end, the Court ordered a re-trial. It may be noted that in that case, as in the one before us, no objection was taken at the trial itself. In a later case Emperor v. Ernamali A.I.R. 1930 Cal. 212 a Full Bench of the Calcutta High Court had occasion to refer to the Privy Council decisions in Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*and in Abdul Rahman v. Emperor *A.I.R. 1927 P.C. 44(SUPRA)* and at p. 217, Page, J. said:
Now, in 1901, Subramania Ayyar v. Emperor *(1901) 25 Mad. 61 (Supra)*was decided by the Privy Council. It was a plain case in which there had been a flagrant violation of a rule of

procedure enacted to prevent the prejudice that an accused person inevitably will suffer if he is called upon to answer in one trial a multiplicity of charges. In that case the failure to conform to the procedure laid down in the Code of Criminal Procedure clearly went to the root of the trial and vitiated it.

51. At page 218, he observes:Whether a particular breach of the procedure prescribed in the Code vitiates the proceedings or not, in my opinion must depend upon the gravity of the breach and the consequences that are presumed or proved to have flowed from it....

52. Then there is a Bombay case Queen-Empress v. Fakirapa (1891) 15 Bom. 491. There were four persons on their trial, all of whom were police officials. The charge against them was that during a police investigation into a case of theft, they illtreated and wrongfully confined one Hanma, his wife Rakhma, and his son-in-law, Yellia, with the object of extorting confessions from them and recovering the stolen property. They were charged with the following offences : (1) All the four accused persons were charged with an offence under Section 330, I.P.C., committed against Hanma, the charge covering several acts of violence alleged to have been committed against Hanma during his illegal confinement, which formed the subject of the second head of the charge. (2) All the accused with an offence under Section 348, committed against Hanma between 5th and 18th January 1889. (3) Accused 1 and 3 with an offence under Section 348 committed against the deceased Rakhma, wife of Hanma, on 5th January 1889. (4) Accused 3 with an offence under Section 330 committed against the deceased Rakhma on 14th January 1889; (5) All the accused with an offence under Section 330 committed against Yellia in the interval between 15th and 23rd January 1889. (6) All the accused with an offence under Section 348 committed against Yellia during the same period. (7) Accused 1, 2 and 3 with an offence under Section 346 committed against Yellia between 8th February and 9th March 1889. It was held that:If, in any case, either the accused are likely to be bewildered in their defence by having to meet many disconnected charges, or the prospeot of a fair trial is likely to be endangered by the production of a mass of evidence directed to many different matters and tending by its mere accumulation to induce an undue suspicion against the accused, then the propriety of combining the charges may well be questioned.

53. The principles thus laid down in the aforementioned case were cited with approval by this Court in Sanuman v. Emperor A.I.R. 1921 All 19(Supra).

54. In the present case, there were 99 witnesses for the prosecution and about 1,000 documentary exhibits. Our paper books alone contain 890 pages of printed matter. Having regard to all the circumstances, we are compelled to hold that the accused were embarrassed in their defence in having to meet a multifarious accumulation of evidence upon a diversity of counts, several of which were illegally joined in the trial. We wish to do justice to the investigating officers who must have devoted an immense amount of time, labour and care in collecting, sifting and co-ordinating this mass of evidence, but we think that before a prosecution of this character is

launched, legal advice ought to be taken lest the ends of justice be defeated.

55. It remains to be determined whether or not a re-trial should be ordered. Learned Counsel for the accused have strenuously pleaded against such action and they point out that, taking into consideration the investigation, the enquiry, the trial and the appeal, the case has been pending against the accused since 1932. This is unfortunately true, but if the plea of misjoinder had been taken at the earliest possible moment in the Court of the committing Magistrate, a very large amount of this time would have been saved. We naturally express no opinion on the merits and are not in a proper position to do so, since we have only heard a portion of the arguments for the defence, but the case is one of no little importance from the point of view of public morality and we think that, if we were to refrain from ordering a re-trial, such omission might encouarge fraud and dishonesty in others.

56. In the result we dismiss the Government appeal and the application for enhancement and we also allow the appeal of B.S. Vidyarthi, A.B. Tandon and Gopinath Singh, but we direct that these persons be retried on such charges and in such number of trials as the authorities may deem proper. Presumably the charges on which the accused have been acquitted and in respect to which the Local Government has not appealed will be dropped. We would suggest that advice of competent counsel be obtained before the case is again presented for trial. The bail bonds are cancelled.

Cases Referred.

1A.I.R. 1933 Pat 142
2A.I.R. 1932 All 18
3A.I.R. 1931 All 443
4(1910) 33 Mad. 502
5A.I.R. 1919 Bom. 111
6A.I.R. 1931 Pat 102
7A.I.R. 1919 Bom. 111
8(1901) 25 Mad. 61
9A.I.R. 1924 Lah 104
10A.I.R. 1927 P.C. 44
11A.I.R. 1930 Cal. 212
13A.I.R. 1933 All 264
14A.I.R. 1936 All 337