

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A.No. 520/2009

% *Judgment reserved on: 22nd February, 2012*
Judgment delivered on: 27th February, 2012

ABDUL BAKI MANDAL Appellant
Through: Mr. Ajay Verma & Mr. Gaurav
Bhattacharya, Advs.
versus

STATE Respondent
Through: Mr. Navin Sharma, APP.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. The instant appeal is being filed against the impugned judgment dated 27.04.2009 whereby the appellant was held guilty and convicted for the offence punishable under Section 20 Unlawful Activity (Prevention) Act, 1967 (hereinafter referred as to the 'said Act'). Vide order on sentence dated 27.04.2009 he was sentenced to undergo for a period of 07 years and to pay a fine of ₹1000/- under Section 20 of the said Act. In default of payment of fine he shall undergo one month simple imprisonment. Benefit of Section 428 Cr.P.C. has been extended to appellant.

2. In brief, the case of the prosecution is that in the month of July, 2005 there was a 'Fidayeen' Attack by militants at Ram Janam Bhumi-Babri Masjid site in Ayodhya in which five militants were gunned

down by the Security Forces. One mobile phone was recovered from the possession of one of the deceased militant. To work out the conspiracy and the outfits involved in the '*Fidayeen*' attack, a team was constituted. From the scanning of the data and its subsequent analysis, it was revealed that the terrorists involved in the Ayodhya attack had also set up their base in Delhi. To further develop this information, sources were deployed in Delhi and Jammu Kashmir to unearth this conspiracy, through the technical surveillance and scanning of data, it was revealed that the *Fidayeen* Attack on Ayodhya was the handiwork of the banned terrorists outfit Jaish-e-Mohammad (hereinafter referred as 'JeM') and was using Delhi as a transit point between Bangladesh and Jammu-Kashmir and had also set up their module in Delhi and this module had provided shelter to many terrorists of Jaish-e-Mohammed who were involved in terrorist attack in India.

3. From the technical surveillance, it was revealed that one Abdul Baki @ Raju, resident of West Bengal used to ferry the militants from Bangladesh to their safe hideouts in Delhi and vice versa and that one Amir, resident of Assam was also instrumental in providing hideouts to the JeM militants in Delhi and adjoining areas. This information was discussed with senior officers and a team consisting of SI Kailash Bisht and HC Bijender Singh were sent to West Bengal to identify and kept a secret watch on the movements of Abdul Baki @ Raju. HC Satender was also sent on 05.11.2005 to assist the team already deployed there. On 10.11.2005, on the basis of information received from SI Kailash

Bisht that Abdul Baki had come to Howrah Station and purchased a ticket for Delhi for train No. 2381 Purva Express. This fact was recorded in Daily Diary and discussed with senior officers.

4. Thereafter, a team, under the supervision of ACP Sanjeet Kumar Yadav headed by Inspector Badrish Dutt consisting of Inspector Mohan Chand Sharma, SI Sanjay Dutt, SI Vijay Tyagi, SI Rakesh Malik, SI Pawan Kumar, ASI Vikram, SI Rajpal Dabas, ASI Shahjahan and constables, was formed. After ascertaining the time of arrival of Purva Express at New Delhi Railway Station, the raiding party left for New Delhi Railway Station and the team members were deployed on Ajmeri Gate side as well as Pahar Ganj side as the train was to arrive at Platform No. 6.

5. After the train arrived, SI Kailash Bisht pointed out towards the accused Abdul Baki who came out of the General Compartment which was located at the rear end of the train and it was decided to follow him secretly. After getting down from the train, the appellant came out of the New Delhi Railway Station from Ajmeri Gate side and proceeded towards Bus Stop. Suddenly he started running towards Minto Road, then he was apprehended after being chased.

6. During interrogation, his identity was revealed as Abdul Baki Mandal, resident of Village and P.O. Gacha, Bashir Hat, Distt. North 24 Pargana, West Bengal and that he was member of the banned terrorist organization Jaish-E-Mohammad (JeM) and had come to Delhi on the direction of his handler in Bangladesh namely Anwar @

Jubed. During investigation, it was revealed that he had illegally brought many terrorists of JeM, from Bangladesh to Delhi including the terrorist involved in Ram Janam Bhumi-Babri Masjid attack in July, 2005. On the basis of interrogation of the appellant, case FIR No.146/2005 under Sec.18/19/20 of Unlawful Activities (Prevention) Act, 1967 was registered against the appellant.

7. During further investigation of this case, his police remand was sought and on 17.11.2005. At the instance of appellant Abdul Baki Mandal, three identity cards were recovered, one of which was of appellant Abdul Baki Mandal issued by JeM and two other identity cards issued from Karachi, Pakistan belonging to Militants of JeM who were helped by the appellant in illegally crossing over in India. On the basis of disclosure statement of appellant Abdul Baki Mandal, other accused persons namely Amir Ali, Nafiq-Ul-Biswas, Shag Khan @ Hilal, Nadir and Mohd. Ibrahim were also arrested, however while filing the charge-sheet, **as no substantive material could be found against accused Nafiq-Ul-Biswas, Sohag Khan @ Hilal, Nadir & Mohd. Ibrahim, they were got discharged and accused Abdul Baki Mandal and Amir Ali were sent to face trial for the offence punishable under Sec. 18/19/20 of the said Act.**

8. Vide order dated 14.03.2007, learned Trial Court discharged accused Amir Ali and only appellant was charged for the offence punishable under Section 20 of the said Act, to which he pleaded not guilty and claimed trial.

9. Prosecution has examined seven witnesses in all in support of its case. Appellant has also been examined under Sec.313 Cr.P.C. to enable him to explain about the evidence appearing against him, wherein he has denied the case of prosecution and stated that he was arrested from Howrah Railway Station by police officials of Special Cell four months prior to his arrest in this case. One other person who was barber by profession was also brought from Howrah whose name he did not remember. He was detained in Special Cell for four months and thereafter he falsely implicated in this case. Three-four other boys from Assam were also detained in the Special Cell and after four months, he and one other person Amir who were sent to Jail and others were released.

10. It is further stated that he was brought by the police of Special Cell on the pretext of making some inquiries but he was falsely implicated in this case. He has further stated that in fact he was picked up by the police at New Delhi Railway Station before four months of his arrest and during this period, he was forced to work for Special Cell in Bangladesh and on his refusal, he was implicated in this case. Appellant has not led any evidence in his defence.

11. PW-1 ASI Raj Singh is the Duty Officer who has proved the FIR No. 106/2005 as Ex.PW1/A.

12. PW-4 Sh. Vinay Kumar, who was working as Deputy Secretary (Home), Govt. of NCT Delhi on 6.2.2006 has conveyed the sanction of Hon'ble Lt. Governor vide order Ex.PW4/A and sent the same to the

police.

13. PW-5 Sh. Sanjay Singh, CO, Milky Pur, Distt. Faizabad, U.P. has stated that a case FIR No.157/05 for the offence punishable under Sections 147/148/149/307/353/153/153-A/153-B/302/295/120-B India Penal Code and 16/18/19/20 of Unlawful Activities (Prevention) Act was registered at PS Ram Janam Bhumi, Distt. Faizabad, UP, the same is exhibited as Ex.PW5/A.

14. PW-6 Inspector Kailash Bisht is the material witness who identified and kept secret watch on appellant Abdul Baki. As per his deposition, in the month of July, 2005 there was a '*Fidayeen* Attack' at Ram Janam Bhumi site in Ayodhaya, in which five *Fidayeen* Militants were gunned down by security forces and from one of the slain militant, mobile phone was recovered. He has further stated that to work out the conspiracy of the terrorist outfit, a team headed by Inspector Mohan Chand Sharma was formed. In order to develop the information, secret sources were deployed and through the technical surveillance and scanning, it was revealed that the attack on Ayodhaya was handiwork of banned terrorist outfit Jaish-e-Mohammad (JeM) which was also using Delhi as a transit point between Bangladesh and Jammu & Kashmir and have set up their modules in Delhi to provide shelter to the *Fidayeen* Militants. It was also revealed through technical surveillance that one Abdul Baki @ Raju, resident of West Bengal used to carry the militants from Bangladesh to their safe hideouts at Delhi and vice versa.

15. It is further deposed, he along with the other police officers reached at Kolkata and deployed their sources in and around Kolkata in West Bengal and on 05.01.2005 HC Satender also joined them. On 09.11.2005, an informer who was already deployed in Bashir Hat, Distt. North 24 Pargana, West Bengal, informed that the said appellant Abdul Baki Mandal was planning to leave for Delhi on 10.11.2005, so he along with the team members identified the appellant with the help of secret informer. It was also revealed that the appellant would be boarding Purva Express from Howrah Railway Station. Accordingly, on 10.11.2005, he informed to Senior Officers that Abdul Baki Mandal @ Raju had come to Howrah Station and had taken railway ticket for Delhi and boarded train No.2381 Purva Express.

16. As per the instructions of senior officers, he along with other team members, carefully followed him and also informed the senior officers that the appellant Abdul Baki Mandal had boarded the general compartment of Purva Express which was located in the rear end of the train and was following the movement of the said Abdul Baki in the train.

17. He has further deposed that next day i.e. on 11.11.2005 at about 8.45 am, train Purva Express entered Platform No.6, at New Delhi Railway Station. The appellant Abdul Baki Mandal got down from the general compartment with black colour canvas bag. He pointed out the appellant to the team members present at the platform No.6 including Inspector Mohan Chand Sharma and Inspector Badrish Dutt.

18. Accordingly, the appellant was apprehended near the Ajmeri Gate side of the Railway Station. On inquiry, the appellant Abdul Baki Mandal disclosed that he was member of banned Terrorist organization Jaish-e-Mohammad and had come to Delhi on the direction of his handler in Bangladesh, namely Anwar @ Jubed. The appellant had also informed that he was directed to take two Militants of Jaish-e-Mohammad from Delhi and to safely take them across the border to Bangladesh. It is further disclosed that he had brought illegally many terrorists of Jaish-e-Mohammad from Bangladesh to Delhi and that he had also brought the *Fidayeen* Militants involved in Ayodhya Attack.

19. PW-6 Inspector Kailash has further deposed that facts were communicated to senior officers and at about 10.30 am the appellant Abdul Baki Mandal was taken to the office of Special Cell, Lodhi Colony for further interrogation. Inspector Badrish Dutt prepared the rukka and handed over the same to SI Vinay Tyagi for registration of the case. After the case was registered, the further investigation of this case was entrusted to Sh. Sanjeev Yadav, ACP/NDR, Special Cell who also interrogated the appellant. After finding sufficient evidence, appellant Abdul Baki Mandal was arrested vide arrest memo Ex.PW3/D and his body inspection memo Ex.PW6/A and personal search memo Ex.PW3/E were prepared. The bag of the appellant was seized vide memo Ex.PW3/A and some documents recovered from the possession of appellant were also seized vide seizure memo Ex.PW3/B. Appellant Abdul Baki Mandal also made disclosure statement Ex.PW3/C. He identified the black colour bag containing

some clothes as Ex.P4 and the documents i.e. two STD slips, pocket diary and railway ticket Ex.P5 (colly) to be the same which were recovered from the appellant.

20. PW-2 Inspector Badrish Dutt, has deposed about the formation of a team headed by Inspector Mohan Chand Sharma and surfacing name of Abdul Baki, resident of West Bengal to be the person having relations with JeM, who was bringing in and taking out of India, the militants of the aforesaid organization from Bangladesh. Subsequent to the information received from SI Kailash Bisht about the arrival of the appellant to Howrah Station, closely followed up the appellant and board the same train. Thereafter enquiries were made from Railway Station for arrival of train Poorva Express. In the meanwhile, SI Kailash Bisht was also informing about the movement of train.

21. It is further deposed that on 11.11.2005, he along with Inspector Mohan Chand Sharma and other team members left for New Delhi at about 7 AM and reached to platform No.6 at about 7.20 AM, where he asked 8-10 passerby to join the raiding party, but none agreed, explained their inability. On cursory interrogation, he revealed that he was working for band militant organization JeM and had come to Delhi on direction of his handler Anwar to bring two militants of this Organization for taking them to Bangladesh. Appellant further disclosed that he had also brought-in 5 militants in Ram Janam Bhumi – Babri Masjid attack in 2005.

22. PW-3 SI Vinay Tyagi, has also deposed on identical lines as

stated by PW-2 Inspector Badrish Dutt. He had also gone to village of appellant along with ACP Sanjeev Kr. Yadav as they left Delhi on 16.11.2005 and reached village Gacha, West Bengal on 17.11.2005. On pointing out of appellant, 3 identity cards were recovered from the 'taand' (loft) in the left side room of his house, which was seized vide memo Ex.PW1/H.

23. He has further deposed that the identity Card Ex.PW3 was that of appellant containing his code name as '**Nasir**' and gave his designation as "**Area Commander, Bengal**". To this effect, an entry was made at PS-Basir Haat vide G.D. No.1098 dated 17.11.2005 and on the next date i.e. 18.11.2005 all of them returned to Delhi.

24. PW-7 ACP Sanjeev Kr. Yadav, IO of the case has deposed that on receiving the investigation of this case, he along with PW-2 Inspector Badrish Dutt reached at the spot and prepared the site plan Ex.PW7/A at his instance. Rest he has supported as deposed by the other police witnesses.

25. Mr.Ajay Verma, learned counsel appearing on behalf of the appellant has submitted that trial court has convicted the appellant for the reasons that he made a disclosure statement, wherein he admitted, he was member of JeM. The disclosure statement of the appellant lead to recovery of identity cards. The recovery of identity cards of the others shows that accused was involved in the activities. Possession of the same lead to inference that he was active member of the organization as admitted in the disclosure statement. Investigation has

been done fairly as the persons arrested at the disclosure of the accused Abdul Baki were later on discharged at the application of the prosecution.

26. Learned counsel has asserted that if the identity cards of others were already recovered, then, there was no need for the prosecuting agency to go to West Bengal. It creates doubt on the investigation.

27. He has further argued that the prosecution has failed to prove beyond reasonable doubts all the three circumstances; and relied upon the depositions of the witnesses on material points as under:-firstly;

A. Arrest of the appellant based upon the technical surveillance and disclosure statement:-

- a. The prosecution case is doubtful as the surveillance, the primary source of information has not been proved by the prosecution.
- b. The arrest of the appellant on the Delhi Railway is doubtful as PW-7 has stated that the appellant was arrested at the office of Special Cell.
- c. PW-5 categorically stated before the trial court that he prepared the chargesheet and supplementary chargesheet of the Faizabad case and no incriminating evidence was found against the appellant; secondly

B. Visit of Police Officials at West Bengal and recovery of Identity Card

- a. Initial travel to the West Bengal on 06.10.2005 also not proved as no document placed on the record. It creates doubt on the prosecution case whether any police officer travelled to West Bengal or not.

- b. None of the witnesses have been able to prove beyond reasonable doubt that they visited the village of the appellant at West Bengal as no documentary proof of their visit has been proved during the trial.
- c. The visit to the Village of the Appellant is doubtful as PW-6 states that there were houses at the distance of 1KM and PW-7 IO states that houses were at the distance of 50 Meter.
- d. It is an admitted case that no independent witness was taken during the alleged search and seizure made at the village of the Appellant. There was neither an attempt by them nor could the villagers understand English or Hindi. This also casts a doubt on the case of the prosecution; thirdly

C. Alleged Identity card not proved beyond reasonable doubt connecting the appellant with the membership of banned organization:

- a. In a criminal trial such as the present matter, the onus is on the prosecution to prove beyond reasonable doubt that the 'so called Identify Cards' are not doctored and are only belong to the Banned Organization.
- b. No expert witness had been examined to prove that the Banned Organization issues cards similar to those that has been recovered, in the similar cases, to prove this fact Defence Expert or any Intelligence Agency could have been examined to prove the genuinity of the identify card.
- c. It is settled law that the onus to prove the document would be on the person who relies the same. The prosecution has to prove beyond reasonable doubt that the document relied by itself is genuine, which is the sole basis of conviction.
- d. Admittedly, the documents relied upon were not

public documents and the same were private documents. Unless the document was proved to be genuine, the same is not admissible in evidence; and fourthly

D. Trial Court ought not to have taken literal interpretation of the Section 20 of the Act.

- a. It is settled law that the literal interpretation of Section 20 of the Unlawful Activities (Prevention) Act, 1967 cannot be taken, if it leads to absurd results. The court can deviate from literal interpretation, rule of statute to reach a sensible interpretation so that the same is not *ultra virus* of the Article 19 and 21 of the Constitution of India.

28. Learned counsel for the appellant has further submitted that PW-2 Inspr. Badrish Dutt, Special Cell has deposed that he received clue from the technical surveillance, which revealed that one person named Abdul Baki resident of West Bengal, is having relationship with the organization and bringing out terrorists in and out of India, from Bangladesh. PW6 was directed to closely follow the appellant and board the same train. He was informing about the movement of the train. Appellant started moving towards Bavbhuti Marg and suddenly started running, then was apprehended. That on cursory interrogation, appellant revealed his address and disclosed that he is a member of the banned terrorist group and on direction of his handler in Bangladesh namely Anwar Jubed, he was directed to take 2 terrorists from Delhi to across border to Bangladesh. Also disclosed that he had brought 5 militants involved in Ayodhya attack in 2005. From the interrogation conducted there was prima facie evidence against Appellant about

concealing, harbouring the members of the banned organization.

29. Learned counsel has argued that PW-2 did not conduct any investigation on the mobile phone recovered by UP Police. Also did not know who provided the data of the mobile phone to Inspr. M.C. Sharma. The base of JeM could not be located in Delhi on the basis of that data information. Accused was identified in Kolkata before 05.11.2005. He also admitted that neither the railway police nor the coolies were asked to join the raid, whereas they remained about 1½ hours at the spot, after appellant was apprehended.

30. Learned counsel for appellant has further submitted, PW-3 SI Vinay Tyagi has deposed that on 11.11.2005 he was posted as SI in Spl. Cell, Lodhi Colony. From the scanning of the data of the recovered mobile by Inspr. Mohan Chand Sharma and Inspr. Badrish Dutt and subsequent analysis of the data so found revealed of the appellant. PW6 Kailash identified the appellant & kept surveillance. At about 06:10 to 07:10AM, the team departed equipped with arms and ammunitions and bulletproof jackets in private cars. The ACP recorded his statement on laptop and print out was taken at Delhi, after they returned.

31. Learned counsel has argued that this witness has deposed that no documents were seized regarding relation of Ayesha Bibi and Appellant. They did not enter PS-Basir Haat after investigation, hence no arrival entry was made. No document was seized to show the occupancy of the Appellant in that house. No statement of any witness

was recorded to the effect that the Appellant was occupying that room. It is admitted as correct that no site plan is on the file. They did not take any interpreter with them, as they were aware that they could not understand Hindi. They remained there for about one hour. As there was language problem, they could not ask from the villagers about the visits of the appellant to his village or whether he used to live in the village. One W/SI Chanda Sejwani was associated in the raid, as she knew Bengali and could communicate with the appellant, as during investigation appellant used to speak in Bengali also, which they were unable to understand.

32. Further, it is also admitted that the name of issuing authority and the postal address of JeM is not written on the identify Card, therefore, its genuineness could not be verified from JeM. **In reply to the specific question put by the trial court, he answered and admitted that the SIM Card recovered from one of the slain militant was given to the Special Cell through Central Intelligence Agency, which was scanned and duly scrutinized by the Special Cell.**

33. Whereas, PW-5 Inspector Sanjay Singh, from UP police deposed that the charge-sheet and supplementary charge-sheet was filed in FIR No.157/05 at Faizabad. The appellant is not facing trial in that case. No incriminating evidence came against the appellant in the investigation done by him so far. One mobile phone was recovered, but he could not tell if any sim card was recovered or not.

Therefore, he asserted that the basic information, on which the appellant was arrested and convicted, has not been proved.

34. PW-6 Insp. Kailash deposed that on 09.11.2005, he received information about the appellant's planning to come to Delhi. On cursory interrogation, he revealed that he was resident of Village. No documentary proof of their visit at West Bengal. He was initially sent to Kolkata, he was in the train when the accused was coming to Delhi on 10.11.2005 – 11.11.2005. He was directed to closely follow the appellant and board the same train. He was informing about the movement of the train. On cursory interrogation, appellant revealed his address and disclosed that he is a member of the banned terrorist group and on direction of his handler in Bangladesh namely Anwar Jubed, he was directed to take 2 terrorists from Delhi to across border to Bangladesh. Also disclosed that he had brought 5 militants involved in Ayodhya attack in 2005. From the interrogation conducted there was *prima facie* evidence against appellant about concealing, harbouring the members of the banned organization. **The jurisdiction of Special Cell is in Delhi only. The UP Police had not sent any requisition to conduct investigation of *Fidayeen* attack at Ram Janam Bhumi. The mobile was not recovered by the Special Cell. The IMEI number was provided by the Central Intelligence agency in the third week of July, 2005. During technical surveillance no specific location of the appellant came to his notice. They did not make any arrival or exit at the police station of the Kolkata.**

35. Learned counsel for appellant has referred to testimony of PW7 ACP Sanjeev Kumar, who deposed that on personal search of the

appellant ₹585 were recovered from one black colour rexin purse. They were 4-5 officials when the appellant was taken to West Bengal on 16.11.2005. They have not filed any travel document with the charge sheet nor he produced any such document. He prepared the charge sheet, and the visit of Kolkata is not mentioned therein. They hired a private vehicle; the registration number thereof could not be furnished by him. No document like ration cards was seized regarding the relationship between Ayesha Bibi and the appellant or regarding the occupancy of the house of the appellant. **No site plan was prepared of the place of the recovery, as he did not feel it necessary.** They tried to make inquiry from the persons living in that village but due to language problem and their unwillingness, the inquiries could not be conducted regarding conduct of the accused. They did not have translator/interpreter with them, as one of the members of the raiding party knew Bengali. **No departure entry was made.** Statement of Vinay Tyagi was recorded by him on his laptop at railway station before leaving to Delhi. Inspr. Badrish did not hand over him any interrogation memo. **To a specific questions put by the court, he answered that no incriminating evidence was handed over to him by Inspr. Badrish Dutt. Accused was arrested at the Spl. Cell Office. He admitted that the place of arrest in the seizure memo has been shown at New Delhi Railway Station. He also admitted that it was not possible to verify the I-Cards. He also deposed that no data was collected by him which was gathered through technical surveillance. He did not receive any sim card or mobile phone from UP police nor did he investigate on this aspect.**

36. Learned counsel for the appellant has relied upon judgment in **Indra Das v. State of Assam** (2011) 3 SCC 380 wherein it is held as under:-

*“1. There is no evidence against the appellant except the confessional statement. The alleged confession was subsequently retracted by the appellant. The alleged confession was not corroborated by any other material. We have held in **Arup Bhuyan's case** (supra) that confession is a very weak type of evidence, particularly when alleged to have been made to the police, and it is not safe to convict on its basis unless there is adequate corroborative material. In the present case there is no corroborative material. However, the appellant has been convicted under Section 3(5) of TADA which makes mere membership of a banned organization a criminal act, and sentenced to five years rigorous imprisonment and Rs.2000/- fine.*

*2. In **Arup Bhuyan's case** (supra) we have stated that mere membership of a banned organization cannot incriminate a person unless he is proved to have resorted to acts of violence or incited people to imminent violence, or does an act intended to create disorder or disturbance of public peace by resort to imminent violence. In the present case, even assuming that the appellant was a member of ULFA which is a banned organization, there is no evidence to show that he did acts of the nature above mentioned. Thus, even if he was a member of ULFA it has not been proved that he was an active member and not merely a passive member. Hence the decision in **Arup Bhuyan's case** (supra) squarely applies in this case.*

*3. In our judgment in **State of Kerala v. Raneef** we had referred to the judgment of the U.S. Supreme Court in*

Elfbrandt v. Russell 384 US 17(1966) which rejected the doctrine of 'guilt by association'.

4. In *Elfbrandt's case* (*supra*) Mr. Justice Douglas, speaking for the Court observed:

1. Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat.

2. This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States by the Fourteenth Amendment.

3. A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

4. The decision relied on its earlier judgments in *Schneiderman v. U.S.* 320 US 118(136) and *Schwartz v. Board of Bar Examiners* 353 US 232(246). The judgment in *Elfbrandt's case* (*supra*) also referred to the decision of the U.S. Supreme Court in *Scales v. U.S.* 367 US 203 (229) which made a distinction between an active and a passive member of an organization.

5. In *Abrams v. U.S.*, 250 US 616 (1919) Mr. Justice Holmes of the U.S. Supreme Court in his dissenting judgment wrote: (LeD p.1180)

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result

with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the 1st Amendment left the common law as to seditious libel in force. History seems to me against the notion".
(emphasis supplied)

6. *It has been submitted by the learned counsel for the Government before the TADA Court that under many laws mere*

membership of an organization is illegal e.g. Section 3(5) of Terrorists and Disruptive Activities, 1989, Section 10 of the Unlawful Activities (Prevention) Act 1967, etc. In our opinion these statutory provisions cannot be read in isolation, but have to be read in consonance with the Fundamental Rights guaranteed by our Constitution.

7. *The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional. The first attempt of the Court should be try to sustain the validity of the statute by reading it down. This aspect has been discussed in great detail by this Court in **Government of Andhra Pradesh v. P. Laxmi Devi 2008(4) SCC 720.***

8. *In this connection, we may refer to the Constitution Bench decision in **Kedar Nath Singh v. State of Bihar AIR 1962 SC 955** where the Supreme Court was dealing with the challenge made to the Constitutional validity of Section 124A IPC (the law against sedition). In **Kedar Nath Singh's** case this Court observed:*

“If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them

unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence.”

9. Section 124A which was enacted in 1870 was subsequently amended on several occasions. This Court observed in **Kedar Nath's case (supra)** observed that now that we have a Constitution having Fundamental Rights all statutory provisions including Section 124A IPC have to be read in a manner so as to make them in conformity with the Fundamental Rights. Although according to the literal rule of interpretation we have to go by the plain and simple language of a provision while construing it, we may have to depart from the plain meaning if such plain meaning makes the provision unconstitutional.

10. Similarly, we are of the opinion that the provisions in various statutes i.e. 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal have to be read down and we have to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution. It is true that ordinarily we should follow the literal rule of interpretation while construing a statutory provision, but if the literal interpretation makes the provision unconstitutional we can depart from it so that the provision becomes constitutional.

37. Learned counsel for the appellant has also relied upon **Tukaram S. Dihole v. Manikrao Shivaji Kakote (2010) 4 SCC 329** wherein it is held as under:-

“Tested on the touchstone of the tests and safeguards enumerated above, we are of the opinion that in the instant case the appellant has miserably failed to prove the authenticity of the cassette as well as the accuracy of the speeches purportedly made by the respondent. Admittedly, the appellant did not lead any evidence to prove that the cassette produced on his agent. On a careful consideration of the evidence and circumstances of the respondent was guilty of indulging in corrupt practices”.

38. On the other hand, Mr. Navin Sharma, learned APP while refuting the contention of learned counsel for appellant submitted that the technical surveillance was not required to be produced or proved during trial, as it was not a *sine-quo-non* for bringing the guilt of appellant at home or to prove the prosecution case against him.

39. He has further submitted that appellant has answered to question No.20 put to him during his examination under Section 313 Cr. P.C. as under:-

“Qus. Have you to say anything else?”

Ans. I am innocent. I was arrested from Howrah Railway Station by police officials of Special Cell four months prior to my arrest in this case. One other person who was barber by profession was also brought from Howrah. His name I do not remember. I was detained in Special Cell for four months and thereafter falsely implicated in this case. Three-four other boys from Assam were also detained in the Special Cell. After four months,

myself and one other person Amir were sent to Jail and others were released. I was brought by the police of Special Cell on the pretext of making some inquiries, but thereafter, I was falsely implicated in this case. In fact, I was picked up by the police at New Delhi Railway Station before four months of my arrest and during this period, I was forced to work for Special Cell in Bangladesh and on my refusal, I was implicated in this case.”

40. Learned APP has further submitted that if he was arrested four months prior, then either he or on his behalf a complaint would have been lodged for the alleged illegal detention by the police.

41. Vide seizure memo Ex.PW3/B, one pocket telephone diary wherein several numbers were mentioned in Bengali; one train ticket from Howrah Junction to New Delhi bearing No.8898420 purchased for ₹ 244/-; one STD slip of telephone No.00880187108262 dated 09.11.2005; another STD slip of Modern Xerox of telephone No.0080175092154 of dated 09.11.2005, were seized from the appellant. Notice regarding legal aid was also issued to appellant in Bengali vide memo Ex.PW7/B and the house was searched vide memo Ex.PW3/4 from where two Identity cards, one with the stamp of ‘Assistant Director, DRO Karachi (South)’ and ‘1975’ is embossed thereon and some script in Urdu language is also there, on another identity card ‘1980’ and some words in Urdu language are embossed thereon.

42. PW-3 SI Vinay Tyagi has proved the departure entry dated 17.11.2005 as Ex.PW3/DB from police station Basirhat, West Bengal.

43. Learned APP further submitted that the appellant made disclosure statement Ex.PW3/C wherein he disclosed regarding his being member of JeM and activities carried out by him.

44. He further referred to the deposition of PW7 ACP Sanjeev Kumar, IO of the case who deposed that on 11.11.2005 he received the information that the investigation of this case was had been entrusted to him and the *rukka* was prepared by Inspector Badrish Dutt, who sent the same through SI Vinay Tyagi for registration of the FIR. He (IO) alongwith Inspector Bardrish Dutt reached the spot and prepared the site plan Ex.PW7/A at his instance. This witness has also proved all the recoveries effected from the appellant.

45. Learned APP further submitted that the other co-accused persons, who were arrested alongwith the appellant, on moving the application by prosecution, got discharged. This shows that there was fair investigation on the part of the police. Since, a lot of incriminating material was there against the appellant, therefore, charge-sheet was filed under Section 18, 19 & 20 of the said Act. However, learned Trial Court framed charge only under Section 20 of the said Act against appellant and other person namely Amir was discharged.

46. The appellant was the area commander, Bengal and his identity card has been issued by JeM, which is a banned terrorist outfit. Having such type of card in his possession; proves that he was involved in some destructive activities in this country. He has been bringing in and taking out the terrorists from India, Pakistan and Bangladesh. On the

receipt of surveillance information from PW5 SI Sanjay Singh of UP police, same were carried out and during surveillance appellant was found involved in these activities.

47. Learned APP has further submitted that learned Trial Judge has relied upon the last paragraph of the disclosure statement Ex.PW3/C of the appellant, according to which, Pakistani JeM terrorist whom he helped in crossing Bangladesh Border and brought to Delhi to live with Amir, some of their documents and identity cards issued by Juber of JeM were recovered from his house at his instance. It has been clarified by the Trial Judge that the confession to the police is not admissible under the said Act even if it is made before gazetted officer. But the same become relevant under Indian Evidence Act, 1872 if it resulted in discovery of some fact. In the instant case, disclosure statement of appellant has led to the recovery of the identity cards of appellant himself and others. Recovery of the identity cards of other persons led to the inference that the appellant was not only ordinary member of the said organization. That is why the identity cards of other persons came in his possession for one purpose or the other. The possession of identity cards of other persons cannot be explained on any hypothesis other than that of appellant being actively involved in the activities of said organisation, as submitted by him in his disclosure statement.

48. It is further observed by learned Trial Court that no doubt, none of the prosecution witnesses had seen the data of the technical surveillance launched after the '*Fiyadeen Attack*' on Ram Janam

Bhumi-Babri Masjid site, but whatever came to the notice of the officer launching the technical surveillance was brought to the notice of the senior officers and at that time, the only information available with the Special Cell was that Abdul Baki of West Bengal was having relation with the organisation and was ferrying terrorists.

49. Learned Trial Court further observed that sight cannot be lost of the fact that appellant has not assigned any reason of his false involvement. It was not his case that IO knew him before arrest or had any enmity with him. So, there was no reason of false implication at the hands of the police. Equally important is the fact that the police arrested six persons, but four of them namely Nafiq-Ul-Biswas, Sohag Khan @ Hilal, Nadir & Mohd. Ibrahim, were got discharged; whereas appellant and Amir Ali (since discharged by learned Trial Court) were put to trial.

50. By summing up, learned APP submitted that the prosecution witnesses have proved the case beyond reasonable doubts. There is no discrepancy in the impugned judgment passed by learned Trial Court. Therefore, instant appeal may be dismissed.

51. After hearing learned counsel for both sides and perusing the impugned judgment, the admitted facts are that from the technical surveillance, it was revealed that one Abdul Baki @ Raju, resident of West Bengal used to ferry the militants from Bangladesh to their safe hideouts in Delhi and vice versa and that one Amir, resident of Assam was also instrumental in providing hideouts to the JeM militants in

Delhi and adjoining areas. There is no proof on record that how investigating team has further zeroed down that the appellant is the same Abdul Baki Mandal @ Raju, and resident of Village and P.O. Gacha, Bashir Hat, District North 24 Pargana, West Bengal. And that he was member of banned terrorist organization JeM and had come to Delhi on the direction of his handler in Bangladesh namely Anwar @ Jubed.

52. As alleged against the appellant that he illegally brought many terrorists of JeM from Bangladesh to Delhi including the terrorists involved in Ram Janam Bhumi Babri Masjid attack in July, 2005. However, no proof thereof has been placed on the record to prove aforesaid facts. Even otherwise, all the accused persons arrested on disclosure of the appellant – either have been got discharged by the investigating agency itself or has been discharged by the Court. Therefore, the version of the prosecution becomes under shadow of doubt.

53. The appellant was arrested on the technical surveillance. Firstly, the said technical surveillance has not been proved; secondly, PW5 SI Sanjay Singh of UP police has not even proved the recovery of any mobile phone from the *Fiyadeen* militant, who was gunned down by security personnel in Ram Janam Bhumi Babri Masjid attack, therefore, the story of the prosecution is doubtful on this aspect also.

54. Admittedly, the investigating agency zeroed down upon the appellant as Abdul Baki Mandal @ Raju who was involved in taking in

and taking out the terrorist in India, Bangladesh, and Pakistan for his organisation – at Howrah Railway Station itself. He travelled throughout in general compartment upto Delhi. At Kolkata itself the investigating agency did not arrest him and allowed him to travel down to Delhi. If the version of the prosecution is taken to be true, then the investigating team had taken a great risk which would have proved fatal and of great loss of life and property to the passengers on board of said train or to this country – as they could have done any misshape with the train and its passengers. No prudent person will believe that if such a terrorist had been identified in Kolkata when he came to board the train and the raiding team allowed him to travel down upto Delhi in general compartment; whereas members of the investigating team travelled in a reserved compartment.

55. As per the identity card Ex.P3 the code name of the appellant was ‘Nasir’ and his designation was ‘Area Commander, Bengal’. From such a person who is ferrying terrorists in Indian, Pakistan and Bangladesh and providing hideouts to the militants would carry a cash amount of ₹ 585/- only and without any credit card or mobile phone etc. It is also not believable that a person of this nature and stature – as alleged – would not keep substantial amount or any instrument for communication. Moreso, such person would have also kept some weapon etc for his defence.

56. The visit to the village of the appellant is also doubtful as PW6 Inspector Kailash has deposed that there were houses at a distance of about 1KM and whereas PW7 ACP Sanjeev Kumar, IO of the case

stated that the houses were at a distance of 50 meters only. Even otherwise, no expert witness has been examined to prove that the banned organisation issues the cards of similar depiction which have been recovered from the appellant.

57. PW2 Inspector Badrish Dutt, did not conduct any investigation on the alleged mobile phone recovered by the UP police. He also did not know who provided the data of mobile phone to Inspector Mohan Chand Sharma. There is no proof on record to this effect that the appellant was occupying that room from where the documents were recovered. As admitted by PW7 ACP Sanjeev Kumar, IO of the case that no site plan to this effect has been prepared – creates doubt even on the visit of the police officers at the native place of appellant. Even the visit to Kolkata has not been mentioned either in the charge-sheet or in supplementary charge-sheet.

58. The police team had also not taken any translator or interpreter with them despite the fact that they were aware that in the village no one would understand Hindi or English. It shows that the prosecution has very casually handled this case and the appellant has been fixed in the instant case.

59. Learned Trial Judge has mainly relied upon the confessional statement of the appellant and recovery of three identity cards. The law has been settled in *Arup Bhuyan's case (supra)* that confession is a very weak type of evidence, particularly when alleged to have been made to the police, and it is not safe to convict on its basis unless there

is adequate corroborative material. In the present case there is no corroborative material.

60. It is further decided in above referred case that mere membership of the banned organisation cannot incriminate a person unless he is proved to have resorted to the acts of violence or incited people to imminent violence, or does an act intended to create disorder or disturbance of public peace by resort to imminent violence. In the present case, admittedly, there is no case prior to against him and he never been involved in any criminal case earlier.

61. Further, the law has been settled in **Elfbrandt's case (supra)** that those who join an organization, but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat.

62. The law is very settled that the statutory provisions cannot be read in isolation, but have to be read in consonance with the Fundamental Rights guaranteed by our Constitution. It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence.

63. The glaring fact of the instant matter is that out of the total sentence of seven years – as inflicted by learned Trial Court - appellant has already undergone more than 6 ½ years.

64. Keeping the above discussion into view, the impugned judgment dated 25.04.2009 and order on sentence dated 27.04.2009 passed by learned Trial Court are hereby set aside. Appellant is acquitted from all the charges.

65. Appellant be set at liberty forthwith, if not warranted in any other case.

66. Consequently, Criminal Appeal No.520/2009 is allowed and stands disposed of.

67. Registry to remit the Trial Court Record.

68. Copy of order be sent to Jail Superintendent, Delhi for information and compliance.

69. No order as to costs.

SURESH KAIT, J

FEBRUARY 27, 2012

b/jgd/MK