

Bench:

Mr. Justice Md. Ruhul Quddus

and

Mr. Justice ASM Abdul Mobin

Criminal Appeal No. 248 of 2011

Abdul Quddus Khan Salafi

... Appellant

with

Criminal Appeal No. 328 of 2011

Nur-e Alam and another

...Appellants

with

Criminal Appeal No. 394 of 2011

Mahmudul Islam alias Rubel

...Appellant

with

Criminal Appeal No. 533 of 2011

Opiar Rahman and three others

...Appellants

with

Criminal Appeal No. 7127 of 2011

Saiyakul Islam

...Appellant

with

Criminal Appeal No. 149 of 2011

Hafizul Islam

...Appellant

-versus-

The State

...Respondent in all the appeals

and

Criminal Miscellaneous Case No. 501 of 2019

Golzar and another

...Petitioners

-versus-

The State

...Opposite party

Mr. Md. Abdul Mazid Mollah, Advocate
... for appellant in Criminal Appeal 248 of 2011

Mr. Md. Zahangir Alam, Advocate
... for appellants in Cr Appeals 328,394,533,7127
and 149 of 2011

Mr. Md. Wahiduzzaman Sohel, Advocate
... for appellants 2-3 in Cr Appeal 533 of 2011

Mr. Dewan Abdun Naser with Mr. Sheikh Omar
Sharif, Advocates
... for petitioner in Cr Misc Case 501 of 2019

Md. Moniruzzaman (Rubel), Deputy Attorney
General with Mr. Mohammad Abdul Aziz Masud,
Ms. Shovana Banu, Ms. Farhana Afroz and
Ms. Shamsun-Nahar (Laizu), Assistant Attorney
Generals
... for the State

Judgment on 01.08.2019

Md. RuhulQuddus,J:

The above criminal appeals under section 31 of the Santrash Birodhi Ain, 2009 and criminal miscellaneous case under section 561A of the Code of Criminal Procedure arisen out of one judgment and order of conviction and sentence have been heard together and are disposed of by this judgment.

Learned Additional Sessions Judge and Santrash Birodhi Bisheh Tribunal No.2, Nilphamari by judgment and order dated 29.11.2010 passed in Santrash Case No. 01 of 2010 convicted 22 accused persons separately under sections 7(1), 8 and 9(1) of the

Santrash Birodhi Ain, 2009 (in short the Ain, 2009) for different terms of imprisonment. Accused Abdul Quddus Khan Salafi (appellant in Criminal Appeal No. 248 of 2011), Nur-e Alam and Mamunur Rashaid (Criminal Appeal No. 328 of 2011), Hafizul Islam (Criminal Appeal No. 149 of 2011) were convicted under section 7(1) of the Ain and sentenced to suffer rigorous imprisonment for fourteen years with a fine of Taka 10,000/- (ten thousand) each in default to suffer imprisonment for another two months. Accused Opiar Rahman and Md. Moshiur Rahman alias Dr. Moshiur (appellants in Criminal Appeal No. 533 of 2011) were convicted under section 7(1) of the Ain and sentenced to suffer rigorous imprisonment for fourteen years with a fine of Taka 10,000/- (ten thousand) each in default to suffer two months more and also convicted under section 8 of the Ain and sentenced to suffer rigorous imprisonment for another 6 (six) months, Amzad Hossain and Md. Mintu alias Mintu (Criminal Appeal No. 533 of 2011, Saiyakul Islam (Criminal Appeal No. 7127 of 2011) and Mahmudul Islam alias Rubel (Criminal Appeal 394 of 2011) were convicted under section 9(1) of the Ain and sentenced to suffer rigorous imprisonment for 7 (seven) years with a fine of Taka 5,000/- in default to suffer rigorous imprisonment for one month more. Accused Golzar Hossain and

Abdul Baki alias Bakul (petitioners in Criminal Miscellaneous Case No.501 of 2019) were convicted under sections 7(1)/8 of the Ain and sentenced to suffer rigorous imprisonment for fourteen years with a fine of Taka 10,000/- (ten thousand) each in default to suffer imprisonment for another two months.

Informant Md. SaidulAlam, a Sub-Inspector of Police at Jaldhaka Police Station, Nilphamari produced three accused, namely, Nur-e Alam, Mamunur Rashid and Md. Golzar Hossain to the police station and lodged Jaldhaka Police Station Case No. 01 dated 4.12.2008 stating, *inter alia*, that Kool Chandra Roy, Proprietor of Continental Currier Service, Jaldhaka came to the Officer-in-charge of the police station with a parcel on 02.12.2008 at about 15:10 hour and stated that on 01.12.2008 some three unknown youths had booked seven parcels containing hard substance to send those to different places in Rangpur. He sent six parcels, but due to shortage of acknowledgement receipt could not send the last one. As there was hard substance inside the parcels, it raised his doubt and accordingly he took it to the police station.

The Officer-in-charge opened the parcel and found there a DVD and a computer composed letter of Jamaatul Mujahedin

Bangladesh (in short JMB). The Officer-in-charge recorded a general diary (in short GD) and assigned the informant with inquiry into the matter. On inquiry he found the said three accused to be involved in the occurrence and arrested them. They disclosed the names of Mashiur, Mostafa, Labu, Didar and some others also to be associated with them and disclosed that they were active members of the banned organization JMB struggling for ousting the incumbent Government and changing the existing constitutional and judicial system of Bangladesh. In this way the accused persons committed offence under sections 6, 8 and 9(1) (2) of the Santrash Birodhi Odhyadesh, 2008 (in short the Ordinance, 2008).

Another Sub-Inspector of Police Md. Mazharul Islam investigated the case and submitted charge sheet on 30.12.2009 against 30 accused persons under sections 6(2), 7(4), 8, 9(3) and 13 of the Ain, 2009 including the three FIR-named accused.

During investigation some other accused were arrested. 14 accused made confessions under section 164 of the Code of Criminal Procedure before the Judicial Magistrate, wherein they admitted to be members of JMB. Some of them stated that they

were trained in the marshland of Kurigram under the leadership of Khalid Saifullah and contributed to the fund of JMB.

Meanwhile, the Santrash Birodhi Ain, 2009 came in force on 24.02.2009 with retrospective effect from 11.06.2008 repealing the Ordinance, 2008 with a saving clause [vide section 45 (2)] that all acts done or actions taken under the Ordinance, 2008 shall be deemed to have been done/taken under the Ain, 2009. It needs to mention that Ordinance, 2008 was promulgated on 11.06.2008.

Eventually the case was sent to the Additional Sessions Judge and Santrash Birodhi Bishesh Tribunal, Nilphamari. Learned Judge of the Tribunal framed charge against all the 30 accused under sections 6 (2), 7 (4), 8, 9 (3) and 13 of the Ain, 2009 by order dated 02.05.2010 in presence of 19 accused, who pleaded not guilty and claimed justice.

In order to prove its case prosecution examined 28 witnesses. Of them PW 1 Saidul Alam, the informant stated that on the day of occurrence three persons came to the office of Continental Currier Service and booked seven parcels. Owner of the Currier Service Kool Chandra Roy could send six of them, but could not send the last one for want of acknowledgement

receipt. All the seven parcels were looking similar and there were some hard substances inside the parcels, which raised doubt in his mind and he took the remaining parcel to the Officer-in-charge (in short OC), Jaldhaka police station who opened it in presence of the witnesses and found there one DVD cassette and a computer composed letter. The OC seized those articles under a seizure list and took signature of the witnesses there. He also recorded a GD and assigned the informant with inquiry into the matter. The informant arrested accused Nur-e Alam, Mamunur Rashid and Golzar Hossain. On interrogation they admitted to be members of JMB and disclosed that accused Mashiur, Mostafa, Labu, Didar and many others were associated with them. They further disclosed that they were struggling to establish Islamic rules in Bangladesh ousting the existing Government and changing the constitutional and judicial system.

In cross-examination PW 1 denied the defence suggestion that confessions of the accused were extracted on physical torture or that they were falsely implicated in the case.

PW 2 Abdul Wahed Bahadur, a civilian who visited the police station at the time of opening the parcels stated that Kool Chandra Roy, owner of Continental Currier Service had handed

it over to the OC. It was 9' x 6" in size and containing the address of receiver. The parcel was opened in his presence and a compact disk (CD) and leaflet were found therein. Arabic letters were scribed on the CD. A seizure list was prepared for seizing those articles and he put his signature there. He proved his signature on the seizure list and also proved the seized articles as material exhibits.

PW 3 Kool Chandra Roy, owner of Continental Courier Service, Jaldhaka stated that the occurrence took place on 01.12.2008 at about 10:00 am. Three unknown youths came to his office and booked seven parcels. On receiving those he issued six acknowledgement receipts, but as there was no more receipt, he could not send another parcel. On the following day a Sub-Inspector of police named Mazharul Islam came to his office and asked him about the documents. He replied that six parcels were already sent, but one was there. He could not say whether the parcel was containing any documents of JMB. It was taken to the police station and opened in his presence. One CD and leaflet were there. Those were seized in his presence and he put his signature there. He proved the signature.

PW 4 Mostafizur Rahman stated that police arrested accused Hasanur Rahman from his ward at about 11:00 pm on 20.12.2008 and recovered some *jehadi* documents from under his bed. Police prepared a seizure list and he signed it. He proved the seized article as material exhibit-3.

PW 5 Jwel Rana, a local witness stated that on 05.12.2008 at about 11:50 am he was going home. At the eastern side of Kadamtali Road he noticed some police personnel in front of the shop of Mashiur. There the police took his signature on a seizure list. He proved the seizure list and his signature there. Under the said seizure list, some documents were seized, which he also proved as material exhibit-4.

PW 6 Zahedul Islam, the then Member of Ward No.1, Showlmari Union Parisad stated that his house was situated at the bank of river Tista. The sandy land of Dawra Bari was situated 2 kilometers away from his house. He came to know that the members of JMB and some unknown persons received training there.

In cross-examination PW 6 stated that he knew accused Majedur Rahman Labu. He was the Secretary of local Union Parisad.

PW 7 Kahar Ali, another local witness stated that he was a resident of Purba Bala village. Accused Dr. Mashiur Rahman was his neighbor. He (Dr. Mashiur) was a member of JMB and used to receive training on the vacant land situated at the eastern side of his house.

In cross-examination PW 7 denied the defence suggestion that because of previous enmity and pending cases, he falsely deposed against Dr. Mashiur Rahman.

PWs 8, 9 and 10 Anisur Rahman, Makbul Hossain and Abdul Majid respectively three other neighbours of accused Dr. Mashiur Rahman deposed in similar line of PW 7.

PW 11 Maruf Hossain, a Senior Judicial Magistrate posted at Nilphamari at the material time stated that he had recorded confession of accused Mashiur Rahman on 01.05.2009, that of accused Manwar Hossain on 28.02.2009 and Golam Mostafa on 03.12.2009. He did it following the rules and procedure. He (PW 11) proved the said confessions and his signatures there as exhibits 6, 7 and 8 series respectively.

In cross-examination PW 11 asserted the confessions to be voluntarily made and denied those were extracted on torture.

PW 12 Md. Abdul Quddus, another Judicial Magistrate, posted at Nilphamari at the material time stated that he had recorded confession of accused Abdul Qddus Khan on 20.12.2008, that of Hafizul Islam, Abdul Baki alias Bakul, Abul Kalam and Atiar Rahman on 21.12.2008, Golzar on 23.12.2008 and Shajahan and Hasanur on 30.09.2009. He proved those confessions and his signatures there as exhibits: 9-17 series.

In cross-examination PW 12 reaffirmed the statements made by the accused in their respective confessions and denied the defence suggestion that they had not made their confessions voluntarily or that he had recorded the same under instruction of police.

PW 13 Mominur Rahman Chowdhury, a local witness who was present at the time of arresting accused Hasanur and was made a witness to seizure of some booklets from his (Hasanur's) house. He proved the seizure list and his signature there and also proved the seized booklets as material exhibit-5.

PW 14 Hamidur Rahman, another local witness who was present at the time of search in the house of accused Mashiur Master on 18.02.2009. Police recovered some documents from his house. He (PW 14) did not see anything but some papers. A

seizure list was prepared, which he signed. He proved the seizure list and his signature there.

In cross-examination PW 14 stated that accused Mashiur Rahman was a teacher of Khutamara Rahmania High School. He was resident of another village and was not present at the time of Mashiur's arrest and also did not see any recovery.

PW 15 Mizanur Rahman, a local witness stated that one day some police personnel came to the house of accused Mashiur Rahman. On search they recovered some diary and papers therefrom. He heard that the police arrested Mashiur Rahman as he was a member of JMB. In cross-examination he (PW 15) stated that he did not see what police had recovered from his house.

PW 16 Abul Kashem stated in brief that he heard that some unknown persons used to receive training on the sand bank of river Tista.

PW 17 A Hakim stated that on 08.12.2008 he saw the police to take accused Golzar to his house. Police also called him along with Shahidul and Abul Hossain there. After digging the floor of his room, police recovered a *dao* and small axe. Those

were wrapped with a polythene paper. He heard that accused Golzar was a member of JMB.

PW 18 Saiful Islam, another local witness stated that on the same day he saw a police car by the side of Golzar's house. Police called him there and recovered one *ram dao* and axe digging the floor of his room. In cross-examination PW 18 denied the defence suggestion that no *dao* or axe was recovered from his house.

PWs 19, 21, 23 and 25 Abul Hossain, Amalendu Roy, Towhidul Islam Sepahi and Ekramul Hoque respectively were tendered by the prosecution.

PW 20 Nazrul Islam stated that while coming back home from market on 08.12.2008 he saw the police to arrest Hafizul. Police took his signature on a paper and asked him whether he knew that Hafizul was involved in activities of JMB. There was a book in the hand of a police personal, which was seized under a seizure list. He proved the seizure list and his signature there and also the seized book as material exhibit. In cross-examination PW 20 stated that he did not see to recover the book or read the contents thereof.

PW 22 Md. Delwar Hossain, a police personal stated that under the leadership of Sub-Inspector Saidul Islam they raided Munshipara area on 04.12.2008 and arrested Golzar, Mamunur Rashid and Nurul and took them to police station. On interrogation they admitted their association with JMB and further admitted that they had sent the CD and leaflet through the Courier Service. Accused Golzar also disclosed the names of Didar, Labu, Atiar, Hasanur, Manwar, Moshiur, Dr. Mashiur and Azizul to be members of JMB.

In cross-examination PW 22 could not say whether accused Golzar was taken on remand three times and he did not disclose the names of the said co-accused.

PW 24 Ohidul Islam, a local witness stated that in the night on 21.02.2009 he went to bed after having meal, when his neighbor Majidul Islam called him and informed that some RAB personnel arrested accused Manwar. He went there. A seizure list was prepared, whereon he put his signature. He proved the said seizure list and his signature there and also proved four books which were seized under the seizure list as material exhibits-5 series.

PW 26 Ajit Kumar, a police personal stated that under the leadership of Sub-Inspector Saidul Alam they went to Munshipara on 04.12.2008 at 11:00 pm and arrested Golzar, Mamunur Rashid and Nur-e Alam. On interrogation they admitted themselves to be involved with JMB. In cross-examination PW 26 stated they were arrested on secret information.

PW 27 Md. Rabiul Alam, Senior Judicial Magistrate posted at Nilphamari at the material time stated that accused Nur-e Alam and Mashiur Rahman were taken to him on 26.02.2009 and he recorded their confessions in compliance with the law. He proved the said confessions, his signatures and that of the accused thereon as exhibits: 20-21 series.

In cross-examination PW 27 denied the suggestion that their confessions were extracted on torture or that they were not given sufficient time for reflection. He affirmed that there were no marks of injuries on their persons.

PW 28 Mazharul Islam, a Sub-Inspector of Police and Investigating Officer of the case stated that at the material time he was posted at Jaldhaka police station and was assigned with investigation of the case. He started investigation with prior

permission of the concerned Magistrate. He visited the place of occurrence (PO), prepared a sketch map and index thereof. He seized the materials on different occasions and arrested 18 accused. He also arranged recording confessions of the accused and recorded statements of the witnesses. He found a prima-facie case against the accused and submitted the charge sheet.

In cross-examination PW 28 stated that JMB was banned on 23.02.2005 by a press note. He denied the defence suggestion that the confessions were recorded on torture taking the accused on repeated remand. He further denied that he did not properly investigate the case.

After closing the prosecution evidence, learned Judge of the Tribunal examined the accused, who were facing trial. They reiterated their innocence, but did not examine any defence witness.

After conclusion of trial, learned Judge of the Tribunal convicted and sentenced 22 accused by the impugned judgment and order dated 29.11.2010, challenging which the appellants and petitioners moved in this Court with the instant criminal appeals and miscellaneous case. Some of them, namely, Mahmudul Islam alias Rubel (appellant in Criminal Appeal No. 394 of 2011), Md. Amzad Hossain and Md. Mintu alias Mintu

(appellants No. 3-4 in Criminal Appeal No. 533 of 2011), Saiyakul Islam (appellant in Criminal Appeal No. 7127 of 2011), Golzar Hossain and Abdul Baki alias Bakul (petitioners in the Criminal Miscellaneous Case) were granted bail by this Court and they have been enjoying its privilege till today.

Mr. Md. Abdul Mazid Mollah, learned Advocate appearing for the appellant in Criminal Appeal No. 248 of 2011 submits that without a prior sanction as mandated in section 40(2) of the Ain, 2009 no Court can take cognizance of offence thereunder. But the learned trial Judge took cognizance of offence against the accused in the present case without any prior sanction. Even during continuance of trial he did not obtain any sanction of the Government to validate his jurisdiction to try the case. Such trial is wholly without jurisdiction, in conclusion of which the impugned judgment and order passed is also without jurisdiction and liable to be set aside.

Touching the merit of the case Mr. Mollah further submits that an offence under section 7(1) of the Ain, 2009 constitutes when a person provides money or any other service or instigate to do so for the purpose of committing any terrorist act defined in section 6 of the Ain. Simple contribution to the fund of JMB as such does not constitute an offence under section 7 (1) of the

Ordinance, 2008/Ain, 2009. Here, in the first information report (FIR), charge sheet or evidence on record no such offence of contribution of money for the purpose of committing an act of terrorism having been disclosed, the conviction of the appellant under section 7(1) of the Ain based on no legal evidence is liable to be set aside.

Mr. Md. Zahangir Alam, learned Advocate appearing for appellant No.1 in Criminal Appeal No. 533 of 2011 and appellants in Criminal Appeals No. 328, 394, 7127 and 149 of 2011 adopts the submission of Mr. Mollah so far it relates to prior sanction in taking cognizance of offence and further submits that for sake of argument even if the allegation made in the FIR and the statements made in the confessions of the accused regarding their membership in JMB and contribution to its fund are taken to be true, it does not constitute any offence under section 7(1) of the Ain as it does not disclose any offence to aid to any terrorist act defined in section 6 of the Ain. Learned Judge of the Tribunal without sifting the evidence and considering the nature of allegation whimsically proceeded against the accused and convicted them most illegally, which is liable to be set aside.

Mr. Dewan Abdun Naser, learned Advocate appearing for the petitioner in Criminal Miscellaneous Case No. 501 of 2019 submits that at the time of commission of the alleged occurrence the name of JMB was neither notified in gazette as a banned organization nor included in the schedule of the Ain and as such simple membership in JMB was not an offence under sections 8 and 9 of the Ordinance, 2008/Ain, 2009 at the material time. But the learned Judge of the Tribunal convicted the accused persons under the said substantive provisions of the Ain and committed illegality. To pass an order of conviction under the said penal provisions, it was incumbent upon the prosecution to show that at the material time JMB was notified as a banned organization and appeared in the schedule of the Ordinance/Ain, but without any minimum discussion over this most vital issue of the case, learned Judge passed a wholesale order of conviction and sentence under sections 8 and 9(1) of the Ain, which is violative of article 35 (1) of the Constitution and as such absolutely illegal, without jurisdiction and liable to be set aside.

Without prejudice to the above submission, Mr. Dewan as a 2nd line of argument further submits that it was mandatory to obtain a sanction under section 40 (2) of the Ain prior to taking cognizance of offence against the accused, which the trial Judge

did not. In absence of such sanction the trial has been vitiated. The prior sanction as provided in section 40(2) of the Ain in fact confers jurisdiction upon the Tribunal to commence a proceeding under the Ain. Since the trial Judge took cognizance without sanction, even during the proceedings did not obtain such sanction to validate his jurisdiction, the entire proceedings were without jurisdiction and the impugned judgment and order of conviction in conclusion of such trial were also without jurisdiction. Alongside these vital law points, it would be evident from the record that this is a case of no evidence inasmuch as no offence has been disclosed against any of them. On all counts, the impugned judgment and order are illegal, without jurisdiction and liable to be quashed. In support of his submission, Mr. Dewan refers to an unreported decision passed in Criminal Miscellaneous Case No.35216 of 2011 (*Rahel Ahmed and another vs The State*).

Mr. Md. Wahiduzzaman Sohel, learned Advocate for appellants No. 2-3 in Criminal Appeal No. 533 of 2011 submits that the offence was allegedly committed on 01.12.2008, when the Ordinance, 2008 was in force and the accused were liable to be prosecuted only under the substantive penal provision of the Ordinance, 2008. But they were charged and subsequently

convicted under the penal sections of the Ain, 2009 which was beyond the scope of law and absolutely illegal.

Mr. Md. Moniruzzaman, learned Deputy Attorney General appearing for the State submits that at no point of trial, the defence raised the issue of sanction but faced the trial, cross-examined the witnesses and surrendered to the jurisdiction of the Tribunal. Now after conclusion of trial, they cannot raise the issue of sanction.

Learned Deputy Attorney General further submits that inclusion of the name of a terrorist organization and its notification in the official gazette is a procedural law, which can take retrospective effect. It appears from the Gazette dated 19.11.2012 that JMB was already banned on 23.02.2005. It, therefore, cannot be said that at the material time, membership in JMB was not an offence. Since 2005 it was a banned organization and membership in this organization was an offence under the Ordinance, 2008 promulgated on 11 June, 2008. Citing some examples of terrorist attacks in home and abroad, learned Deputy Attorney General further submits that it is a great concern of the security of Bangladesh as well as of the whole world.

Learned Deputy Attorney General then proceeds with submission that the confessional statements of the accused clearly proved them to be well trained and active members of JMB and regular contributors to its fund. If they are released on hyper technical argument advanced by the defence, security of the State may be endangered. The appeals are, therefore, liable to be dismissed and the Rule to be discharged.

We have considered the submissions of the learned Advocates of both the sides, examined the evidence and other materials on record and consulted the relevant provisions of law. During submissions of the defence lawyers, we directed the learned Deputy Attorney General to produce the gazette by which JMB was banned and notified to be a terrorist organization. In compliance therewith, he submitted a copy of Bangladesh Gazette extra ordinary dated 19.11.2012, wherefrom it was found that Jamaatul Mujahedin was notified in the gazette and the date of its proscription was 23.02.2005 as mentioned at the right column of the prescribed form. For an understanding about the nature and reason of the proscription, the said gazette is quoted below:

“বাংলাদেশ গেজেট
অতিরিক্ত সংখ্যা
কর্তৃপক্ষ কর্তৃক প্রকাশিত
সোমবার, নভেম্বর ১৯, ২০১২

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার

স্বরাষ্ট্র মন্ত্রণালয়
আইন অধিশাখা-১

আদেশ

তারিখঃ ০৪ অগ্রহায়ণ ১৪১৯ বঙ্গাব্দ/১৮ নভেম্বর ২০১২ খ্রিস্টাব্দ

এস, আর, ও নং ৩৮৯-আইন/২০১২।- সন্ত্রাস বিরোধী আইন, ২০০৯ (২০০৯ সনের ১৬ নং আইন) এর ধারা ১৮ এর উপ-ধারা (২) এ প্রদত্ত ক্ষমতাবলে, সরকার, আদেশ দ্বারা, নিম্নবর্ণিত নিষিদ্ধ সংগঠনসমূহকে উক্ত আইনের তফসিলে সংযোজন করিল, যথা-

তফসিল

(ধারা-১৮ দৃষ্টব্য)

ক্রমিক নং	সংগঠনের নাম	সংগঠনের ঠিকানা	নিষিদ্ধকরণের তারিখ
(১)	শাহাদাত-ই-আল হিক্‌মা পার্টি বাংলাদেশ	জনৈক মিজানুর রহমানের বাড়ী, হড়গ্রাম নতুন পাড়া বাইপাস সড়ক, থানা রাজপাড়া, রাজশাহী মহানগর।	০৯-০২-২০০৩ খ্রিঃ
(২)	জাগ্রত মুসলিম জনতা বাংলাদেশ (জেএমজেবি)	সুনির্দিষ্ট ঠিকানাবিহীন	২৩-০২-২০০৫ খ্রিঃ
(৩)	জামা'তুল মুজাহেদীন	সুনির্দিষ্ট ঠিকানাবিহীন	২৩-০২-২০০৫ খ্রিঃ
(৪)	হরকাতুল জিহাদ আল ইসলামী	সুনির্দিষ্ট ঠিকানাবিহীন	১৭-১০-২০০৫ খ্রিঃ
(৫)	হিজবুত তাহরীর বাংলাদেশ	এইচ, এম সিদ্দিক ম্যানসন, ৫৫/এ পুরানা পল্টন, ঢাকা এবং ২০১/সি পল্টন টাওয়ার (৩য় তলা), ২৭ পুরানা পল্টন লেন, ঢাকা।	২২-১০-২০০৯ খ্রিঃ

২। ইহা অবিলম্বে কার্যকর হইবে।

রাষ্ট্রপতির আদেশক্রমে
সি কিউ কে মুসতাক আহমদ
সিনিয়র সচিব ”

(Emphasis supplied)

In this way JMB was included in the schedule of the Ain, 2009 for the first time on 19.11.2012 by the above quoted gazette notification. Before that the Government banned it on

23.02.2005 (vide evidence of PW 28 and right column of the schedule quoted above). We asked both the parties to make it clear whether Jamaatul Mujahedin and Jamaatul Mujahedin Bangladesh was the same organization. In response thereto learned Deputy Attorney General informed that it was the same organization and the learned Advocates for the appellants did not controvert it. It thus appears that the banned organization Jamaatul Mujahedin is/was also named as Jamaatul Mujahedin Bangladesh. We also asked the leaned Deputy Attorney General to explain under what provision of law, the order dated 23.02.2005 was issued or whether there was compliance of natural justice or any reasonable ground was shown in the order. Learned Deputy Attorney General reportedly contacted the Ministry of Home Affairs and that of Law, Justice and Parliamentary Affairs but failed to cite any law under which the order was passed, even to produce any copy of such order.

Section 18 of the Ordinance, 2008 as well as of the Ain, 2009 confers authority on the Government to pass an order banning any organization on reasonable grounds of its involvement in terrorist activities and include it in the schedule of the Ordinance/Ain. For proper appreciation of the scheme of anti-terrorist law and justification of the impugned judgment and

order of conviction under sections 7 (1), 8 and 9 of the Ordinance, 2008 that was in force at the material time, all the sections are quoted below:

“৭। সন্ত্রাসীকার্যে অর্থ যোগান সংক্রান্ত অপরাধ।-(১) যদি কোন ব্যক্তি অন্য কোন ব্যক্তি অন্য কোন ব্যক্তিকে অর্থ সেবা বা অন্য কোন সম্পত্তি সরবরাহ করেন বা সরবরাহ করিতে প্ররোচিত করেন এবং কোন সন্ত্রাসীকার্যে ও উদ্দেশ্যে উহা ব্যবহারের ইচ্ছা পোষণ করেন, বা ইহা সন্দেহ করিবার যুক্তিসংগত কারণ থাকে যে, উহা সন্ত্রাসীকার্যে ব্যবহার করা হইবে বা হইতে পারে, তাহা হইলে তিনি সন্ত্রাসী কর্মকাণ্ডে অর্থ যোগানের অপরাধ সংঘটন করিবেন।

৮। নিষিদ্ধ সংগঠনের সদস্য পদ।- যদি কোন ব্যক্তি ধারা ১৮ এর অধীন কোন নিষিদ্ধ সংগঠনের সদস্য হন বা সদস্য বলিয়া দাবী করেন, তাহা হইলে তিনি অপরাধ সংঘটন করিবেন এবং উক্তরূপ অপরাধ সংঘটনের জন্য তিনি অনধিক ছয়মাস পর্যন্ত যে কোন মেয়াদেও কারাদণ্ড, অথবা অর্থদণ্ড, অথবা উভয় দণ্ডে দণ্ডিত হইবেন।

৯। নিষিদ্ধ সংগঠন সমর্থন।-(১) যদি কোন ব্যক্তি ধারা ১৮এর অধীন কোন নিষিদ্ধ সংগঠনকে সমর্থন করিবার উদ্দেশ্যে কাহাকেও অনুরোধ বা আহবান করেন, অথবা নিষিদ্ধ সংগঠনকে সমর্থন বা উহার কর্মকাণ্ডকে গতিশীল ও উৎসাহিত করিবার উদ্দেশ্যে কোন সভা আয়োজন, পরিচালনা বা পরিচালনায় সহায়তা করেন, অথবা বক্তৃতা প্রদান করেন, তাহা হইলে তিনি অপরাধ সংঘটন করিবেন।

(২) যদি কোন ব্যক্তি কোন নিষিদ্ধ সংগঠনের জন্য সমর্থন চাহিয়া অথবা উহার কর্মকাণ্ডকে সক্রিয় করিবার উদ্দেশ্যে কোন সভায় বক্তৃতা করেন অথবা রেডিও,

টেলিভিশন অথবা কোন মুদ্রণ বা ইলেকট্রনিক মাধ্যমে কোন তথ্য সম্প্রচার করেন, তাহা হইলে তিনি অপরাধ সংঘটন করিবেন।

(৩) যদি কোন ব্যক্তি উপ-ধারা (১) অথবা (২) এর অধীন কোন অপরাধে দোষী সাব্যস্ত হন, তাহা হইলে তিনি অনধিক সাত বৎসর ও অন্যান্য দুই বৎসর পর্যন্ত যে কোন মেয়াদের কারাদণ্ডে দণ্ডিত হইবেন এবং ইহার অতিরিক্ত অর্থদণ্ডও আরোপ করা যাইবে।

১৮। সংগঠন নিষিদ্ধকরণ।- (১) এই অধ্যাদেশের উদ্দেশ্য পূরণকল্পে, সরকার কোন সংগঠনকে সন্ত্রাসীকার্যের সহিত জড়িত রহিয়াছে মর্মে যুক্তিসঙ্গত কারণের ভিত্তিতে, আদেশদ্বারা, তফসিলে তালিকাভুক্ত করিয়া, নিষিদ্ধ করিতে পারিবে।

(২) সরকার, আদেশদ্বারা, যে কোন সংগঠনকে তফসিলে সংযোজন বা তফসিল হইতে বাদ দিতে অথবা অন্য কোনভাবে তফসিল সংশোধন করিতে পারিবে।”

(Emphasis supplied)

The Santrash Birodhi Ain, 2009 was enacted repealing the Ordinance, 2008. But section 18 as quoted above remained unchanged in the new Ain of 2009. From a simple reading of the same, it would be clear that the Government is required to include the name of any terrorist organization in the schedule appended to the Ordinance/Ain and an offence under sections 8 and 9 thereof would be committed only after such inclusion by a Gazette notification. On perusal of the Ordinance, 2008 it further appears that no terrorist organization or entity or person was included in the schedule thereof at the material time. For the first

time it was notified and included in the schedule of the Ain, 2009 on 19.11.2012 with implied effect from 09.2.2003, 23.2.2005 and 17.10.2005 as appears in the Gazette. When the law was enacted in 2008/2009, how an order of proscription thereunder could be passed in 2003/2005?

It is also necessary to point out here that freedom of assembly, right to association and freedom of thought and speech are inviolable fundamental rights guaranteed under articles 37-39 of the Constitution. So, any order restricting the above rights must be well reasoned and supported by law enacted within the constitutional scheme. Article 35 (1) of the Constitution mandates that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act. For better appreciation of the constitutional prohibition to ex-post facto penal law, the said article is quoted below:

Article 35(1). "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence."

The above quoted constitutional mandate clearly prohibits ex-post facto penal provision in our criminal law. So, conviction of the accused due to their membership in JMB by its inclusion in the schedule of the Ain, 2009 on 19.11.2012 with implied effect from 23.02.2005 is a violation of article 35 (1) of the Constitution. However, any of its member because of his membership in JMB would be liable to be prosecuted under the relevant provisions of the Ain, 2009 only on or after 19.11.2012 subject to existence of a reasoned and post legislation order to that effect. In the present case the accused were involved in the alleged occurrence on or before 01.12.2008, when the Ordinance of 2008 was in force but without inclusion of any terrorist organization in its schedule. Inclusion of JMB on 19.11.2012 with implied retrospective effect from 23.02.2005 is, therefore, hit by article 35(1) of the Constitution. It also goes against the established principle of construction of statute that any substantive penal law cannot take effect retrospectively.

Further, in the case in hand, offence was committed and FIR was lodged during the Ordinance, 2008 was in force, but the charge sheet was submitted, charge was framed and conviction was passed mentioning the substantive penal provisions of the

Ain, 2009. This was a conceptual mistake on the part of the Investigating agency as well as the trial Court. However, such mistake would not materially prejudice the accused as the quantum of sentences are same in sections 7, 8 and 9 of both the Ordinance, 2008 and Ain, 2009 and it would not invalidate the conviction on that count.

There were other penal provisions relating to terrorist activities (section 6), financing to terrorist activities (section 7), criminal conspiracy (section 10), harboring terrorists (section 14) etcetera in the Ordinance, which were common in nature and not co-related to one's status in the schedule under section 18 thereof. The accused were also charged under such a provision, namely, section 7(1) of the Ain and there was no legal bar to prosecute them under that substantive penal provision excepting sections 8 and 9. The saving clause i.e section 45 (2) of the Ain, 2009 could save only the proceedings in the present case to that extent, but the record shows that no sanction was ever accorded before taking cognizance of offence against the accused. From a plain reading of section 40 (2) of the Ordinance, 2008/Ain, 2009 it is clear that previous sanction of the Government is a condition precedent to take cognizance of any offence, in absence of which the proceedings of any case thereunder shall be vitiated. This

view is reflected in an unreported decision of another Division Bench passed in Criminal Miscellaneous Case No. 35216 of 2011 as cited by Mr. Naser. The case of *Anti-Corruption Commission vs Dr. Mohiuddin Khan Alamgir and others*, 62 DLR (AD) 290 also lends support thereto.

Before parting, we need to mention that in course of hearing, we passed an order for production of the material exhibits to see what was there in the compact disk and contents of the seized articles. In compliance therewith the District and Sessions Judge, Nilphamari informed this Court by Memo No. 01-06/2019/253 dated 30.05.2019 that the material exhibits were destroyed by order dated 27.12.2014. Where there were six criminal appeals pending, the trial Court was required to retain the material exhibits under rule 209 of the Criminal Rules and Order, 2009 Vol-1. It is our common experience that such types of gross mistake or negligence are being frequently happened. The trial Judges all over the Country should be careful and cautious about destroying material exhibits of criminal cases, upon which appeals are still pending.

Under the circumstances, the Registrar General is directed issue a circular reminding the Judges of the Subordinate Courts

about compliance with rule 209 of the Criminal Rules and Order, 2009.

It is further mentioned that in order to combat terrorism the Santrash Birodhi Ain, 2009 and proscription of terrorist person, entity or organization under section 18 thereof must be flawless and match the established principles of criminal law as well as the fundamental rights guaranteed under the Constitution. It is, therefore, expected that the Government would make a scrutiny over its previous orders as to whether the proscription of terrorist organizations under section 18 of the Ain, 2009 were passed lawfully and take necessary steps for curing the defects, if any, otherwise proceedings against the terrorists for their involvement and membership in proscribed organization may fall apart and the purpose of legislation to combat terrorism through a fair judicial process may be hampered.

In view of the above discussions, the impugned judgment and order of conviction and sentence appear to have been passed without jurisdiction and as such these are liable to be set aside/quashed.

Accordingly, the criminal appeals are allowed and the Rule in criminal miscellaneous case is made absolute. The impugned judgment and order dated 29.11.2010 passed by the

Additional Sessions Judge and Santrash Birodhi Bisheh Tribunal No.2, Nilphamari in Santrash Case No. 01 of 2010 is set aside as a whole. The appellants and petitioners who are already on bail are discharged from their bail bonds and the rest are to be set at liberty forthwith, if not wanted in any other criminal case.

Communicate the judgment with a copy to the concerned Secretaries to the Government in the Ministry of Home and that of Law, Justice and Parliamentary Affairs and Registrar General of the Supreme Court of Bangladesh as well.

ASM Abdul Mobin, J:

I agree.