Emperor Vs Ramchandra Rango Sawkar

Court: Bombay High Court

Date of Decision: Oct. 6, 1938

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 195(1)(b), 233
Penal Code, 1860 (IPC) â€" Section 109, 408, 477A

Citation: AIR 1939 Bom 129 : (1939) 41 BOMLR 98

Hon'ble Judges: Wassoodew, J; Sen, J

Bench: Division Bench

Judgement

Wassoodew, J.
The seven accused-appellants have been convicted by the Additional Sessions Judge of Dharwar upon various charges

relating to the embezzlement of funds of the Dharwar Bank, Limited, and fabrication of accounts and evidence. Accused Nos. 2 and 3, who were

the directors of the bank, were convicted of the offences punishable under Sections 408, 409 and 193 and also 477A read with Section 109 of

the Indian Penal Code; accused Nos. 1, 4, 5 and 7 who along with accused Nos. 2 and 3 as partners in Joshi & Co., were conducting Shri Ram

Cinema Company, were convicted of the offences punishable under Sections 408, 409 and 193 and also 477A read with Section 109 of the

Indian Penal Code; and accused No. 8, the manager of the bank, of the offences punishable under Sections 408 and 409 read with Section 193

and also 477A of the Code. Upon a complaint by the present general manager of the Dharwar Bank, Limited, this prosecution was commenced

with the sanction of the board of directors of that bank. Accused No. 8, who was the manager of the bank from 1918 to 1932, and also the two

directors, accused Nos. 2 and 3 the former of whom was also a treasurer of the bank at the material time, were charged with the substantive

offence of criminal breach of trust committed in respect of six sums of money belonging to the bank at different times : Rs. 365 on or) about

November 23, 1930; Rs. 494-8-0 on January 12, 1931; Rs. 1,000 on January 20, 1931; Rs. 142 on February 2, 1931; Rs. 154-11-0 on March

31, 1931; and Rs. 303-12-0 on April 21, 1931,Ã¯Â¿Â½the misappropriation covering a period of nearly five months. The remaining accused were

charged with having abetted the other accused in the commission of the said offences of criminal breach of trust. Accused Nos. 1 to 7 were further

charged with having prepared a false document on or about November 13, 1931, with the object of escaping immediate liability to the bank in

respect of Rs. 30,000 which was part of the loans debited in the current account of their firm known as Joshi & Co., in the bank and made without

security and proper authority. Accused No. 8, the bank manager, who it was said had abetted the fabrication of the said document, was also

charged with the substantive offence of falsification of accounts to cover the amount of the bond in question. The remaining accused were also

charged with having abetted the bank manager in the commission of the offence of fabricating false account. The complaint was made on October

22, 1934. The trial in the Sessions Court commenced on June 22, 1936, and ended in the conviction of the accused on December 10, 1936. The

appeals were filed in the High Court somewhere in February, 1937, and the accused who were subsequently released on bail had by then

undergone part of their sentence by nearly seven months. The delay in the hearing of these appeals has been principally due to the printing of the

voluminous record of evidence and documents relied upon at the trial.

2. The material facts giving rise to this prosecution, so far as a statement thereof is relevant for the present purpose, are these :Ã¯Â¿Â½The Dharwar

Bank, Limited, at whose instance, as I have said, the complaint was originally lodged, was established on May 8, 1896, and registered under Act

VI of 1882. According to its constitution, its business was originally entrusted to eleven directors elected by its shareholders. One of these

directors, was elected as managing director, and another treasurer, who at the initial stage were the only persons conducting the daily business of

the bank. In 1901 a manager was appointed for the first time to conduct its ordinary business. It appears that in 1909 a branch of the bank was

opened at Hubli where accused No. 8 was first appointed, as a clerk in 1910. In course of time he succeeded to the position of manager there.

His services were transferred to Dharwar in 1918 as manager. It may be noted that upon the opening of the branch at Hubli the Dharwar Bank

was under the direct supervision of seven out of the eleven directors, four of whom being deputed to supervise the business of the Hubli branch. It

is in evidence that in June, 1919, one Rao Saheb A. K. Katti and Section Rule Malapur were appointed directors of the Dharwar Bank, of whom

the former was elected as managing director, and he continued as such till March, 1932, when owing to proceedings in liquidation and the

resolution of the shareholders signifying want of confidence in the management, the old directorate resigned. From a perusal of the articles of

association it seems to have been intended that the bank''s business should be managed by the directors who were clothed with full powers of

management, the bank''s business consisting principally of receiving fixed and current deposits and lending money to shareholders and others on

promissory-notes and bonds on personal and other security. In the exercise of their powers resolutions were passed by the directors from time to

time for the regulation of business, particularly in relation to loans and overdrafts to the bank''s constituents. It is important to note that the

managing director had limited powers to grant loans on his personal responsibility to shareholders and that too upon approved security, the power

to sanction loans in excess of Rs. 100 resting with the board of directors. The bank manager himself had no authority to grant loans, except small

hand loans known as ""Chokun loans"" without the previous, sanction of either the managing director or the board as the case may be. As regards

loans, overdrafts and renewals, the practice was to apply to the bank in a form prescribed for the purpose stating what security, if any, was

procurable and offered. Thereupon the bank manager reported in the column printed at the foot of the application form whether in his opinion the

application should be sanctioned, and it was thereafter circulated among the directors for their sanction. Upon such sanction the applicant was

permitted to operate on his current account within the amount sanctioned. In that way the bank''s affairs were conducted till 1923, and there Is no

suggestion that till then there was any breach of the rules.

3. In 1923 there was a general election of directors, and among those elected were accused No. 2, K.S Joshi, and accused No. 3, V.N. Phatak.

Both of them continued as directors till the date of this prosecution. It may be noted here that accused No. 2 was then appointed treasurer in

addition.

4. In 1925 another branch of the Dharwar Bank was opened at Gadag, and one director from Dharwar out of seven was deputed to supervise the

working of that branch. Since then only six directors were responsible for the working of the bank at the headquarters. During the officiating period

of these directors from 1925 till 1932, it has been conceded in argument, the only manager in charge of the bank''s affairs at Dharwar was accused

No. 8. The subject of this enquiry relates precisely to that period, particularly the transactions relating to loans granted to Joshi & Co. It is pertinent

to observe that under the terms of the service agreement entered into in 1913 at the time of his entry (vide exhibit 156), accused No. 8 had

undertaken to observe faithfully the rules of the bank for the conduct of business. The rules, as have been interpreted, required the manager to

deposit in double lock all cash in excess of Rs. 500 in hand and bonds and other securities including pledged articles, one of the keys of the double

lock being in the custody of the treasurer. The manager among other things was required to supervise the establishment, and was generally

responsible for the bank''s transactions. All applications for loans were to be circulated by him among the directors, and upon their sanction he was

to make disbursements and payments. It may be noted that the manager had no authority to sanction overdrafts to the constituents either with or

without security. The rules imply if they do not in terms express that limitation of his powers.

5. Except during his temporary absence between October, 1925, and June, 1926, on deputation for organising the Gadag branch, accused No. 8

continued as manager of the Dharwar Bank since the date of his appointment from 1918 till 1932. It is expressly admitted that during his

management a current account was first opened in the name of Shree Ram Cinema Company with a cash credit of Rs. 74-4-0 on June 25, 1928.

It appears from the extract of the current account that on the same day that company overdrew Rs. 2,925-12-0 in that account. According to the

statements of accounts submitted that account continued till March 28, 1929, when the balance due to the bank was Rs. 2,725-3-6. It seems that

the amount of that debit was transferred on April 6, 1929, to a new account of Joshi & Co., who were the agents of Shree Ram Cinema Company

and who practically represented that company. It is clear upon the record that Joshi & Co. operated on that current account till November 13,

1931, through its managerÃ¯Â¿Â½accused No. 1Ã¯Â¿Â½when the total outstandings due to the bank were Rs. 32,008-7-0. On that date the debtors

represented by accused Nos. 1 to 7 executed an instalment bond (exhibit 161) for Rs. 30,000, the balance of Rs. 2,008-7-0 being carried over to

the debit account of the company in the bank. The charges in this case relate only to the six loans advanced to Joshi & Co. referred to above, out

of the large number of advances made or obtained between the above period.

6. Notwithstanding the fact that the allegations were crystallised in the charge which related to the said six items, a large body of evidence was

tendered at the trial to show not only the connection of the accused inter se but also their connection with other business firms and banks, their

personal transactions and their financial commitments, the object being to demonstrate that the manager, accused No. 8, in disregard of the rules

had dishonestly allowed them to operate on their several accounts without any balance to their credit, without proper and adequate security, and

without the necessary sanction of either the managing director or the board of directors. It was suggested that all these transactions were referable

to a general conspiracy to defraud the bank. I might say without hesitation that much of the evidence is strictly irrelevant to the charges as framed.

7. It may be mentioned that for the amount alleged to have been embezzled a decree was obtained by the bank on August 9, 1935, against Joshi

& Co., through its partners, in a suit instituted on August 20, 1934, on the footing of a subsisting promise to pay implied in the borrowings upon

overdrafts in their current account.

8. It is the case of the prosecution as outlined in the complaint (exhibit 11) that accused Nos. 1 to 7, the partners of Joshi & Co., had conspired

with accused No. 8, the manager of the Dharwar Bank, in the year 1922-23 ""to help themselves, their friends and relatives freely with the bank''s

money and to utilise the resources of the bank for the promoting and financing their private enterprises to the advantage of themselves and to the

detriment of the vital interests of the bank,"" that till 1932 they took loans for themselves and their friends to the extent of Rs. 3,00,000, and that

large amounts were advanced without proper security and without proper sanction of the manager, or the directors, or the board of directors to

Joshi & Co. The aggregate amount of Rs. 2,459-15-0, the subject of the specific charge of criminal breach of trust, was made up of the items

aforesaid. It must be noted that the charge in respect to the allegation of conspiracy was restricted to a case of mutual abetment and instigation u/s

109 of the Indian Penal Code. The other part of the accusation was that in November, 1931, accused Nos. 1 to 7, seeing that the bank was in

embarrassed circumstances, that there was the possibility of a financial crisis, that the shareholders were insistent on the removal of the

management of the directorate, and that a notice was received from one of the depositors with a view to bring the bank into liquidation, prepared

an instalment bond for Rs. 30,000 with the help of accused No. 8 containing terms for payment in twenty-five years of that part of the debt due in

the current account of Joshi & Co.

9.It may be pointed out that the offences specified by reference to the sections of the penal enactment were those punishable under Sections 193,

422, 477 and 477A read with Sections 37 and 120B of the Indian Penal Code. That specification is in the second part of the complaint. The

District Magistrate before whom the complaint was filed took cognizance thereof, issued process under the sections mentioned in the complaint,

and transferred it for enquiry to the Sub-Divisional Magistrate of Dharwar town who ultimately committed the accused for trial to the Court of

Session. It is noticeable that the Sub-Divisional Magistrate omitted to frame a charge u/s 120B, because in his opinion it was redundant. The

objection taken by the accused in the Sessions Court to the jurisdiction of the Magistrate to enquire and commit the accused in view of the

specifications of the offences under the penal enactment in the complaint was rejected as illegitimate, the argument underlying the objection being

that the offence u/s 120B relating to conspiracy to commit non-cognizable offences could not be taken cognizance of by the Magistrate without

proper sanction as indicated in the provisions of Section 196A, Sub-section (2), of the Criminal Procedure Code. The accused upon their failure in

the Sessions Court applied unsuccessfully in revision to the High Court at the early stage of the trial. Thereafter the trial proceeded, and the

accused have been convicted of the above offences, the Sessions Judge agreeing with the assessors in the case of accused Nos. 1, 2, 3 and 8 and

disagreeing with the majority for convicting the remaining accused. The accused have been sentenced upon their conviction to various terms of

imprisonment.

10. The case for the accused generally could not have been more lucidly placed before us and with greater moderation than was done by Mr.

Gajendragadkar in examining the record for accused No. 1, and we are indebted not only to him for taking us rapidly through the mass of evidence

but also to the other learned advocates appearing for the rest of the accused for having ably collaborated with him. As is natural in such cases, we

have had to allow considerable latitude in argument, and we are now in possession of the facts necessary to express our considered opinion on the

material placed on the record.

11. For the accused a number of preliminary objections have been raised not only with regard to the legality of the trial and charges, but also with

regard to the maintainability of the prosecution by reason of the judgment of the civil Court decreeing the claim of the bank to recover on the basis

of a valid contract the sum alleged to have been embezzled. The plea of bar to this trial is based upon grounds of public policy and not on any

doctrine of estoppel. The argument is that an accusation of fraud is inconsistent with the claim founded upon a valid contract in the civil suit, and

that therefore the judgment of the civil Court must necessarily conflict with the possible conviction resulting from this prosecution. The higher

grounds of public policy, in my opinion, undoubtedly necessitate the avoidance of conflict of decisions between criminal and civil Courts

established for beneficent and good government. If I may be permitted to say so, with respect, I agree with the remarks of Heaton J. in Markur, In

re ILR (1914) Bom. 1 : S.C. 18 Bom. L.R. 185, on the subject to the following effect (p. 4):

If we are to administer justice as a civilized country, if we are to avoid those conflicts between civil and criminal Courts which ordinarily must be

fraught with evil and can produce no good, if, in short, we are to make the actual administration of justice in this country bear a proper relation to

that which we profess it to be, then we cannot have criminal Courts trying over again matters which have been thoroughly dealt with and finally

decided by a civil Court of competent jurisdiction. It may be that to this principle there would be rare exceptions founded on, possibly, the

discovery of new, cogent and important evidence. But ordinarily that principle must prevail, and if that principle must prevail, then it is a matter of

the first importance, of the very highest relevancy to show to a criminal Court that the matter which the criminal Court is asked to adjudicate on has

already been fully dealt with by a civil Court.

12. For that purpose it is of great importance to scan the grounds of the decision of the civil Court and consequently the judgment of that Court

becomes relevant and admissible. It was observed in Agni Kumar Das v. Mantazaddin ILR (1928) Cal. 290 that the civil and criminal law being

products of the same legislature it would 1 be attributing an inconsistency to the legislature to permit the criminal Courts in the exercise of their

limited jurisdiction to override or nullify the proceedings of civil Courts. On grounds of public policy, harmony between the decisions of the two

Courts must be secured. The question therefore is whether any conflict is likely to arise in this case by reason of a possible conviction, in view of

the decree passed on August 9, 1935, in the suit filed on August 20, 1934, which was instituted prior to this prosecution. After giving careful

consideration to the argument, I am not satisfied that there is real possibility of conflict between the prosecution and the civil Court"s decree.

Rightly or wrongly, the bank treated as ratified the acts of their agent, the manager, supposed to have been committed in excess of authority and

therefore presumably initially dishonest. Apparently two courses were open to the bank, either to ratify the illegal acts, if that was permissible in

law, and to proceed to recover the amount due on the current account upon the footing of a subsisting ratified contract, or to claim damages

against the parties concerned. Having regard to the allegations of the bank, it is permissible to argue that the claim was based upon such

ratification. There were various acts of ratification referred to in the mass of evidence, such as the demand for security, repayment and amendment

of the contract, and it is therefore possible to assume that the decree passed upon that footing would not create an inconsistency. It is also

important to bear in mind the general principle of public policy usually invoked in reference to ratification of illegal and criminal acts resulting in the

stifling of criminal prosecutions. Consistently with that principle if the civil Court''s decree constitutes the composition of non-compound-able and

felonious acts, the objections cannot be permitted to prevail against the Crown prosecution. We are therefore of the opinion that in the

circumstances the decree of the civil Court does not serve as an effective bar to this prosecution.

13. Turning then to the first objection as to the legality of the trial, it may be noted that it is based principally upon the jurisdiction of the committing

Magistrate to enquire into and the Additional Sessions Judge to try the case. That objection is of a two-fold character. It is first based upon the

provisions of Section 196A(2) of the Criminal Procedure Code, the underlying argument being that the accusation in the complaint, irrespective of

the ultimate charge framed, upon which the trial proceeded, of a conspiracy to commit non-cognizable offences, such as the offences of cheating

and criminal misappropriation under the Indian Penal Code, necessitated the previous sanction of the Local Government or the District Magistrate

specially empowered, and that the assumption of jurisdiction by the District Magistrate without such sanction was ultra vires. That objection, in our

opinion, is not well founded. Section 196A(2) says as follows:

No Court shall take cognizance of the offence of criminal conspiracy punishable u/s 120-B of the Indian Penal Code...in a case where the object

of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous

imprisonment for a term of two years or upwards, unless the Local Government, or a Chief Presidency Magistrate or District Magistrate

empowered in this behalf by the Local Government, has, by order in writing, consented to the initiation of the proceedings.

14. The jurisdiction of the Court to take cognizance of an offence of conspiracy u/s 120B depends according to the terms of the section upon the

object of the conspiracy. If the object is to commit non-cognizable offence, undoubtedly sanction under that section is essential to give jurisdiction

to the Court. Now, the object of the conspiracy has to be determined at the initial stage not only by reference to the sections of the penal

enactment referred to in the complaint but also upon the facts narrated therein and the evidence tendered before the Magistrate : see Biroo Sardar

v. Ariff (1924) 26 Cri. L.J. 302. Upon reading the complaint we felt satisfied that the principal and the only object of the conspiracy was to

commit fraud on the bank through its manager ; in other words, to induce the latter to commit criminal breach of trust in respect of the bank''s

money in his charge by granting cheap credit on a precarious chance of realisation. There is no other object suggested in the whole complaint as

the basis of the agreement underlying the supposed conspiracy. It is true that the complaint alludes to certain incidental acts of the bank manager to

conceal the fraud, the various circumstances concurring in bringing the bank into financial crisis in 1931, and also the plan conceived then to stave

off immediate demand or liability by resorting to the device of adjustment. But reading the complaint as a whole, it is equally apparent that that was

not the object of the conspiracy. The whole trend of the complaint is suggestive of the inference that it did not originally enter the minds of the so-

called conspirators to meet the critical situation referred to if and when it arose. There is, in my opinion, recognisable difference between the object

of a conspiracy and the means adopted to realize that object. If they are separable, then, even if the object is sought to be attained by resort to

non-cognizable offences, I do not think sanction is necessary. It does not matter if the object is erroneously mixed up with the statement of method

of attaining it in the body of the complaint. It is perfectly open to the Magistrate upon the evidence to dissect the facts in order to decide the

question of sanction. It is relevant to state for the present purpose that neither the Magistrate nor the Additional Sessions Judge thought that the

evidence was sufficient to frame a charge of conspiracy, and in our opinion in view of the attitude adopted by the learned Public Prosecutor at the

trial, that view cannot be said to be unwarranted. The first part of the objection on the ground of illegality of the trial for want of jurisdiction

therefore fails.

15. The second part of the objection is directed against the trial of the offence u/s 193 of the Indian Penal Code without the sanction, u/s 195(1)(b)

of the Criminal Procedure Code, of the Court in which it is said civil proceedings were pending in relation to which the offence is said to have been

committed. That objection we think is indeed formidable and perfectly justified by the record. Section 195(1)(b) provides as follows:

No Court shall take cognizance of any offence punishable under any of the following sections of the same Code, namely section 193,...when such

offence is alleged to have been committed in or in relation to any proceeding in any Court, except on the complaint in writing of such Court or of

some other Court to which such Court is subordinate.

16. Under Sub-section (4) of that section it is clear that the provisions of Sub-section (1) apply also to criminal conspiracies to commit such

offences and to the abetment of such offences. In order to see whether the applicability of the prohibition in that section is attracted to this case it is

necessary to note certain contemporary events with their dates. There was a great break-down in the credit of the bank in 1931 or thereabouts

owing to the depreciation of the securities upon which the bank had taken loans from the Central Bank of India, Limited. The bank was then

negotiating for additional loans in Bombay. There was a contemporaneous demand for additional security and threat of recovery by civil process

by the Central Bank. One depositor, Gokhale had given notice on October 27, 1931, for return of his deposit with a view to support a winding up

petition upon an act of bankruptcy. In fact the said Gokhale made a petition to the Bombay High Court in December, 1931. That petition is not on

the record, and we are left to guess its nature from the subsequent events that followed. There was a scheme framed later on upon that petition and

it was followed by an amended scheme. Inferentially that suggests that the original petition under the Indian Companies Act was no other than to

wind up the bank. That position is accepted in the absence of the original record by both the parties. The bond in question (exhibit 161) was

executed on November 13, 1931, on the eve of that petition. On August 20, 1934, the bank filed civil suit No. 70 of 1934 in the Subordinate

Judge"s Court at Dharwar to recover Rs. 6,421, the balance of the loan taken by Joshi & Co. in their current account after deduction of the

amount in the bond. That bond, according to the complainant Kadkol, who is the principal witness for the prosecution in this case, included the

amount now alleged to have been misappropriated. Apart from the fact that that statement is perhaps not reconcilable with the accounts of the

bank, that was the case made out at the trial on behalf of the prosecution. Thereafter on October 22, 1934, this complaint was lodged containing

an accusation inter alia that the bond was procured to postpone the recovery of the debt to Joshi & Co. Now, if the complaint was that the

evidence was fabricated to prejudice the bank"s claim in a pending or future judicial proceeding, which in fact it did as I shall presently show, the

sanction of the Court before which such proceeding was pending at the date of the complaint was necessary in order to enable the Magistrate to

take cognizance of the offence alleged, provided it could be said that in fact the fabrication was committed in relation to such proceeding. The

allegations in the complaint in connection with the preparation of the bond are as follows:

Fearing that they would no longer be able to retain office and the persons that may succeed to office may discover all these transactions and then

may insist on the immediate payment of all dues found at the foot of the account of Joshi & Co. with the bank, the accused have created a

dishonest document with fraudulent intentions hurriedly on November 15, 1931, with a view to avoid immediate demand and to get ample time to

safeguard their interest and to avoid any repayment if they could.

17. Referring to the charge framed, it expressly states that the bond was fabricated in order that the same may be used in the interests of the

accused and to the detriment of the bank. The question is whether upon the facts the fabrication implied in the preparation of the bond was

committed in relation to the proceedings in a Court. It cannot be denied that the suggestion underlying the prosecution if analysed might well imply

the possibility of the bond being tendered to evade the claim of the bank being enforced directly by a civil Court"s process or through the liquidator

in insolvency if the winding up proceedings succeeded. It was once the view prevalent in this Court that proceedings in Court should be pending at

the date of the offence, and that otherwise Sub-section (3)(b) of Section 195 of the Criminal Procedure Code did not applyÃ¯Â¿Â½see Govind

Pandurang, In re ILR (1920) 45 Bom. 668 : 22 Bom. L.R. 1239 and In re Mohaniraj (1230) 32 Bom. L.R. 589. But that view was not approved

of in In re Indrachand Bachraj (1931) 34 Bom. L.R.249. There it was held that if the charge was that the evidence had been fabricated in

connection with proceedings which were only contemplated by the accused, then of course the burden would be upon the Crown to prove the fact

that the proceedings were in fact contemplated, because the mere fabrication of evidence was not in itself a criminal offence. The learned Chief

Justice after referring to the cases decided in this Court tested his argument by referring to four instances which may possibly arise u/s 195 of the

Criminal Procedure Code. After setting out three in which the section would clearly apply, he considered the fourth case in which an offence u/s

193 of the Indian Penal Code was in respect of proceedings in a Court of law which were contemplated but which in fact were never started, and

it was held that that was the only case to which Section 195 of the Criminal Procedure Code did not apply. In my view this case does not fall

under the fourth class of cases that is within the exception, for when the Court took cognizance of the offence u/s 193 of the Indian Penal Code

there were two proceedings pending in a civil Court:Ã¯Â¿Â½(1) the winding up proceedings in the High Court, and (2) the civil suit No. 70 of 1934. It

has been argued by the learned Government Pleader that the use of the bond against the possible demand by the liquidator either through or

outside any civil Court would not be in relation to a judicial proceeding. The possibility of the use of the bond in the proceedings before the

liquidator was in the contemplation of the accused according to the prosecution and that is the finding of the trial Court. The liquidator"s

proceedings could certainly be regarded as a continuance of the proceedings in the winding up before the Court, he being its officer, and the

argument is clearly not well founded.

18. But there is a more firm ground in support of the objection. Now, apart from the admissions of Kadkol with reference to the identity of the

claim in the civil suit, it could not be controverted that but for the bond nothing prevented the bank from recovering the full amount due in the

current account and that the restriction of that claim was the direct result of the introduction of the adjustment evidenced by the bond into the

bank"s accounts. Consequently it could be said that the bond intimately related to the claim in that suit, and was therefore in relation to that suit

within the meaning of Section 195(1)(b). On the face of the bond it adjusts the amount of Rs. 30,000 due at the foot of the account. A larger

amount was admittedly then due. If what Kadkol has stated were true, the claim in the suit was directly affected by the bond. Even then the

fabrication would be in relation to the claim made in that suit before the First Class Subordinate Judge. It seems to us, upon a careful consideration

of the facts and circumstances, that, having regard to the charge u/s 193 of the Indian Penal Code, a complaint by that Court was necessary to give

jurisdiction to the Magistrate to enquire into that charge. That defect affects the entire proceedings both before the committing Magistrate and the

trial Court. The result following from the absence of jurisdiction to take cognizance of such an offence has been considered in Emperor v.

Rudragouda Rachangouda (1936) 39 Bom. L.R. 70, to which my learned brother was a party. There following the principle in Queen-Empress v.

A. Morton and Moorteza Ali ILR (1884) 9 Bom. 288 it was held that where the Court has acted without jurisdiction with regard to a part of the

trial, the whole proceedings are vitiated by the illegality committed.

19. I shall now turn to the other important objection to the legality of the charge. That objection is based upon joinder of charges in respect of

offences of criminal breach of trust and falsification of accounts and fabrication of false evidence by means of the aforesaid bond for Rs. 30,000,

the amount whereof relates as expressly stated in the evidence of the complainant to items not involved in the charge of criminal breach of trust. As

I have already stated, the charge of criminal breach of trust involves the appropriation of Rs. 2,459 between November 23, 1930, and April 21,

1931. That amount was appropriated on six different occasions by six different transactions. That does not, however, affect the legality of the

charge of criminal breach of trust having regard to the provisions of Section 222, Sub-section (2), of the Criminal Procedure Code, There is no

necessity in law for specifying particular items or exact dates. The difficult question is whether the other charges under Sections 477A and 193

read with Section 109 of the Indian Penal Code could be properly joined. Section 233 of the Criminal Procedure Code provides for charging an

accused person in respect of different offences, and it requires a separate charge for every distinct offence and a separate trial for every such

charge. The exceptions to that section are mentioned in the sections that follow. It has not been contended that the offences are not distinct. Indeed

it may be said that even the six items involved in the charge of criminal breach of trust are distinct offences, or unconnected offences according to

the ordinary meaning of the term, even though they may fall under the same sectionÃ¯Â¿Â½see Emperor v. Jethalal ILR (1905) 29 Bom. 449 : S.C. 7

Bom. L.R. 527. But assuming that a wider meaning can be attributed to the word ""distinct"", the offence of falsification of accounts is certainly a

distinct offence falling as it does under a different section of the penal enactmentÃ¯Â¿Â½see Radha Nath Karmakar v. Emperor ILR (1922) Cal. 94,

The offence of fabrication of false evidence relating to items partly or wholly unconnected with the charge of criminal breach of trust is undoubtedly

a distinct offence. Unless therefore the case can be brought within the exceptions to Section 233 of the Criminal Procedure Code, the joinder of

the two charges offends against the prohibition. Section 234 of the Criminal Procedure Code does not obviously apply for the offences are not of

the same kind, that is, punishable with the same amount of punishment under the same section of the Indian Penal Code.

20. The only section relied upon by the prosecution in support of the joinder of charges is Section 235 of the Criminal Procedure Code, and the

suggestion is that the offences were committed in pursuance of a conspiracy to defraud the bank and therefore they form one series of acts so

connected together as to form the same transaction. That section provides as follows:

(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he

may be charged with, and tried at one trial for, every such offence.

21. The expression ""the same transaction"" has been judicially interpreted in a series of decisions which also establish that a misjoinder of charges

for distinct offences cannot be cured u/s 537 of the Criminal Procedure Code. The leading case on the effect of misjoinder of charges is that of

Subramania v. King-Emperor (1901) 3 Bom. L.R. 540 There the accused was charged with no less than forty-one acts, extending over a period

of two years, for extorting money in pursuance of a conspiracy. Referring to the provisions of Section 234 of the Criminal Procedure Code, their

Lordships of the Judicial Committee observed as follows (p. 540):

The reason of such a provision which is analogous to our own provisions in respect of embezzlement is obviously in order that the jury may not be

prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent

embarrassment both to Judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the

object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a

definite criminal offence is of the essence of criminal procedure.

22. Those remarks are apposite in the present case. There the Board was not prepared to dissect the verdict and the whole trial was set aside. Of

course, cases of this kind must be distinguished from cases of mere irregularity, such as Abdul Rahman v. Emperor (1926) 29 Bom. L.R. 813. In

the latter case the depositions, in some instances, were read over and interpreted by the interpreter to the witnesses in a criminal trial, and during

that process the Magistrate continued to record further evidence, and the depositions, in other instances, recorded in English, were handed to the

English speaking witnesses to be read over by themselves ; and it was held that the procedure was irregular but, inasmuch as no prejudice had

been caused to the accused, it did not affect the validity of the trial. The distinguishing feature of the two cases as pointed out in the later decision of

their Lordships of the Privy Council was that in the former the procedure adopted was one which the Code positively prohibited, and it was

possible to suppose that it might have worked actual injustice to the accused.

23. The circumstances under which a charge of criminal breach of trust can be legally joined to a charge of falsification of accounts is illustrated by

the decision of this Court in Emperor Vs. Lalji Bhanji, . There the accused was tried at one trial on two charges, one u/s 408 and the other u/s

477A of the Indian Penal Code, that is, criminal breach of trust as a servant, and preparation of false accounts; and it was held that the case fell

within Clause (1) of Section 235 of the Code of Criminal Procedure, 1898, inasmuch as there was only one act of criminal breach of trust charged

against the accused and the falsification of accounts formed part of the transaction relating to the criminal breach of trust, and therefore they were

offences connected with one another and arising out of the same transaction. It is obvious that if the falsification of accounts charged had not

formed part of the transaction as to the criminal breach of trust, and if it related to an act different from the one charged u/s 408, the result might

have been different. I may here refer to the charge u/s 477A, which is thus formulated:

You accused Nos. 1 to 7 got the bond placed among the bank records through the aid of accused No. 8 and, on your part, instigated and

intentionally aided accused No. 8 to make certain false entries in the account books of the said bank and thereby caused serious mischief to the

accounts of the said bank which had evidenced the rights of the bank and the liabilities of you accused Nos. 1 to 7 and also thereby in extinguishing

the rights of the bank.... Thus, you accused Nos. 1 to 7 committed offences punishable under Sections 193, 467, 477 and 477A read with

Sections 109 and 34 and 37 of the Indian Penal Code.

24. It is not the suggestion of the Crown that the falsification related to the items involved in the charge of criminal breach of trust. The suggestion is

that the falsification was intended to cover the amount involved in the bond which related, as I have explained, to entirely different items. The

amount in the bond certainly includes a much larger number of advances than those affected by the charge as to criminal breach of trust. In that

connection I would refer to the case of Emperor v. Nathalal (1902) 4 Bom. L.R. 433. There several acts of criminal breach of trust and

falsification of accounts, some of them unconnected with the rest, were charged against the accused, and it was held that the trial was illegal. Here

is a compendious charge of falsification of accounts not only in relation to the several acts of criminal breach of trust alleged in the charge, but other

similar acts committed between 1923 and 1928 since the alleged formation of the conspiracy. The decision in Emperor Vs. Manant K. Mehta, is

to the same effect. There the accused was convicted at one trial on three charges of criminal breach of trust committed in respect of three amounts

of money on different dates, and also on three more charges of falsification of accounts with reference to the same three items; and it was held that

the joinder of charges was illegal and vitiated the trial. In that case the possibility of legalising the charge in that state of the accusation was

considered, and there is an obiter dictum by Fawcett J. that if the charge comprised only one offence of criminal breach of trust for the aggregate

amount alleged to have been embezzled and one other offence for the entire falsification of the accounts in regard to that embezzlement, perhaps no

objection could be urged against the charge. It is difficult to say with approval that that manner of drafting the charge could cure the defect.

25. I need only refer to two other cases cited at the bar, one of Emperor v. Jiban Kristo Bagchi ILR (1912) Cal. 318, and the other Queen-

Empress v. Fakirapa ILR (1890) 15 Bom. 491, as supporting the objection urged. There it was held that a charge of criminal breach of trust could

not be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction. In the latter

case Jardine J. referred with approval to the observations of the House of Lords in Castro v. The Queen (1881). L.R. 6 App. Cas. 229. In

considering the rule as to the trial together of any number of felonies and any number of misdemeanours, Lord Blackburn there observed as follows

(p. 244):

There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of

several things at once, and frequently the mere fact of accusing him of several things, was supposed to tend to increase the probability of his being

found guilty, as it amounted to giving evidence of bad character against him.

26. Those remarks bear out the just complaint of the defence in regard to the joinder of charges. The main ground of attack in this case is directed

to emphasize how the roving enquiry has drifted from the main objective resulting in prejudice to the accused. The recourse to the joinder of

unconnected accusations was perhaps inspired by the resolution of the bank ""to entangle as many directors and bank subordinates and all others

concerned, however weak the charges may be."" The enquiry was allowed to extend over a period of nearly ten years, and it is surprising how the

voluminous record, which, as I have already said, has little or no bearing upon the principal accusation, was allowed to be ushered in in the process

of the trial on a definite charge. It has been said,Ã¯Â¿Â½and I think with reason,Ã¯Â¿Â½that perhaps the object of the prosecution in joining these charges

was to seek an opportunity of leading evidence of other transactions of the accused with other firms in which some or other of them had a

connection, and thus to intensify the suspicion and cause embarrassment to the accused in their defence.

27. But apart from the irrelevancies in question the point is whether the acts involved in the charges could, as the learned Government Pleader has

argued, be regarded upon the tenor of the complaint as part of the same transaction. The accused, proceeds the argument, abetted and instigated

each other by conspiring to commit the acts of criminal breach of trust and that inasmuch as such acts have been committed in pursuance of a

conspiracy, which in some measure is the subject of the indictment, those acts must be presumed to have been committed in pursuance of the

conspiracy, and therefore can be the basis of a joint trial; The first part of the charge against the accused was in these terms:

That you accused Nos. 1 to 8 with others, with the common object of dishonestly misappropriating the Dharwar Bank''s resources and money,

through the help of its Officers who had been entrusted with and had dominion over the same, conspired togetherÃ¯Â¿Â½and committed criminal

breach of trust by allowing and facilitating by Joshi & Co. of DharwarÃ¯Â¿Â½misappropriation between November 16, 1930, and November 15,

1931, of the bank''s money.

28. Then follow specific sections of the Code, namely Section 409 read with Section 109 of the Indian Penal Code. Now, if that charge implied a

general conspiracy to defraud the bank and stave off its full demand, it is easily intelligible that the series of acts committed to attain the object of

the conspiracy, which under the Indian Penal Code is one offence, would form a transaction in itself, and it would be proper to say that the

offences constituted by all the acts would be part of the same transaction. But the allegation of a general conspiracy was not accepted, and a

restricted charge of mutual abetment by conspiracy was framed. That necessarily restricted the scope of the enquiry to the conspiracy relating to

the specific act abetted. It would therefore prima facie be difficult to defend the charge on the principle applicable to a trial upon a charge of

general conspiracy. It is true that there might have been a substantive charge of conspiracy for the purpose of defrauding the bank, for the

complaint did indicate an offence punishable u/s 120B of the Indian Penal Code. But the learned Magistrate had dropped that charge because it

was redundant. And the learned Additional Sessions Judge agreed with the Magistrate upon a statement of the Public Prosecutor. It might

therefore be fair to infer that the Crown did not intend to proceed with the charge of general conspiracy. Consequently upon the restricted scope

of the charge the evidence of the enquiry had to be narrowed down and limited to the number of acts of mutual abetment resulting from that

conspiracy. The learned Government Pleader''s argument, as I understand it, is that even if a charge u/s 120B of a general conspiracy to embrace

all the alleged acts were not framed, the allegations in the complaint containing an accusation of that description were sufficient to validate the

charge consolidating not only the acts referable to the abetment for the purpose of committing criminal breach of trust, but acts committed

subsequently, namely the fabrication of the bond, as if they were part of the acts constituting abetment by conspiracy. That seems to me to be

entirely ignoring the scope of the charge under Sections 408 and 409 read with Section 109 of the Indian Penal Code. The word ""transaction"" is

usually used to include the steps leading to a conclusion or resulting in action, though often transaction emphasises the fact of something done or

brought to a conclusion. In that sense every embezzlement constituted by the unauthorised advance would be a transaction in itself. To ascertain

whether a series of acts are parts of the same transaction it would be essential to see whether they are linked together to present a continuous

whole. The expression ""same transaction"" as judicially interpreted signifies ""related to one another in point of purpose, or as cause and effect or as

principal and subsidiary acts as to denote one continuous and completed action."" The idea of completion cannot be divorced from the

interpretation of the expression. The question is at what stage the act alleged has been done or completed. Applying that test the joinder of charges

is manifestly improper.

29. But the main point in the argument of the learned Government Pleader is that community of purpose coupled with concert and design implied in

abetment by conspiracy make the different acts alleged parts of the same transaction. In that connection I might refer to the observations in

Emperor Vs. Krishnaji Anant Dange, where the learned Chief Justice said that ""a mere common purpose does not constitute a transaction,"" and

also the following observations in Choragudi Venkatadri v. Emperor ILR (1910) 33 Mad. 502 to indicate what common purpose really implies (p.

507):

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. If that were so,

the results would be startling; for instance, supposing it is alleged that A for the sake of gain has for the last ten years been committing a particular

form of depredation on the public, viz., house-breaking and theft, in accordance with one consistent systematic plan, it is hardly conceivable that he

could be tried at one trial for all the burglaries which he committed within the ten years.

30. That was a case in which it was alleged that a company was formed with the object of defrauding the public in a particular manner and the

promoters of the company were charged with several distinct acts of embezzlement committed in the course of several years. The ratio of the

decision was approved of in Emperor v. Shapurji Sorabji (1935) 38 Bom. L.R. 105. There the accused were convicted of criminal breach of trust

and cheating, and also forgery and creating false evidence. The accused were employees of the Aden Settlement Executive Committee which was

constituted to supply water to the public on payment. Water tickets were printed and sold to consumers in booklets which were entrusted to the

accused for sale, and they were required to pay the money received into the bank. The particulars of the book issued were entered in a register. It

was found upon investigation that several unauthorised books had been printed in a private press and sold to several individuals. And it was found

upon the charges framed that they were incompetent. In dealing with the tests to ascertain whether the acts were part of the same transaction Mr.

Justice Broomfield made the following observations (p. 113):

Continuity of action in the context must in my opinion mean this : the following up of some initial act through all its consequences and incidents until

the series of acts or groups of connected acts comes to an end, either by attainment of the object or by being put an end to or abandoned. If any

of those things happens and the whole process is begun over again, it is not the same transaction but a new one, in spite of the fact that the same

general purpose may continue.

31. With respect I agree with that interpretation. If from time to time Joshi & Co. had resorted to the device of securing advances without security

with the help of the manager and directors of the bank, two of whom were their own partners, the test of completion could be satisfactorily applied

to every advance when made. It would therefore be difficult to say that the different advances between 1928 and 1931, made from time to time

upon different applications, though a series of similar acts, constituted one transaction. The only connection between them would be the community

of object or purpose and the identity of the lender and the party benefiting thereby. But in the view I take that would not be enough to constitute

those advances ""the same transaction"" within the meaning of that expression in Section 235 of the Criminal Procedure Code.

32. The learned Government Pleader has urged that in Emperor v. Shapurji Sorabji the result might have been different if the prosecution had

alleged that the acts had been done in pursuance of a conspiracy. That perhaps might have solved the difficulty as I have already indicated. But the

learned Government Pleader goes further and suggests that even if conspiracy is not made the basis of the charge in express terms, a general

expression of that character in the complaint would serve the purpose equally well. We were referred to the following remarks in Emperor v.

Shapurji Sorabji at p. 113 of the report:

It might well be different if the prosecution had alleged a conspiracy between the accused to print 4,100 books from the beginning. But there is no

such charge, and as far as I can see, that is not really the prosecution case.

33. Those observations are clearly obiter and do not support the argument.

34. We were also referred to the observations of the Judicial Committee in Babulal v. King-Emperor : Babulal Choukhani and Sailendra Nath

Mukherjee Vs. The King-Emperor, . That was not a case of misjoinder of charges. But the point urged before the Board was with regard to

misjoinder of parties. The Board was dealing with the accused who were tried together for offences committed between January, 1934, and

January, 1935, as parties to a criminal conspiracy to commit theft of electrical energy belonging to the Calcutta Electric Supply Corporation Ltd.,

by tampering with meters at the premises of consumers, and that in pursuance of the said conspiracy both the tamperers as well as the consumers

were tried together for having committed theft of the electrical energy at different premises belonging to the respective consumers u/s 120B of the

Indian Penal Code read with Section 39 of the Indian Electricity Act, and also Section 379 of the Indian Penal Code. Although upon the evidence

it was held that the charge of conspiracy was not proved, the plea of misjoinder of persons and charges was rejected on the following among other

grounds (p. 795):

Nor is there any limit of number of offences specified in Section 239 (d). The one and only limitation there is that the accusation should be of

offences "committed in the course of the same transaction." Whatever scope of connotation may be included in the words "the same transaction,"

it is enough for the present case to say that, if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy

(a circumstance which makes the act of one the act of each and all the conspirators), these acts are committed in the course of the same

transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy serve

to unify the acts done in pursuance of it.

35. If my interpretation of those observations is correct, they apply to cases where a charge of conspiracy has been formulated, so that the alleged

common concert serves to unify the acts done in pursuance of the conspiracy. It is entirely different where the charge is restricted in its scope to

abetment by conspiracy to do a specified act. The scope of the enquiry is thereby restricted and not enlarged, so as to embrace all acts and sundry

done in pursuance of a general conspiracy to do similar acts extending over not only the period involved in the charge of abetment but over a much

larger period, anterior and subsequent. Having regard to the language of Section 109 of the Indian Penal Code, it cannot be said that abetment by

conspiracy involves a general agreement to do a series of acts of which the act abetted is one. Even assuming that it could be so, if at the end of a

long spell new circumstances arose and the parties again agreed to make a fraudulent adjustment of their account with a view to prolong the refund

of the money misappropriated, that in my opinion would strictly be a second conspiracy independent of the first. Consequently the result of the acts

committed under the latter conspiracy could not be tacked on to a charge on the former.

36. The cases to which we were referred in support of the joinder of the different charges, particularly Babulal v. King-Emperor, were cases

where an express charge u/s 120B had been framed. The observations in Emperor v. Datto Hanmant Shahapurkar ILR (1905) Bom. 49 : S.C. 7

Bom. L.R. 633 have no direct bearing, for there the Court was concerned with misjoinder of parties and the Court dealt with the community of

purpose as a circumstance unifying and connecting the acts of different persons. Certain observations in Kashiram Jhunjhunwalla v. Emperor ILR

(1935) Cal. 808 do in a sense strike a discordant note. There the accused was charged with having committed misappropriation of several sums of

money and the various sums of money were lumped together u/s 222(2) of the Criminal Procedure Code. The accused was also charged with

falsification of accounts affecting two of these items, and it was held that the joinder was legal. The decisions of this Court have consistently

maintained to the contrary. The consideration which weighed against that view may be fairly summarised in the following words of Costello J. in his

judgment (p. 814):

The real question which we have to decide is whether, contrary to the view taken in the Madras case Choragudi v. Emperor ILR (1910) Mad.

502, it ought not to be held that if a person is charged with one offence, namely, that of misappropriation of a gross sum as provided in Section

222(2) then that one offence ought to be deemed to have arisen out of one transaction so as to enable the prosecution to join with it in the same

charge a charge of some other offence constituted by the series of acts or some of the series of acts which connected together form that

transaction.

37. With extreme respect I find it difficult to agree with that reasoning. The assumption that because under the provisions of Section 222(2) of the

Criminal Procedure Code the specification of a gross sum in respect of which an offence is alleged to have been committed and the dates between

which it is committed is permissible, it must follow that only one offence has arisen out of the different misappropriations, and, that it must be

regarded as one transaction, is not warranted by the provisions of the section. That section provides that the charge so framed ""shall be deemed to

be a charge of one offence within the meaning of Section 234"" and not that it is one offence. Although several items of defalcations may be lumped

together so as to obviate the difficulty arising under the provisions of the Code, they would not necessarily constitute one transaction for obvious

reasons. Each act may retain its homogeneity and may be completely separated from the rest, unless under special circumstances they could be

entwined in one transaction. Upon the authorities I am clearly of the opinion that the charge is seriously defective in that it has joined together the

offences under Sections 193 and 477 A of the Indian Penal Code contrary to the provisions of Section 235(1) of the Criminal Procedure Code.

38. It is extremely regrettable and it is very annoying to us that the effort of so many months'' judicial enquiry should have been utterly wasted for

non-observance of the forms of procedure. For that result those entrusted with the prosecution and trial are obviously not free from blame. It is

surprising that they should have deliberately deviated from the normal and simple course of procedure which has been laid down by the law as

interpreted in the various rulings of our Courts. As has been pointed out, the necessity of following that procedure is obviously dictated by reasons

of practical expediency and justice, namely, to simplify the enquiry from the point of view of the accused. The mischievous results from an

altogether complicated trial have been impressed on Courts by the numerous judgments of the High Court and Privy Council. This case illustrates

in a very sorrowful manner the evil of digression by introducing complications into a charge and embarrassing the accused as well as the Court. The

voluminous record before us contains comparatively very few salient and relevant facts upon which the Court''s attention need be directed to

apportion responsibility, for the evidence was directed to facts connected remotely with the misappropriation of the funds involved in the main and

the subsidiary charges. In view of the fact that the misjoinder has vitiated the entire trial, we have considered the expediency of directing a re-trial in

this case. We have weighed the considerations placed before us by Mr. Gajendragadkar on behalf of the accused, namely, the sufferings through

which the accused have gone in the course of the enquiry, the time spent in prison upon conviction pending their release in appeal which covered a

period of nearly seven months and the possibility of recovering the misappropriated amount through decrees of the civil Court. But along with those

considerations the enormity of such a crime cannot be overlooked. The Crown has undertaken this trial to bring to book offenders charged with

malversation of funds of the investing public, the depositors and shareholders. One of the accused is a bank manager, and two others are directors.

It is suggested that the directors are at the worst guilty of inaction and that they are amenable to the order of a civil Court to pay up the amount lost

by the bank in this transaction. The grave and mischievous consequences of that suggestion are not fully appreciated. The directors are chosen by

the shareholders not to act as mere dummies. They are chosen to watch over their interests and those of the depositors. The public exposure of

malpractices in connection with banking concerns wherever they are brought to light and the punishment of the delinquents should ordinarily be the

first concern of the State. The investing public are entitled to protection against the consequences of organized crime envisaged in the charge;

otherwise the condonation of the acts of all those concerned in peculation and malversation of money invested and deposited in banks must have a

very disastrous effect on the community in general. We therefore think that the interests of public justice could only be served by a thorough inquiry

and trial of the offenders against whom there is sufficient prima facie evidence. After due consideration of the arguments we think it necessary to

direct a re-trial only on one compendious accusation of criminal breach of trust and its abetment punishable either u/s 408 or u/s 409 of the Indian

Penal Code read with Section 109 of the Code as already stated in the charge. The remaining offences included in the charge under Sections 193

and 477A and abetment must be dropped altogether at the re-trial.

39. On the question as to which of the accused should undergo re-trial, it seems clear, without expressing our views upon the credibility of the

evidence led, that the principal persons involved by the evidence are the bank manager and the directors. If loans were granted beyond authority,

of which there is prima facie proof, the person directly responsible for offending against the rules would be the manager who was obliged to obey

and carry out the rules. The crucial question in the case is whether the manager has acted without authority and granted loans to his friends without

the sanction of his superiors, namely, the managing director or the board. There is considerable body of evidence on the point indicating that no

sanction was obtained and that the transactions were imprudent and unbusinesslike savouring of obvious dishonesty. There are, it must be

admitted, counterveiling circumstances of greater or less cogency indicating that the managing director had abdicated his responsibility in favour of

the manager by signing blank cheques and handing them over to the latter for utilising them as occasion arose. That piece of conduct, which

deserves severe reprehension, might indicate that the director concerned left the sanctioning of the loans to the discretion of the manager, and, thus

if he did not suggest, facilitated the commission of this crime. The other accused charged along with him, if they have dishonestly abetted the bank

manager"s offence, would be equally responsible with him for the result. The fact that all these advances have been properly accounted for in the

ordinary books of the bank would by itself make no difference in the situation, if the basic sanction to validate them at the inception is lacking. We

have read the evidence, and have been taken through all the relevant facts. Without) pronouncing our opinion thereon which might prejudice the

accused at the re-trial, it is sufficient to say upon the facts that the case of accused Nos. 4, 5 and 7 is distinguishable from that of the remaining

accused Nos. 1 2, 3 and 8. Accused No. 1 was the managing partner of Joshi & Co. and was directly dealing with the bank manager in obtaining

advances without security. Accused Nos. 2 and 3 who were directors at the material time and who should have known these transactions and who

have profited their firm are transparently connected with the dealings of accused No. 8, the manager. We therefore set aside their convictions, and

order that these accused should undergo re-trial upon the charge as indicated above.

40. With regard to accused Nos. 4, 5 and 7, the only circumstance against them is that they are partners in the firm of Joshi & Co. for whose

benefit these loans were taken. But merely because a person is a partner in a firm, he is not liable for all the criminal acts of the managing partner

unless he was aware of them or in some way has connived at them. In the view we take of their position in this firm upon the evidence, we do not

think it is sufficiently established that they are responsible for this crime. The evidence suggests that they had not actively participated in the affairs

of the firm and did not concern themselves with the methods adopted by the managing partners in financing it. It is also pointed out to us that some

of them are men of respectability and means, and that they would not naturally lend themselves to a conspiracy of this description. We think the

prosecution evidence falls short of that degree of proof which we would require to connect them with the doings of the partners. At least two of

them were not living in Dharwar when the alleged malversation took place. There are certain statements made by accused Nos. 4, 5 and 7 which

might imply that they had given the managing partner authority to borrow from the bank, and which are susceptible of the view that they connived

at the fraud committed by him to further the interests of the firm. But beyond those statements and their possible adverse interpretation, there is

nothing in the evidence to connect them directly with the suggested abetment of criminal breach of trust. As fairly observed by the learned

Government Pleader, beyond those statements the evidence directed against them is that of participation in a general conspiracy, not directly

relevant to the charge of embezzlement of the specific items making up the gross sum in the charge under Sections 408 and 409 of the Code.

There are other details in their conduct to which our attention has been drawn, which might fairly involve a contrary supposition. We therefore think

that it would not be fair to subject accused Nos. 4, 5 and 7 to a second ordeal of re-trial. Inasmuch as their conviction is not based upon a proper

trial, accused Nos. 4, 5 and 7 must be acquitted and discharged. The fines if paid by them should be refunded.

41. We direct accused Nos. 1, 2, 3 and 8 will continue on bail during re-trial on furnishing fresh bail, upon the same terms, in the trial Court.

Sen, J.

42. I agree. I think that the objection as to jurisdiction based on Section 195(1)(b) of the Criminal Procedure Code ought to prevail. The relevant

part of the said section reads thus:

No Court shall take cognizance of any offence punishable u/s 193, when such offence is alleged to have been committed in, or in relation to, any

proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

43. At the date when the Court took cognizance of the offence, that is, on October 22, 1934, there had been (1) a petition for the winding-up of

the bank resulting in a scheme which on a subsequent petition of the bank was replaced by another scheme; and (2) the filing of suit No. 70 of

1934 by the bank against Joshi & Co. and accused Nos. 1 to 7 for Rs. 6,421 on accounts. The winding-up proceedings commenced in

December, 1931, and terminated in December, 1933, and suit No. 70 of 1934 was pending at the date of the complaint. The winding-up petition

was filed within a few weeks of the date of the execution of the bond (exhibit 161), that is, November 13, 1931. The law applicable in such cases

has been clarified and stated in the judgment of the learned Chief Justice in In re Indrachand Bachraj (1931) 34 Bom. L.R. 294. According to that

decision, if any of these proceedings were proceedings in or in relation to which the offence u/s 193 had been committed, a complaint of the Court

in which those proceedings took place was necessary before cognizance of that offence could be taken. The charge and the complaint make it

clear that the prosecution case was that the accused got the bond (exhibit 161) executed being apprehensive that they would be driven out of the

bank and succeeded by a new board which might insist on the immediate payment of all dues found at the foot of the account of Joshi & Co. with

the bank. The charge also states, with reference to the offence u/s 193, that the instalment bond dated November 13, 1931, was created inter alia

for the purpose of its being used in a possible judicial proceeding relating to the affairs of the bank. The learned Additional Sessions Judge was

rightly of opinion that ""there had been every prospect and apprehension that an Official Liquidator or Receiver of the bank"s assets would be

appointed or a temporary attachment granted against the bank, in consequence of which immediate payment of the entire amount due to the bank

might be demanded by the Official Liquidator, the Receiver or the Attaching Creditor""Ã¯Â¿Â½(paragraph 127 of the judgment). These facts, in my

opinion, make it amply clear that the execution of the bond can be said to have been in relation to the winding up proceedings.

44. As regards suit No. 70 of 1934, it was based on the khata of Joshi & Co., after taking into account the amount of the bond (exhibit 161). But

for the bond and the consequent entries in the khata it is clear that the bank would have sued Joshi & Co, for the whole amount due. Defendants

Nos. 4 and 6 in the suit make express reference to this bond in their written statements.

45. Thus the alleged offences must be held to have been committed in reference to the winding-up proceedings as well as to the suit. Therefore,

there being no complaint in writing of either of the Courts in which the said proceedings were held, the committing Magistrate clearly had no right

to assume jurisdiction, and consequently all the subsequent proceedings must be held to be invalid and vitiated.

46. In view of this finding I do not think it necessary to arrive at a conclusion regarding the contention of the appellants, which has been argued at

great length, as to whether the proceedings are further vitiated by misjoinder. On the authorities, which have been cited and considered by my

learned brother, the position seems to be this, that if there be a charge u/s 120B regarding a well-defined conspiracy in pursuance of which the acts

with which the accused are charged are committed, then there would be no misjoinder. Here the complainant alleged conspiracy in this way. He

has stated at the beginning of his complaint:

47. It appears from the records of the Dharwar Bank, hereinafter called the Bank, and other information available that in or about the year 1922-

1923 the accused abovenamed with certain other friends and relatives of theirs formed themselves into a group to help themselves, their friends

and relatives freely with the Bank''s money and to utilise the resources of the Bank for the promoting and financing their private enterprises to the

advantage of themselves and to the detriment of the vital interests of the Bank.

48. The charge also begins in this way:

That you accused Nos. 1 to 8 with others, with the common object of dishonestly misappropriating the Dharwar Bank''s resources and money,

through the help of its officers who had been entrusted with and had dominion over the same, conspired together.

This part of the charge appears to me to correspond to the part in the complaint which mentions the conspiracy, this conspiracy thus being a wider

affair than the conspiracy implied in the expression ""abetment by conspiracy"" u/s 109 of the Indian Penal Code. The prosecution in this case

dropped the charge u/s 120-B, being apparently apprehensive that the conspiracy alleged was a conspiracy to commit at least some non-

cognizable offences. The question that arises, therefore, is, on the charge u/s 120-B being dropped, though no essential part of the prosecution

case appears to have been given up, was it still open to the prosecution to rely on a general conspiracy for connecting the offences charged in such

a way as to show that they formed part of or constituted one transaction? This, I must confess, I do not find an easy question to decide. But as we

have decided to quash the proceedings in this case on another ground, I do not personally find it necessary to express any opinion on this question.

In view of the desirability of avoiding complications in the fresh trial, I agree that the new charge should not include the offences punishable under

Sections 193 and 477-A of the Indian Penal Code and abetment thereof.

49. As to the argument based on Markur, In re (1914) ILR 41 Bom. 1 : S.C. 18 Bom. L.R. 185, and Agni Kumar Das v. Mantazaddin ILR

(1928) Cal. 290 with reference to suit No. 70 of 1934, namely, whether the conduct of the accused was ratified by the subsequent civil

proceedings, I think it is essential to remember that there can be no estoppel of a criminal prosecution and no ratification of a criminal offence. It

also seems to me that however necessary and desirable it may be, as a matter of public policy, to prevent conflicts between decisions of civil and

criminal Courts, it is of far greater moment to the State that no non-compoundable offence should be left unpunished if it is possible to secure

evidence to prove such offence. There can be, besides, no ""relating back"" in the case of an offence as a result of a civil proceeding which treats the

act as the foundation of the civil claim, although the criminal Court ought as a rule to take into consideration the civil Court''s judgment relating to

such claim.

50. I agree that the amount of evidence against accused Nos. 4, 5 and 7 is so little and its quality so inconclusive, that it would be best not to order

a re-trial of these accused, especially in view of the length of the present criminal proceedings and the fact that they have already undergone a

substantial part of their sentences.

51. Finally, I agree with my learned brother that we are considerably indebted to Mr. Gajendragadkar, advocate for accused No. 1, for the ability

and the lucidity of presentation which have been the outstanding features of the arguments he has addressed to us on the general case of all the

accused, and on the particular case of his own client.