ALLAHABAD HIGH COURT

Nadir Ali Barqa Zaidi

Vs.

State of U.P

Criminal Appeal No. 541 of 1957 connected with Criminal Appeal No. 535 of 1957. against judgment of Addl. S. J. Moradabad at Bareilly

(B.R. James and S.N. Sahai, JJ.)

19.03.1957. 29.07.1959

JUDGMENT

B.R. James, J.

1. Nadir Ali Barq Zaidi, Abdul Hamid Khan, Wajid Ali, Pritam Singh, Shujat Ali Khan Rahher, Tulsi Das and Abdul Majid Khan were tried before the Additional Sessions Judge of Moradabad for offence which fell under three main heads : first, that during the period the 15th June 1952 to the 2nd August 1952 they along with some persons unknown were party to a criminal conspiracy to commit the offence of cheating in the towns of Moradabad and Chandausi and were thereby guilty of an offence punishable under Section 420 Indian Penal Code and third, that having been entrusted by various members of the public with sums of money they committed criminal breach of trust with respect to a sum of Rs. 11,701/10/9 out of the total amount entrusted, and were thereby guilty of an offence under Section 409 Indian Penal Code. The learned Judge found the charges not proved against Pritam Singh and Tulsi Das and hence acquitted them. He found the remaining five accused persons guilty of all the offences, with regard to the charge under Section 409 Indian Penal Code holding that they had committed breach of trust with respect to Rs. 6,795/11/9 only. He sentenced each of them to two years' rigorous imprisonment under Section 120B and to at similar term under Section 409. For the charge under Section 420 he held that Nadir Ali, Abdul Hamid and Wajid Ali were the principal offenders and accordingly awarded them each three years' rigorous imprisonment and a fine of Rs. 1,500/-. He considered that the part played by Shujat Ali and Abdul Majid was not so prominent, and therefore for the offence under Section 420 awarded them each two years' rigorous imprisonment and a fine of Rs. 1,500/-. In each case the imprisonment was directed to be concurrent. Nadir Ali, Abdul Hamid, Wajid Ali and Shujat Ali have preferred the present appeal against their conviction and sentences while Appeal No. 535 of 1957 is by Abdul Majid. The appeals originally came up for hearing before the Hon'ble A.N. Mulla, J. who was of opinion that in view of the gravity of the appellant's

offences the sentences awarded were inadequate; he therefore issued notice to them to show cause why these be not enhanced. The two appeals and the enhancement notice are before us for disposal.

2. At the very outset we would like to pay tribute to the trial judge for preparing a detailed judgment in which the voluminous oral and documentary evidence on the record has been thoroughly examined, classified and analyzed, and definite findings given on the numerous issues that the trial raised. His judgment has been of great help to us in deciding these appeals.

3. It is common ground that on the 15th June 1952 a partnership firm entitled "Bharat Helpers" was formed with its head-office in Moradabad town. The appellants Nadir Ali and Abdul Hamid, who it should be noted are residents of Rampur, were its disclosed partners. On their application the firm was registered with the Registrar of Firms, Lucknow, on the 10th July, 1952. It appears that each disclosed partner contributed a mere Rs. 500/- towards the capital of the firm. Subsequently two branches were opened in the town of Chandausi district Moradabad, one called the "Gate Branch" and the other the "Sarai Kham Branch". The prosecution allege that the appellant Wajid Ali, who is the uncle of Nadir Ali, was also a partner of the firm and was placed in over-all charge of the business in Chandausi. while Nadir Ali and Abdul Hamad managed the headoffice at Moradabad and also exercised general supervision over the branches in Chandausi. The prosecution further state that Shujat Ali was appointed the Manager of the two Chandausi Branches though he worked mostly at the Gate Branch, and that Abdul Majid was the person in immediate charge of the Sarai Kham Branch. Indeed this Branch was housed in his own place of residence.

4. The prosecution go on to state that from the very start Bharat Helpers was a fraud. By means of loud-speakers, posters, handbills and cinema slides the appellants falsely advertised this firm as a genuine Bank started with the object of satisfying the financial needs of the public. They publicized a bogus scheme, which may be described as the "monthly scheme", by which any person who made a deposit of Rs. 100/- with the Bank would receive Rs. 700/- in six monthly installments, the first installment, which would be of Rs. 140/10/-, falling due on the expiry of the first month. In addition a payment of one anna per rupee was asked for, ostensibly as the price of application forms, but actually was the commission of the promoters. Later, a second bogus scheme which may be called the "fortnightly scheme", was formulated under which any person who made a deposit of Rs. 100/- would receive Rs. 406/4/- in six. fortnightly installments, the first installment, which would be of Rs. 150/-, being payable 15 days after the date of the deposit. The promise to pay Rs. 700/- for Rs. 100/- in six months' time, or Rs. 406/4/- in three months' time was plainly startling, and would make most people suspicious. The prosecution case is that, in order to lull them into a false sense of security and to induce them to believe that payment would be made as promised and that their deposits would be safe, the appellants embarked on further fraud. What they did was to represent to the public that their concern was a Bank like other Scheduled Banks such as the Allahabad Bank, the Central Bank and the Imperial

Bank, that the schemes mentioned above had the approval of and had been registered with the U. P. Government, that the Directors of the concern had deposited large sums of money as security with Scheduled Banks, that it was a sound, solvent and stable banking concern which was carrying on business in foreign countries which yielded enormous profits and that it was these profits which would enable it to pay the depositors all the sums that had been promised on their deposits. All these representations were utterly false and were mere devices for obtaining money by false pretences.

5. The prosecution add that the appellants at the same time fraudulently and dishonestly suppressed from the public the true facts, namely, that 'Bharat Helpers' was a firm merely registered under the Indian Partnership Act, that its capital was a trifling Rs. 1,000/-, that it had no trade or business, foreign or otherwise; in particular, what was deliberately concealed was that the only way in which a depositor would be paid was from the deposits of subsequent depositors, and that the deposits of subsequent depositors would not be utilized in any profitable investment but purely in payment of money due to prior deposits.

6. It appears from documents on the record that the Gate Branch started receiving deposits on the 18th July 1952, the Moradabad Head office on the 21st July, and the Sarai Kham Branch on the 28th July. From the 18th July to the 2nd August 1952, 330 depositors made deposits of various sums of money, the total amount coming to Rs. 28,946/-. In addition they paid in all Rs. 1,694/5/- as commission to the firm in the shape of "cost of forms". The procedure was that when a person came to make a deposit he was given a certificate for a corresponding number of two-rupee units and was also given a receipt for the total amount paid by him. In addition he paid half-an-anna per rupee at the head-office, and one anna per rupee at the two Chandausi Branches, as the cost of forms, actually the commission of the firm. He was told that when the first instalment of his deposit fell due he was to present the certificate at the branch concerned and receive the appropriate amount. It will have been noted that whatever might be the ultimate fate of the depositors' money, the promoters of the schemes would make nothing but gain, for the amount of one anna or half-an-anna per rupee they realized as commission throughout remained safe in their pockets. To the credit of the appellants be it said that to a considerable extent they maintained regular accounts, and that about Rs. 17,000/- out of the deposits received by them was credited to an account in the Punjab National Bank, Chandausi, opened in the name of the firm.

7. The prosecution also allege that a number of depositors felt suspicious about the bona fides of the firm and consequently went to its appropriate office and demanded back the deposited money, but were met with a blank refusal. Leaders of political parties of Moradabad soon realised that Bharat Helpers, together with several other newly-started similar concerns, was a pure fraud and that soon a stage will come when it would be impossible for any depositor to get back his deposit, still less the promised instalments.

Accordingly they made reports to the police and demanded appropriate action. The police on the 2nd August 1952 made simultaneous raids on the three offices of Bharat Helpers, arrested those

found working therein and seized the papers and money found in each office. They recovered Rs. 1,206/7/- from the head-office, Rs. 98/3/3 from the Gate Branch and Rs. 451/10/- from the Sarai Kham Branch, total Rs. 1,756/4/3. In addition about Rs. 17,000/- of the firm was found in the Punjab National Bank and is still there.
Admittedly all these monies are part of the deposits made by individuals in response to the two schemes of the firm. It will have been noted that the police raid was made less than a fortnight of the making of the first deposit; that is to say, it was made before any installment under either of the two schemes had fallen due; hence it cannot be said that the firm had a chance of showing whether or not it would meet its obligations.

8. The prosecution declare that the firm 'Bharat Helpers' was started as a result of a criminal conspiracy between Nadir Ali, Abdul Hamid, and Wajid Ali solely to cheat the public, that pursuant to the conspiracy these persons committed various dishonest and fraudulent acts, and also suppressed true facts, and by these means induced members of the public to deliver to them large sums of money, money they had no intention of repaying, and that out of the monies entrusted to them they committed criminal breach of trust of a large sum. The prosecution add that shortly afterwards the appellants Shujat Ali and Abdul Majid too joined the conspiracy and pursuant to it committed acts of cheating and criminal breach of trust in the same manner as the original promoters.

9. The appellants deny committing any offence under Sections 120B, 420 or 409, Indian Penal Code. The pleas of Nadir Ali and Abdul Hamid are similar. They deny starting Bharat Helpers with any unlawful object; they state that on the contrary that they started this firm for the purpose of running a Bank legally and honestly, and with every intention of pitying to each depositor the various installments due to him. They disclaim making any false representation to anyone. They admit formulating what have earlier been referred to as the "monthly scheme" and the "fortnightly scheme", and state that they had every intention of implementing them. They assert that Rules and Regulations governing the two schemes were printed and were kept at the office of the firm and were distributed to persons who came there for making enquiries. They declare that these Rules and Regulations clearly stated that each depositor would be paid from the money deposited by subsequent depositors and further that this important fact was disclosed to every person who came to make enquiries. They admit that the firm was neither a Scheduled Bank, nor did it have securities with the Government or other Banks, nor that it had business in foreign countries. They allege that whenever approached by any suspicious depositor they unhesitatingly refunded to him his deposit money.

10. The appellant Wajid Ali disclaims all connection with, or any knowledge of, any criminal conspiracy. He denies doing any propaganda for the firm or inducing the public to make deposits. He explains that Nadir Ali (who is his nephew) and Abdul Hamid asked him to supervise the work of the two branches at Chandausi whenever he went there on his own business, and that it was pursuant to this that he visited Chandausi two or four times and did some supervision work.

But he denies receiving any deposit himself, and says that no deposit was ever made in his presence.

11. The appellant Sujat Ali pleads that believing Bharat Helpers to be an honest business concern he applied to Nadir Ali and Abdul Hamid for a post in it and from the 16th July 1952 was appointed to work as a clerk at the Gate Branch on Rs. 60/- per month. Later he was asked to furnish security, and because he could not do so owing to poverty he left the service of the firm on the 31st July 1952. He alleges that during his period a sum of Rs. 12,218/- was collected at the Gate Branch from depositors, and from day to day was deposited in the Punjab National Bank. He says that he was not the manager of the Sarai Kham Branch, but concedes that he went there twice for checking. He denied making any false representation to the depositors or committing any fraudulent or dishonest act. He suggests that he was a mere servant innocently carrying out orders of his employers.

12. The appellant Abdul Majid, it may be stated, was only sixteen years old when the Sarai Kham Branch was opened in his house in Chandausi town. He explains that since in those days he was preparing privately for the High School Examination he used to stay at home; Nadir Ali and Abdul Hamid told him that he should learn banking by working in the Sarai Kham Branch and that after he had learnt the work they would appoint him the permanent manager of that Branch. He accordingly started working as an apprentice there on the 28th July 1952, and continued to work until the police raid on the 2nd August 1952. He denies having any knowledge of the real objectives of Bharat Helpers and says that he did not receive any deposits by making false representations to anyone. He makes himself out as an unwitting tool in the hands of Nadir Ali and Abdul Hamid.

13. The prosecution case rests on the evidence of 43 witnesses and a large number of documents, while the appellants have in their defense examined 17 witnesses and filed a number of documents.

14. Now, it is common ground that Bharat Helpers apart from accepting deposits and promising to pay for every Rs. 100/- Rs. 700 in six monthly installments under the monthly scheme or Rs. 406/ 4/- in six fortnightly installments under the fortnightly scheme, had no trade, business or investments. The prosecution contend, and the appellants admit, that the fundamental idea of both the schemes was that each depositor would be paid from the deposits made by subsequent depositors, and that the deposits of the subsequent depositors would be utilized purely towards the payment of the dues of prior depositors. Being made to believe the schemes to be genuine a large number of persons from Moradabad and Chandausi made deposits. The question is : what were the representations which the promoters of the schemes made, or which material facts they suppressed, which, induced these people to make the deposits?

15. The answer to this question has been unequivocally given by a large number of prosecution

witnesses. These witnesses were mostly those who actually made deposits. As such they would be the natural witnesses of the representations, and would be speaking from personal knowledge. The defense have found it impossible to shake their credit. Even defense evidence corroborates them on material points. For example, Faiz Ali Khan (D. W. 2) says that Nadir Ali and Abdul Hamid told him that the firm had been registered as a Bank, and told the same to members of the public who made enquiries; Abdul Gafoor (D. W. 13) says that printed cloth posters were fixed all over Chandausi with the inscription "Bharat Helpers Bank (Registered)". Nadir Ali and Abdul Hamid have themselves admitted in their statements before the trial court that they had opened a "Bank" under the name of Bharat Helpers and advertised the same. It is not necessary for us to discuss the testimony of individual witnesses on the point except of three, viz., Aiyub Ilahi, Ram Swarup Tandon and Faiz Ali Khan, for their special importance lies in the fact that they were working as employees of the firm. Out of them Aiyub Ilahi and Ram Swarup Tandon have been produced by the prosecution and Faiz Ali Khan by the defence. Aiyub Ilahi worked first at the Gate Branch and then at the Sarai Kham Branch.

He declares that the accused Wajid Ali, Abdul Majid and Shujat Ali used to tell prospective depositors that their schemes were registered, that they had trade in foreign countries, that their security was in deposit with Government, that they used to make enormous profits from foreign trade and would pay the depositors from these profits and that their Bank was like other Scheduled Banks such as the Allahabad Bank. He himself made a deposit of Rs. 260/-, but got it refunded before the police raid. Ram Swarup speaks of hearing similar representations, and adds that they were made to him personally by Nadir Ali, who gave him a post in the head-office. He himself made a deposit of Rs. 60/-. He declares that if he had known that the aforesaid representations were false he would not have made the deposit or sought employment in the firm. It is worthy of note that on the vital statements made by these two witnesses with regard to the representations made by the accused persons they were not cross-examined at All. The defense witness Fiaz Ali who worked for a few days at the Gate Branch, says that no Rules and Regulations were in existence during his time and that the proprietors of the firm used to say that it had been registered as a Bank.

16. It has been argued on behalf of the appellants that the evidence with regard to their representations is purely oral and that the handbills etc. which they had issued and which have been filed in court do not contain them. The simple answer is that the very fact that the representations were false would be a sufficient deterrent to the appellants' putting them down in black and white; it is for this reason that in the handbills we find mention of little more than the terms of the two schemes. Even then there is documentary evidence of the true intentions of the promoters of the schemes; Ex. P10 is the standard printed certificate issued to each depositor; its opening words are: "Registered by the Govt. of U. P. The Bharat Helpers Moradabad. The Monitary Help Scheme;" the wording would give the reader the distinct impression that the scheme had been registered with the U. P. Government and therefore had the approval of the State authorities.

17. The allegation that Bharat Helpers was a "Bank", an allegation admitted by Nadir Ali and Abdul Hamid themselves, deserves a paragraph to itself. Under the Indian Banking Companies

Act only a "Bank" can do banking business; it must have a certain paid-up capital and reserves; it must transfer a given amount to a reserve fund; it cannot do tanking business unless it holds a licence from the Reserve Bank in this behalf. Thus the Indian law provides safeguards which make a Bank or Banking Company a stable and safe concern, and indeed no concern other than a Banking Company can use the word 'Bank' in its name. Consequently, when the public is told that a concern is a Bank, it would naturally be led to believe that it was clothed with all the incidents incumbent on a Banking Company and held a licence from the Reserve Bank for carrying on banking business. It is evident that by the mere fact of representation to the public that Bharat Helpers was a Bank and thereby inducing it to make deposits the promoters of the firm became guilty of obtaining money by false pretences.

18. Turning now to their commissions, we find the appellants Nadir Ali and Abdul Hamid stating that the schemes were contained in printed Rules and Regulations prepared by them, that these Rules and Regulations were distributed to persons who used to come to make enquiries and that it was written in them that depositors would be paid from the money deposited by subsequent depositors. These statements are totally false. The only Rules and Regulations we have been able to discover are contained in an Urdu sheet marked Ex. D66 and proved by a defense witness, Sardar Khan. There is not even a hint in this document of the mode of payment to a depositor; it merely lays down certain rules of procedure for making deposits; further it declares that the money of the concern would be invested in profitable business in Moradabad and that it would not be recoverable from the assets of its proprietors. These rules are essentially for safeguarding the interests of the proprietors of the firm. It is noticeable that no witness, not even a defense witness, has asserted that he was ever told that a depositor would be paid from the deposits of subsequent depositors or that the money of a subsequent depositor would go towards the payment of prior depositors. The promoters of the schemes had admittedly issued many handbills and posters and also utilized cinema slides for advertising them. It is exceedingly difficult to understand why, if they were honest, they did not proclaim as to where the enormous dividends they were promising would come from. We all know that when the promoters of a genuine company issue a prospectus and invite the public to subscribe to shares, they mention full details, including financial ones, of the work their company proposes to do, so that prospective share-holders know exactly where they stand. On the contrary the promoters of Bharat Helpers preferred to hide true facts. Other concealments they were guilty of were that they never mentioned that the concern was not a "Bank", that it had no securities, investments or foreign trade, that its total capital was a mere Rs. 1,000/- or that their schemes did not have the approval of Government. The concealment of such material facts could not but be dishonest.

19. The so called Rules and Regulations printed in Ex. D66 deserve further comment. The defence witness Faiz Ali has admitted that during his time in the firm no Rules and Regulations existed. Hence Ex. D66 came into existence long after the first deposits were received. Yet we find that from the very beginning depositors were made to use printed application forms - Ex. P7 is a sample of such forms - in which one paragraph runs :

"I have understood the rules and regulations of the Scheme which are quite clear to me, and I hereby agree to abide by them. No objection should be made to change the rules and regulations without notice legally binding on me."

In other words, the depositor was made to say that he had clearly understood the Rules and Regulations, which did not exist, and further that he would have no objection to their being altered without notice to him. This was pure fraud on people who possessed little or no education. It might here be pointed out that Ex. P7 is in English, a language of which scarcely any of the depositors would have the least knowledge.

20. Nor was there consistency in the representations made to many of the depositors. Ex. P10, which is a sample of the standard deposit certificate, has on its back a term which lays down that Rs. 14/- would be the maximum payable on a deposit of Rs. 2/-; that is to say, it would be open to the firm to pay less than the promised seven times. Then, we have it from the lips of Kallan, Abdul Rahim, Teni and Nabban. all witnesses called for the defense, that what they were told was that they would receive seven times the deposit money in one month's time, and account books reveal that this information - undoubtedly totally false and dishonest - yielded a large number of new deposits. Again, the defense witness Gauhar Ali says that he was told that he would get Rs. 700/- for Rs. 100/- in five months, and that Shujat Ali confirmed this. A similar statement is made by another defense witness, Safdar, who attributes the false information to Nadir Ali. Coming as these assertions are from defense witnesses themselves it is not open to the appellants to say that they had adhered to fixed principles or that they had not been making different representations before different persons. This is yet another indication of their dishonesty.

21. On a consideration of the evidence on the record we find it established that the promoters of Bharat Helpers and their associates represented to the public that this concern was a Bank which was registered with Government, that its schemes were similarly registered, that it was a Scheduled Bank like other well-known Banks, that it had securities deposited with Government and other Scheduled Banks and that it had foreign trade which brought in enormous profits from which the depositors would be paid. At the same time the actual mode of payment of the promised installments was kept carefully concealed, as were also suppressed other material facts. Besides, the promoters acted without any Rules and Regulations, and took false declarations from depositors that they had understood the Rules and Regulations. Also, different people were given different information about the schemes, information which in several instances was at variance with the advertised schemes.

22. We might here notice the argument of the appellants that whenever they were approached by any depositor who felt suspicious they refunded to him his deposit and that this ought to be taken as evidence of their good faith. At the trial they produced a number of witnesses in an attempt to

show that on their request their deposit money was refunded to them. The learned trial judge carefully examined the oral and documentary evidence on the point, and after giving the benefit of every reasonable doubt to the appellants, came to the conclusion that deposits had been refunded to only five persons, viz., Nibban, Gauhar Ali, Aqil Khan, Imamuddin and Abdul Ghafoor. The deposits of two others, viz., the prosecution witness Aiyub Ilahi and one Baburam (who was not a witness), were also judged by him to have been repaid. At the same time he held that the claim of repayment by seven defense witnesses was absolutely false. He came to this conclusion on the basis of the receipts Exs. D32. D36, D37, D38, D39, D40, and D41 produced by them. We have no hesitation in accepting the learned Judge's finding on this point. These seven receipts, all of which bear endorsements of the appellants Wajid Ali and Sujat Ali, relate to deposits made on the 1st August 1952 but the supposed repayment of the amounts is shown on them as of the 30th July 1952; that is to say, repayment is supposed to have been made two days before the actual deposit. The endorsements are patently forgeries. As a result we look with much suspicion on the documents relied on by the appellants for pleading repayment. Positive evidence goes contrary to the appellants' plea, for we find the prosecution witnesses Ram Rakshpal, Ram Prasad, Ram Sevar, Mohammed Umer and Bhagwat Saran and the defence witness Sukh Dayal definitely stating that they asked for refund of their money but were not repaid. The defence witness Abdul Ghafoor is the only person who alleges that the appellants announced that if anyone had suspicion he could take back his money, but his cross-examination makes it clear that he asked for his money back only when political leaders told him that Bharat Helpers was against law.

There is another aspect of the question. After making due allowance for the money of the firm in the Punjab National Bank, its proved expenses and the money seized by the police at the raids, the trial judge has found that Rs. 6,795/11/9 out of the total sum deposited remains unaccounted for and that this should be in the hands of the promoters of the firm. Clearly this amount would be available to them for distribution to the depositors, and had their intentions been above board they would have distributed it as soon as they were released after the police raid. But admittedly they did not pay an anna. The argument of good faith is without foundation.

23. The question now arises: On the facts as found by us can offences of cheating under Section 420 Indian Penal Code be held to have been committed? Cheating has been defined by Section 415 in these words :-

> "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

An explanation has been added to the section which lays down that :-

"A dishonest concealment of facts is a deception within the meaning of this section." Further, it is enacted that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person commits an offence punishable under Section 420. "dishonestly" meaning doing anything with the intention of causing wrongful gain to one person or wrongful loss to another - vide Section 24 Indian Penal Code

24. Applying this law to the established facts of the present case we have no doubt that the promoters of Bharat Helpers and their associates cheated a large number of persons and thereby dishonestly induced them to deliver money in the form of deposits. We have already mentioned the false representations they made to the public, including the representation that the firm was a Bank and its schemes approved by Government; at the same time they concealed material facts, specially the fact of how a depositor would be paid from the money of subsequent depositors and that the money of subsequent depositors would be utilized for payment to prior depositors. They further suppressed the material facts that the concern was not a Bank, that it had no trade domestic or foreign, or investments, or that its capital was very sm All. Witness after witness has declared that if these representations had not been made to him, or if he had been told that his money would go towards the payment of prior depositors or that he would be paid from the money of subsequent depositors, he would not have made any deposit. Some witnesses have added that while there was large-scale propaganda by the promoters of the firm there was no counter propaganda on behalf of the State, hence they had no reason to disbelieve the representations which were made. Witnesses have also stated that if the aforementioned material facts had not been kept concealed from them they would have refused to make deposits. Added to all this is the fact that although they had over Rs. 6,700/- in their hand even after the police raid, the proprietors of the firm scarcely paid any one but on the contrary refused payment to those who approached them. Consequently they cannot be heard to say that they acted in good faith. Other evidence of their mala fides is furnished by their obtaining false declarations from depositors on the application forms, and by making different representations to different persons. These circumstances lead irresistibly to the conclusion that each deposit was obtained by cheating and thereby dishonestly inducing the person concerned to deliver his deposit money to the firm. The offence under Section 420 Indian Penal Code is clearly established.

25. Turning now to the charge of criminal conspiracy, we find that Section 120A, Indian Penal Code provides that when two or more persons agree to do, or cause to be done, (1) an illegal act, (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy, while Section 120B enacts that whoever is party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall be liable to punishment.

The essence of criminal conspiracy is an agreement to do an illegal act, for instance, commit cheating. Such an agreement can be proved either by direct evidence or by circumstantial

evidence or by both. It is not necessary that there should be express proof of the agreement, for from the acts and conduct of the parties the agreement can be inferred. For instance, if it can be proved that the accused pursued by similar acts the same object often by the same means, one performing one part of the act and the other another part of the same act, so as to complete it with a view to the attainment of the object which they were pursuing the court will be at perfect liberty to conclude that they had conspired together to effect that object. Proved acts of cheating by various persons belonging to one group at various times at various places by the same devices would furnish strong evidence of the existence of a conspiracy to cheat, as also of the membership of those persons of the conspiracy. In the case before us there is no direct evidence of a conspiracy to cheat. But the conclusion from the circumstantial evidence is unmistakable. Here we have a partnership firm, Bharat Helpers, started as a Bank. Its capital was trifling. It had no investments or trade. It promised incredibly high profits on deposits. A large number of persons made deposits at one or the other of its three branches. This was done at various times on various dates. Depositors came forward because of certain false representations made to them and because material facts were kept concealed from them. By this deception they were induced to deliver their money to the firm and hence were cheated. The same or similar acts of commission and omission were done in respect of the various depositors. These acts were done by one or the other of the persons associated with the firm. The conclusion is irresistible that the cheating was the result of an agreement between these persons to commit the offence of cheating, so that all such persons would be guilty of criminal conspiracy to cheat. It follows that each one of the appellants who is found to have participated in the aforesaid deception and realized deposit money must be held to be a party to the criminal conspiracy, and would in consequence be liable to punishment under clause (1) of Section 120B Indian Penal Code of the several acts of cheating committed in pursuance of the conspiracy.

26. We proceed now to examine the evidence against each appellant and decide if his guilt of these offences is proved. We might point out at the very outset that, in view of what we have observed before, the very fact that a person is found connected with Bharat Helpers in a proprietary or managerial capacity would be convincing proof of his guilt - it might be open to mere clerks or similar employees to plead absence of mens rea, but such a plea would not hold water in the case of proprietors and managers, especially if positive evidence was forthcoming that their participation in the deception had been direct.

27. The participation of Nadir Ali and Abdul Hamid in the criminal conspiracy, and in the many acts of cheating committed pursuant to it, cannot admit of the slightest doubt. They were the two disclosed partners of Bharat Helpers, and indeed were its founders. The two schemes for receiving deposits were initiated by them and given wide publicity. They took a leading part in making false representations and in suppressing material facts, and doubtless this deception was the child of their brain. They worked without any Rules and Regulations, and have falsely stated that Rules and Regulations existed and were communicated to depositors. Equally false is their assertion that each depositor was told that he would be paid his installments from the deposit of

subsequent depositors. They received and handled the money obtained as deposits. They operated the firm's account in the Punjab National Bank. They had complete charge of the "business" done at the Moradabad office. Additionally, they opened branches at Gate and Sarai Kham in Chandausi. They appointed managerial staff there. They exercised general supervision over those two branches. The work done there was of precisely the same nature as that at the Moradabad head office. They can rightly be termed the principal offenders.

28. Wajid Ali, despite his protests of having been merely a casual supervisor of the branches at Chandausi, has been held by the learned trial Judge to have been a proprietor of the firm and to have had complete charge of those two branches. His complicity is established by both documentary and oral evidence. The head-office cash book shows that on the 10th July 1952 he had accompanied Nadir Ali and Abdul Hamid to Lucknow when they were there for getting the firm registered. He has admitted his signature on many documents of the Chandausi Branches. Many of these bear his signature above the word "Manager". In the Inspection Book of the Gate Branch there is an inspection-note written and signed by him, dated the 26th July 1952, which shows that he was making inspections of the branches and issuing instructions. He was present in the Gate office when the police raid took place on the 2nd August 1952. Proved papers show that he was appointing staff at the Gate Branch and working as its effective Manager. Indeed, the papers disclose that far from making casual supervision he was throughout considered by the staff of the Branches as the Manager, and the staff took orders from him. The Punjab National Bank has reported that he was authorised to operate the firm's account with it. Ram Prasad (P. W. 14) who deposited about Rs. 1,400/-, alleges that Wahid Ali announced that he had opened a Bank and made the other false representations already mentioned; the witness further states that he always saw him working at the Gate Branch. All the prosecution witnesses who have referred to him declare that he represented himself as a proprietor of the firm, an allegation fully confirmed by defense documents like Exs. D33, D45 and D46 wherein he has signed himself as "Proprietor". He made false representations to many. The forged receipts Exs. D-32, D36, D37, D38, D39, D40 and D41, to which reference has already been made, bear his signature and endorsement, and show that not only was he doing the actual work at Chandausi but was not above forging documents intended to falsely show that certain persons had been repaid their money. We have no hesitation in agreeing with the learned trial Judge that Wajid Ali worked at the Chandausi branches in his capacity as a proprietor of the firm, and indeed we class him with Nadir Ali and Abdul Hamid as one of the principal offenders.

29. Sujat Ali's plea that he was merely an innocent clerk at he Gate Branch - the implication being that he was unaware of the nature of the business of Bharat Helpers - cannot hold water. A large number of documents of that branch go to show that he occupied the post of its manager and was working as such. He accepted a large number of deposits and issued receipts and certificates in respect of them. He himself admits going to the Sarai Kham Branch twice for checking. Witnesses, for instance Aiyub Ilahi, state that he was among those who made false representations to enquirers and depositors.

He along with Wajid Ali was the person who endorsed repayment on the forged receipts Exs. D32, D37, D38, D39, D40 and D41. Since these receipts were for deposits made on the 1st August 1952 there is obviously no substance in his contention that because he could not furnish security owing to poverty he left the service of the firm on the 31st July 1952. His most recent stand is somewhat different for in his representation to this Court dated the 20th April 1959 from Jail he says : "When it came to the knowledge of the applicant (i.e. Sujat Ali) that this is a bogus firm, the applicant resigned from the service of the firm on 31-7-1953 (it should be 31-7 1952)." It should be clear from this statement that he had knowledge of the true nature of the firm even while he was working as one of its branch managers. Not only did he actually participate in the fraudulent business of the firm but went to the length of forging documents intended to serve as a shield for accused persons. His participation in the criminal conspiracy and cheating cannot admit of any doubt, and we consider his complicity in it to have been only second to that of the proprietors of the firm.

30. With regard to Abdul Majid the trial Judge found it established that he had authority to pass, orders as manager-in-charge of the Sarai Kham Branch. It is not disputed that this branch was opened on the 28th July 1952 and stopped working on the 2nd August 1952 when the police raid took place. Aiyub Ilahi, who worked as clerk in this Branch when it was opened, deposes that Abdul Majid was the working proprietor of the branch, while Majid himself pleads that he was a mere apprentice, having been promised the managership on his learning the work. In our opinion the truth lies somewhere in between. Deposits were admittedly received by Majid and receipts and certificates issued by him. Indeed, under him the "business" of the branch appears to have been highly successful for within the short period it functioned it received deposits amounting to as much as Rs. 8,216/-. Ex. P. 226 is an application for a post by one Rajkishore which bears an order by Majid who has described himself as 'in charge, Bharat Helpers." In all documents which bear his signature he has signed as 'for manager.' We cannot overlook that at that time he was only 16 years old. We are therefore led to the conclusion that he was acting as the de facto manager of the Sarai Kham Branch under the direct supervision of Wajid Ali and Shujat Ali. Nonetheless, there is positive evidence that he too made false representations to depositors. In these circumstances we hold him to have been a member of the conspiracy and to have committed cheating, but compared to the other appellants to have played a relatively minor part in those offences.

31. We turn now to examine the various contentions with regard to the charges under sections 120B and 420 put forward by Mr. D. P. Agarwala, principal counsel for the appellants. He says in the first place that neither of the schemes was fraudulent, and he argues that each was a "snowball" scheme which if allowed by the authorities to be carried on would have attracted depositors in increasing numbers and in consequence each depositor would have unfailingly received his installments in due time. What Mr. Agarwala forgets is that by its very nature either scheme was bound to fail, for a stage must come when no further depositor would be forthcoming and the bubble would burst.

This is demonstrable by simple arithmetic : in the monthly scheme a man depositing Rs. 100/- could be paid only if six further depositors came forward with Rs. 100/- each; to pay those six would require 36 fresh depositors; to pay those 36 would require 216 more; to pay those 216 would require 1,296 more, and so on, the number increasing by geometrical progression in multiples of six. Plainly the entire public and their funds would be exhausted before long. Be that as it may, what Mr. Agarwala has put before us is a purely hypothetical question, for the basis of his argument is that what was placed before the public was an unvarnished 'snow-ball" scheme. But the facts of the instant case are otherwise; the present was not such a scheme; what we have found is that depositors came forward in large numbers because of the misrepresentations made to them and because of the facts which had been dishonestly concealed from them. It is therefore not necessary for us to express any opinion on whether or not a pure and simple "snow-ball" scheme would by itself be contrary to law; what we have to see is whether the schemes of the appellants coupled with their dishonest representations and concealments were in violation of law. Mr. Agarwala has cited *Durgadas Radhakisan v. Emperor*[1]*, Jatindra Nath Sircar v. Emperor*[2]*,* and *Radha Ballav Pal v. Emperor*[3]*,* These decisions no doubt relate to schemes which were in the nature of 'snow-ball' schemes; nonetheless they do not give any assistance to Mr. Agarwala, for in none of them was there any fraud or misrepresentation, nor any inducement to obtain money by false pretences whereas the case before us is just the contrary. We are prepared to agree that the mere fact that a financial scheme is a highly speculative one does not necessarily make it dishonest or fraudulent, but in the instant case the highly speculative nature of the appellants' schemes was, reinforced by fraudulent acts and omissions on their part, and it is this that must bring them within the clutches of the law in respect of cheating. Our view has the support of the decision in *Hari Das Barat v. Emperor*[4]*,*

32. Mr. Agarwala then urged that the impugned schemes amounted to mere misrepresentation of future facts hence did not amount to cheating, and he relies on this sentence in Halsburys Laws of England (3rd Ed. Vol. 10 P. 824) :

> "The false pretence must be of a fact that exists or has existed."

Assuming that this is the correct statement of the law, we do not consider that it helps Mr. Agarwala, for his argument is based on a misconception of the facts. The test is not that the appellants falsely promised to pay seven times or four times the deposited amount on a future date, but that they were guilty of false representation or dishonest concealment of existing facts at the time they induced the depositors to part with money; it cannot therefore be said that their false pretence was confined to the future. In truth, Halsbury's statement of the law does not apply to India, for false pretence in English law is narrower in its application than what is contemplated by "cheating" in Section 415 Indian Penal Code. A promise as to future conduct not intended to be kept is not by itself cheating under English law, but under our Penal Code this will amount to cheating, as is clear from a reading of Illustrations (f) and (g) to Section 415. The law relied on by Mr. Agarwala on this point is not sound.

33. Mr. Agarwala next argues that the appellants may have made false representations or false concealments of fact but did not do so dishonestly hence cannot be brought within the mischief of Section 415 Indian Penal Code, and he relies on the definition of the term "dishonestly' in Section 24. Under Section 24 whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly". Now, Section 23 provides that 'wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled, while "wrongful loss" is loss by unlawful means of property to which the person losing is legally entitled. In the case before us the appellants used unlawful means, that is, deception or false pretences, to obtain money from depositors to which they (viz., the appellants) were legally not entitled, and similarly caused loss to the depositors of money to which they (viz., the depositors) were legally entitled. Consequently by virtue of Sections 23 and 24 the appellants acted dishonestly and hence become punishable under Section 420. In this

[1] AIR 1934 Bom 48 [3] AIR 1939 Cal 327

[2] AIR 1936 Cal 440 [4] ILR 1939 (2) Cal 81

connection we might refer to the case of *In re M.K. Srinivasan*[5], where the accused had issued a company prospectus and as a result had induced persons to purchase shares; it was found that there, were some material omissions from the prospectus which rendered the impression given by it as completely false; it was held that the accused had committed fraud and that the offence of conspiracy to cheat was complete.

34. The next argument of Mr. Agarwala is that the depositors deposited money not because of the false representations of the appellants but because of their own greed. The argument is devoid of substance, for he has not been able to show us any evidence on the record that the deposits were made through the greed of the depositors, nor is there any legal presumption that human beings are invariably actuated by cupidity. On the contrary the evidence positively is that deposits were made on account of the false representations and dishonest concealments made by the appellants, and that had this not been done depositors would have failed to come forward. We might add that in our opinion the success of the appellants was due mainly to the fact that they knew that, playing upon the "get rich quick" mentality of many people, they would succeed in finding a good many gullible members of the public whose credulity would not be able to withstand their representation and suppression of facts provided these were sufficiently unscrupulous, subtle and dishonest.

35. Again, Mr. Agarwala contends that at the time the appellants made their representations or concealments they had no dishonest intention, and he goes on to say that they had every intention of implementing the schemes honestly, and in support of these pleas he submits that Nadir Ali had himself made deposits in a similar bank at Rampur which had been started earlier, that his firm did refund the deposit money to five depositors and that it maintained proper accounts. We have already shown that sooner or later the schemes were bound to fail - a fact of which the appellants were assuredly aware. Besides, the factual data on which Mr. Agarwala relies are

illusory. By starting Bharat Helpers Nadir Ali stood to make a mere 6 ? per cent. on the deposits received by him whereas in the Rampur bank he was due to make 600 per cent. every six months; surely it would be more reasonable to expect him to rest content with his fantastically profitable investment at Rampur instead of making a trifling amount at Moradabad, and that too after a great deal of hard work. Moreover it is arguable that having learnt the art of cheating from the activities of the bank at Rampur he decided to himself start similar activities in Moradabad. As to the five depositors repaid by the appellants, we have already shown that many more were refused payment or repayment receipts forged.

With regard to the allegation of the proper maintaining of accounts we cannot refrain from pointing out that, as held by the Sessions Judge, the large sum of Rs. 7795/11/9 has been left unaccounted for, Intention can only be gathered from the surrounding circumstances. Many of these we have already referred to. We have also pointed out that although the appellants had a large sum of money available they took no steps to repay the depositors barring a paltry five. Contrary to what Mr. Agarwala urges, the surrounding circumstances leave no doubt in our minds as to the dishonest intentions of the appellants.

36. Mr. Agarwala's final contention is that the trial was bad for multifariousness inasmuch as 26 separate instances of cheating were tried together whereas by virtue of Section 234

[5] AIR 1944 Mad 410

(1) Criminal Procedure Code only three could be tried at one trial. The objection is fully answered by the decision of the Supreme Court in *Swamirathnam v. State of Madras*[6], and need not detain us any longer.

37. The various contentions of Mr. Agarwala having thus been found to be untenable it must be held that the appellants have been rightly convicted of the offences under Sections 120B and 420 Indian Penal Code.

38. But their conviction under Section 409 Indian Penal Code is seriously open to question. Under this section a "banker" being in any manner "entrusted" with property commits an offence if he dishonestly misappropriates or converts to his own use that property. The word "banker", it may be pointed out, has not been used in this section in the technical sense of the Indian Banking Companies Act, but signifies any person who discharges any of the functions of the customary business of banking, and would therefore include a firm, like Bharat Helpers. Now, in the customary business of banking there are instances where the banker is entrusted with property and acts as its trustee.

Well-known examples of this are : a person delivers his jewellery to the banker for safe custody; a person delivers his share-scrips to the banker for sale when the market becomes favorable; a person takes a loan from the banker and pledges his goods with him as security. In such cases if the banker commits dishonest conversion of the jewellery or the scrips or the goods he becomes liable under Section 409. But a banker in the course of his customary business also accepts deposits of money and is only bound to repay it to the depositor on demand or after a given

period depending on the terms of the contract governing the deposit. In such a case the question arises as to whether the banker can be said to have been "entrusted" with the deposit money. The answer depends on the true nature of the relationship between the banker and the depositor. The Privy Council in *Attorney-General of Canada v. Attorney-General of the Province of Quebec*[7], following the House of Lords, have described the relationship as follows :-

> "The relation between a banker and the customer who pays money into the bank is the ordinary relation of a debtor and creditor with a super-added obligation arising out of the custom of tankers to honour the customer's drafts .....Once the deposit is made there remains only a debt due from the banker to the customer.....Money deposited with a bank is also not trust money which the trustee must preserve and not use; on the contrary it is lent for use and the bank is not a trustee but a debtor to the depositor."

In the instant case the deposits which the depositors made with the appellants was in the capacity of the latter as bankers. It follows that the appellants a cannot be deemed to have been "entrused" with the money of the depositors; instead they remained merely their debtors. Since entrustment is the essence of an offence under Section 409 they cannot be said to have committed criminal breach of trust by dishonestly misappropriating or converting to their own use the deposited amounts.

39. Another consideration would go to show that in the present case there was no entrustment of the depositors' money. This stems from the fact that it was obtained by

[6] AIR 1957 SC 340
[7] AIR 1947 PC 44

cheating. In *Emperor v. John McIver*[8], a Full Bench case, it was
held by a majority that there is no entrustment within the meaning of Section 405 when property is obtained by cheating. We are in respectful agreement with this view. The following passage from the judgment of Cornish, J., at page 359 of the report is worth quoting :-

> "The notion of a trust in the ordinary sense of that word is that there is a person, the trustee or the entrusted, in whom confidence is reposed by another who commits property to him; and this again supposes that the confidence is freely given. A person who tricks another into delivering property to him bears no resemblance to a trustee in the ordinary acceptation of that term; and Section 405 gives no sanction to regard him as a trustee. The Illustrations to the section show that it is intended to cover the case of property honestly obtained by the person entrusted with it and subsequently dishonestly misappropriated by him in breach of his trust. As I have already said, the essence of criminal breach of trust is the dishonest conversion of the property entrusted. But the act of cheating itself involves a conversion. Conversion signifies depriving the owner of the use and possession of his property.

When the cheat afterwards sells or consumes or otherwise uses the fruit of his cheating he is not committing an act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he practiced to get hold of the property."

40. There is yet another aspect of the matter, at issue. Even if it be assumed for the sake of argument which in view of the above statement of the law we cannot - that the appellants were entrusted with the money of the depositors, they cannot be held guilty under Section 409 unless it can be shown that they dishonestly converted the money into their own use in violation of any legal contract with the depositors. It is the case of the prosecution themselves that the contract between the present parties was that the first installment of the money would become payable only a month or a fortnight after the deposit (depending on whether, the deposit was under the monthly scheme or the fortnightly scheme). Thus the earliest that a violation of the legal contract could take place was a fortnight after the deposit. But it is common ground that the police raid, which terminated the activities of the appellants, took place before the expiry of that period. The raid rendered the performance of the contract physically impossible. It follows that it cannot be held that the appellants committed breach of the contract and therefore breach of trust.

41. For these reasons we find it impossible to uphold the conviction of the appellants for the offence under Section 409, Indian Penal Code.

42. We turn now to the enhancement notice issued to them. We agree with our brother Mulla that their offence was of a henious nature inasmuch as theirs was a well planned conspiracy to defraud a large number of members of the public and especially, as disclosed from the evidence, people of little or no education. Therefore under normal

[8] AIR 1936 Mad 353

conditions we would not have hesitated to enchance the sentences, at least those of the principal offenders. Nevertheless there are circumstances which compel us to forbear.

The offence is of 1952. There was delay in the police investigation, e.g., Shujat Ali and Abdul Majid were not arrested until 14 or 15 months after the police raid whereas there is nothing to suggest that they were absconding. After the order of commitment had been passed the sessions trial did not start until two years afterwards. There is nothing to indicate that the appellants in any way indulged in delaying tactics. This appeal has come up before us about 27 months after the trial judge's judgment. After this long passage of time, for which the appellants cannot be blamed, we do not think that we would be justified in enhancing their sentences. Hence the enhancement notice is discharged.

43. There is no cause for interfering with the sentences passed on Nadir Ali, Abdul Hamid, Wajid Ali and Shujat Ali. But we consider that an exception in the case of Abdul Majid would be justified. His learned counsel, Mr. P. C. Chaturvedi, has made an application that in case we find his guilt established we might give him the benefit of Section 4 of the First Offenders Probation Act. After hearing everything that Mr. Chaturvedi had to say in favor of this appellant we do not

think that he deserves leniency to this extent. His part in the conspiracy, though minor, has been of sufficient significance to warrant more than nominal punishment. But we agree that in his case there are extenuating circumstances. He was only 16 years old at the time of his offence. He worked only at the Sarai Kham Branch which functioned for just five days. Throughout he was acting under the supervision of Wajid Ali and Shujat Ali. The evidence does not disclose that the conspiracy brought him any financial gain. He is at present a student in a University, and if he is sent back to jail his career may be irretrievably ruined. He has already spent some time in jail as an under trial prisoner and has also served out about a week of his sentence. Accordingly we consider that the fine imposed on him by the trial court together with the period he has already served in jail will be adequate punishment for him so that we refrain from sending him back to prison.

44. In the result we set aside the conviction and sentence of each appellant under Section 420 Indian Penal Code. We uphold Abdul Majid's conviction under Sections 120B and 420 Indian Penal Code and while affirming his fine under Section 420, Indian Penal Code we reduce his imprisonment under that section and Section 120B to the period already undergone. He need not surrender, but must pay up his fine without delay.

45. Before we conclude we have to give directions with regard to the sum of about Rs. 17000/- which is with the Punjab National Bank and the cash which was recovered from the three offices of Bharat Helpers in the police raids. This money is admittedly part of the deposits made by the various depositors. Since the latter were the victims of fraud it is only fair that as much of their money as possible be restored to them. Accordingly we direct the District Magistrate of Moradabad to divide the amount among the depositors pro rata, except that the following shall not receive anything :-

> (a) Nabban Gauhar Ali, Aqil Khan, Imam Uddin and Abdul Ghafoor, persons whose deposit money has been held to have been refunded to them;
> (b) Aiyub Ilahi and Baburam, whose deposits have admittedly been returned to them; and
> (c) the holders of the forged receipts Exs. D32, D36, D37, D38, D39, D40 and D41, for these persons attempted to play a fraud upon the Court by falsely claiming that the money covered by these receipts had been returned to them, and we cannot allow them to derive any benefit from their fraud.

Order accordingly.