ITEM NO.2 COURT NO.8 SECTION II

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRLMP No. 18713/2012 in Criminal Appeal No(s). 889/2007

ARUP BHUYAN **Appellant(s)**

VERSUS

STATE OF ASSAM **Respondent(s)**
(for clarification/directions and office report)

WITH
Crl.MP.Nos.18711 & 18712/2012 in Crl.A. No. 1383/2007
(With appln.(s) for impleadment and clarification and Office Report)
R.P.(Crl.) No. 426/2011 In Crl.A. No. 889/2007
(With appln.(s) for Office Report)

R.P.(Crl.) No. 417/2011 In Crl.A. No. 1383/2007
(With appln.(s) for Office Report)

Date : 26/08/2014 These matters were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE DIPAK MISRA
HON'BLE MR. JUSTICE ABHAY MANOHAR SAPRE

For Applicant(s) Mr. Ranjit Kumar, SG
UOI Ms. Ranjana Narayan, Adv.
Mr. D.L. Chidanand, Adv.
Ms. Sushma Suri, Adv.

Mr.Aseem Mehrotra, Adv.
Mr. Abhijat P. Medh ,Adv.

State of Assam Mr. Jaideep Gupta, Sr.Adv.
Mr.Avijit Roy, Adv.
Mr. Navnit Kumar,for
M/s Corporate Law Group ,Adv.

For Respondent(s) Mr. B. Krishna Prasad ,Adv.

Mr. Navnit Kumar,for
M/s Corporate Law Group ,Adv.

Mr. Shreekant N. Terdal ,Adv.

UPON hearing the counsel the Court made the following

O R D E R

Crl.M.P.Nos.18711 and 18712/2012 have been filed in Criminal Appeal No.1383/2007 and Crl.MP.No.18713/2012 has been filed in Criminal Appeal No.889/2007. These applications have been filed by the Union of India. Review Petitions (Crl) No.426 and 417/2011 have been preferred in Crl.A. No.889/2007 and Crl.A.NO.1383/2007 respectively by the State of Assam for review of the decision in the criminal appeals mentioned hereinabove.

Initially the applications seeking permission to file an application for review by the Union of India were not registered on the ground that the Union of India was not a party to the criminal appeals. The said order was challenged in appeal i.e. Crl.M.P.No.22124/2011 in CrlA.No.1383/2007 & Crl.MP.No.22122/2011 in Crl.A.No.889/2007 wherein the learned Chamber Judge on 9/12/2011 had passed the following order.

> **"Mr. Mohan Parasaran, learned Additional Solicitor General, prays for withdrawal of Criminal Miscellaneous Petition Nos.22124/2011 and 22122/2011 with liberty to the applicant Union of India to renew the applications, if necessary, later on. Criminal Miscellaneous Petition Nos.22124 of 2011 and 22122 of 2011 are dismissed as withdrawn with liberty as aforesaid."**

On the basis of the aforesaid observation, the present applications for clarification along with applications for impleadment have been filed by the Union of India. The applications for impleadment have already been allowed in both the appeals. When these applications were listed on 2/5/2014, the following order came to be passed:

"**CRL.MP.No.18713/2012 in Crl.A.No.889/07:**

This is an application for clarification of the judgment passed in Criminal Appeal No.889 of 2007 on 03.02.2011. It is submitted by Mr. Mohan Parasaran learned Solicitor General appearing for Union of India that the Division Bench has opined with regard to the constitutional validity of Section 3(5) of the Terrorist and Disruptive Activities (Prevention)n Act, 1987 by reading down the provisions. He has referred to the paragraph which reads as under:

> **"In our opinion, Section 3(5) cannot be read literally otherwise it will violate Article 19 and 21 of the Constitution. It has to be read in the light of our observations made above. Hence, mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence."**

The learned counsel appearing for the respondent, namely, Arup Bhuyan, very fairly stated that he has nothing to do with the clarification as long as the judgment of acquittal is not disturbed. Mr. Parasaran conceded that he does not intend to question the acquittal as the Union of India is only concerned with the interpretation placed by this Court to save the constitutional validity of the provisions by adopting the doctrine of reading down in the absence of the Union of India.

Ordinarily we would have proceeded to deal with

the matter but Mr. Jaideep Gupta, learned senior counsel appearing for the State of Assam, submitted that he has filed an application for review of the judgment on the ground that the interpretation of Section 3(5) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 has adversely affected the interpretation of Section-10 of the Unlawful Activities (Prevention) Act, 1967. In view of the aforesaid, it would be appropriate if this application is listed along with the application for review.

List CRL.MP.No. 18711-18712 of 2012 in Crl.A.No.1383/07 along with CRL.MP.No.18713 of 2012 in Crl.Appeal No.889 of 2007."

Mr. Ranjit Kumar, learned Solicitor General appearing for the Union of India, has submitted that in the case of *Arup Bhuyan* vs. *State of Assam,* 2011 (3) SCC 377, this Court has read down the provision to the detriment of the interest of the Union of India when it was not a party before it. He has also invited our attention to the decision in *Sri Indra Das* vs. *State of Assam* 2011 (3) SCC 380. In *Arup Bhuyan's* case as well as in the case *Sri Indra Das*, the two-Judge Bench has referred to many authorities of Supreme Court of United States of America and thereafter quoted a passage from *Kedar Nath* vs. *State of Bihar* AIR 1962 SC 955 and relied on *State of Kerala* vs. *Raneef* (2011) 1 SCC 784 and eventually opined thus:

"We may also consider the legal position, as it

should emerge, assuming that the main s. 124A is capable of being construed in the literal sense in which the Judicial Committee of the Privy Council has construed it in the cases referred to above. On that assumption, it is not open to this Court to construe the section is such a way as to avoid the alleged unconstitutionality by limiting the application of the section in the way in which the Federal Court intended to apply it ? In our opinion, there are decisions of this Court which amply justify our taking that view of the legal position. This Court, in the case of R.M.D. Chamarbaugwalla v. The Union of India (1) has examined in detail the several decisions of this Court, as also of the Courts in America and Australia. After examining those decisions, this Court came to the conclusion that if the impugned provisions of a law come within the constitutional powers of the legislature by adopting one view of the words of the impugned section or Act, the Court will take that view of the matter and limit its application accordingly, in preference to the view which would make it unconstitutional on another view of the interpretation of the words in question. In that case, the Court had to choose between a definition of the expression 'Prize Competitions" as limited to those competitions which were of a gambling character and those which were not. The Court chose the former interpretation which made the rest of the provisions of the Act, Prize Competitions Act (XLII of 1955), with particular reference to ss. 4 and 5 of the Act and Rules 11 and 12 framed thereunder, valid. The Court held that the penalty attached only to those competitions which involved the element of gambling and those competitions in which success depended to a substantial degree on skill were held to be out of the purview of the Act. The ratio decidendi in that case, in our opinion, applied to the case in hand in so far as we propose to limit its operation only to such activities as come within the ambit of the observations of the Federal Court, that is to say, activities involving incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace."

It is submitted by Mr. Ranjit Kumar that such reading down of a provision should not have been done without impleading the Union of India as a party and moreover, when the constitutional validity was not called in question. He has drawn our attention to

Section 10 of the Unlawful Activities (Prevention) Act, 1967. It reads as follows:

> "[10. Penalty for being member of an unlawful association, etc.- Where an association is declared unlawful by a notification issued under section 3 which has become effective under sub-section (3) of that section,-
>
> (a) a person, who
>
> (i) is and continues to be a member of such association; or
>
> (ii) takes part in meetings of such association; or
>
> (iii) contributes to, or receives or solicits any contribution for the purpose of, such association; or
>
> (iv) in any way assists the operations of such association,shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable
> to fine; and
>
> (b) a person, who is or continues to be a member of such association, or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property,
>
> (i) and if such act has resulted in the death of any person, shall be punishable with death or imprisonment for life, and shall also be liable to fine;
>
> (ii) in any other case, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.]"

The aforesaid provision was inserted by way of amendment with effect from 21/09/2004. Relying upon the said provision, it is contended by him that if the view expressed in Arup Bhuyan (supra) and Sri Indra Das (supra) is allowed to remain in the field various

laws in other enactments would be affected. It is further urged by him that the Court has erroneously referred to its earlier judgment in Raneef's case wherein the basic fact was different, namely, the Social Democratic Party of India (SDPI) was not a banned organization . The learned Solicitor General would impress upon us that once an organization is banned, Section 10 of the 1967 Act would come into play. Learned Solicitor General has also drawn our attention to certain paragraphs in *Raneef's* case wherein it has been opined even assuming the PFI is an illegal organization, yet it remains to be considered whether all the members of the Organization can be categorically held to be guilty. It is put forth by him that the said judgment did not affect the provisions in other enactments inasmuch as the PFI was not a banned Organization, but after the decisions in *Arup Bhuyan* (supra) and *Sri Indra Das* (supra), the Trial Courts and the High Courts are relying on the said decisions by giving emphasis on the facet of mens rea. The submission in essence, is that had the Union of India been impleaded as a party it could have put forth its stand before the Court and then possibly such reading down of the provision would not have been required.

Mr. Jaideep Gupta, learned senior counsel appearing for the State of Assam, supporting the stand put forth by the Union of India has urged that if such an interpretation is allowed to stand the terrorism would spread and it will be difficult on the part of the State to control the said menace. It is further canvassed by him that the abuse of process of law would not affect the

constitutional validity and that to when it is not under assail.

Mr. Aseem Mehrotra learned counsel had already made a statement on the other occasion that as long as the acquittal is not disturbed he would have no objection if any clarification is made. However, while assisting the Court he has drawn our attention to the authority in *People's Union for Civil Liberties & Anr.* vs. *Union of India* 2004 (9) SCC 580 especially to paragraphs 46 and 49. The said paragraphs read as under:

> **"46. The Petitioners assailed Sections 20, 21 and 22 mainly on the ground that no requirement of mens rea for offences is provided in these Sections and the same is liable to misuse therefore it has to be declared unconstitutional. The Learned Attorney General argued that Section 21 and its various sub-sections are penal provisions and should be strictly construed both in their interpretation and application; that on a true interpretation of the Act having regard to the well settled principles of interpretation Section 21 would not cover any expression or activity which does not have the element or consequence of furthering or encouraging terrorist activity or facilitating its commission; that support per se or mere expression of sympathy or arrangement of a meeting which is not intended or designed and which does not have the effect to further the activities of any terrorist organization or the commission of terrorist acts are not within the mischief of Section 21 and hence is valid.**
>
> ***49. Mens rea* by necessary implication could be excluded from a statue only where it is absolutely**

clear that the implementation of the object of the Statue would otherwise be defeated. Here we need to find out whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule regarding mens rea element. (See: State of Maharashtra V. M H George, AIR 1965 SC 722, Nathulal V. State of MP, AIR 1966 SC 43, Inder Sain V. State of Punjab, (1973) 2 SCC 372, for the general principles concerning the exclusion or inclusion of mens rea element vis-`-vis a given statute). The prominent method of understanding the legislative intention, in a matter of this nature, is to see whether the substantive provisions of the Act requires mens rea element as a constituent ingredient for an offence. Offence under Section 3(1) of POTA will be constituted only if it is done with an -'intent'. If Parliament stipulates that the 'terrorist act' itself has to be committed with the criminal intention, can it be said that a person who 'profess' (as under Section 20) or 'invites support' or 'arranges, manages, or assist in arranging or managing a meeting' or 'addresses a meeting' (as under Section 21) has committed the offence if he does not have an intention or design to further the activities of any terrorist organization or the commission of terrorist acts? We are clear that it is not. Therefore, it is obvious that the offence under Section 20 or 21 or 22 needs positive inference that a person has acted with intent of furthering or encouraging terrorist activity or facilitating its commission. In other words, these Sections are limited only to those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities. If these Sections are understood in this way, there cannot be any misuse. With this clarification we uphold the

constitutional validity of Sections 20, 21 and 22."

Relying upon the same it is propounded by him that these kinds of provisions are to be read down as mens rea in such provisions is inherent being in consonance with Criminal Jurisprudence. Be it stated, in the case of People's Union for Civil Liberties & Anr. (supra) the constitutional validity was called in question and the Court read down the provisions to sustain the constitutionality. That was in the context of the Prevention of Terrorism Act, 2002.

The crux of the matter as submitted by Mr. Ranjit Kumar, learned Solicitor General for Union of India, is that when any provision in Parliamentary legislation is read down, in the absence of Union of India it is likely to cause enormous harm to the interest of the State as in many cases certain provisions have been engrafted to protect the sovereignty and integrity of India.

The learned Solicitor General would contend that the authorities which have been placed reliance upon in both the judgments by the two-Judge Bench are founded on Bill of Rights which is different from Article 19 of the Constitution of India. He has referred to Article 19(1)(c) and 19(4) of the Constitution. Article 19(1)(c) reads as follows.

"19(1)(c) to form associations or unions;"

The said article is further restricted by Article 19(4) which is as follows:

"(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of 4 [the sovereignty and integrity of India or] public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

Relying upon the same it is highlighted by the learned Solicitor General that the Court has not kept this aspect in view while placing heavy reliance on the foreign authorities which are fundamentally not applicable to the interpretative process of the provisions which have been enacted in consonance with the provisions of the Constitution of India.

Regard being had to the important issue raised by the learned Solicitor General and Mr. Jaideep Gupta, learned senior counsel for the State of Assam, we think it appropriate that the matter should be considered by a larger Bench. Let the Registry place the papers before the Hon'ble the Chief Justice of India for appropriate orders.

(USHA BHARDWAJ)
AR-CUM-PS

(RENUKA SADANA)
(COURT MASTER)