Jamaat-E-Islami Hind vs Union Of India on 7 December, 1994

Equivalent citations: 1995 SCC (1) 428, JT 1995 (1) 31, 1995 AIR SCW 8, 1995 (1) SCC 428, 1995 ALL. L. J. 153, (1995) 1 MAD LJ 45, (1995) 1 JT 31 (SC)

Author: Jagdish Saran Verma

Bench: Jagdish Saran Verma, S.P Bharucha, K.S. Paripoornan

PETITIONER:
JAMAAT-E-ISLAMI HIND

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT07/12/1994

BENCH:
VERMA, JAGDISH SARAN (J)
BENCH:
VERMA, JAGDISH SARAN (J)
BHARUCHA S.P. (J)
PARIPOORNAN, K.S.(J)

CITATION:
1995 SCC (1) 428 JT 1995 (1) 31
1994 SCALE (5)107

ACT:

HEADNOTE:

JUDGMENT:

J.S. VERMA, J.:

1. The above appeal by special leave is against the order dated 11.4.1994 passed under Section 4 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as "the Act") by the one member Tribunal comprising of BM.

Lal, J., a Judge of the Allahabad High Court constituted under Section 5 of the Act, confirming the declaration made by the Central Government in the notification dated 10.12.1992 issued under sub-section (1) of Section 3 of the Act that Jamaat-EIslami-Hind is an "unlawful association" as defined in the said Act. The above writ petition has been filed in addition to the said appeal, in the alternative, for a declaration that the provisions of the said Act and the Rules framed thereunder are unconstitutional and ultra vires some of the fundamental rights guaranteed in the Constitution of India.

2. The broad submission of Shri Soli J. Sorabjee on behalf of the said association is, that in the event a construction is made of the provisions of the said Act and the Rules framed thereunder, which give a reasonable opportunity to the association to show cause why it should not be declared unlawful, these provisions would be saved from the vice of unconstitutionality. The alternative challenge to the constitutionality of the provisions is made, only if such a construction cannot be made. It is, therefore. appropriate that the proper construction of these provisions be first made to enable consideration of the contention in the true perspective.

3. The material facts are these. The said association, namely, Jamaat-E-Islami Hind, established in April 1948, is an All India organisation professing a political, secular and spiritual credentials with belief in the oneness of God and universal brotherhood. Its activities are said to be for promoting this objective. A notification dated 10.12.1992 published in the official Gazette the same day was issued by the Government of India in the Ministry of Home Affairs, as under:-

> "MINISTRY OF HOME AFFAIRS NOTIFICATION New Delhi, the 10th December, 1992 S.O. 898(E). - Whereas Shri Sirajul Hasan, Amir of the Jamaat-e-Islami Hind (hereinafter referred to as JEIH) declared in a meeting at Delhi held on the 27th May, 1990 that the separation of Kashmir from India was inevitable.
>
> And whereas Shri Abdul Aziz, Naib Amir of JEIH, addressing a meeting at Malerkotla on the 1st August. 1991, observed that the Government of India should hold plebiscite on Kashmir;
>
> And whereas JEIH has been disclaiming and questioning the sovereignty territorial integrity of India;
>
> And whereas for all or any of the grounds set out in the preceding paragraphs, as also on the basis of other facts, and materials in its possession which the Central Government considers to be against the public interest to disclose, the Central Government is of the opinion that the JEIH is an unlawful association;
>
> Now, therefore. in exercise of the powers conferred by sub-section (1) of section 3 of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), the Central Government hereby declares the 'Jamaat-e-lslami Hind' to be an unlawful association, and directs, in exercise of the powers conferred by the proviso to subsection (3) of that section, that this notification shall, subject to any order that may be made under section 4 of

the said Act, have effect from the date of its publication in the Official Gazette.

[No. II/14034/2(i)/92-IS(DV)1 T.N. SRIVASTAVA, Jr. Secy."

4. In accordance with the proviso to sub-section (3) of Section 3 of the Act, the notification was brought into effect from the date of its publication in the Official Gazette. However, the act of bringing into effect the notification from the date of its publication in the Official Gazette was struck down by the court and so the notification became effective from the date of its confirmation by the Tribunal. The Central Government referred the notification to the Tribunal for the purpose of adjudicating whether or not there is sufficient cause for declaring the association unlawful, in accordance with sub- section (1) of Section 4 of the Act. The Tribunal has decided that there is sufficient cause for declaring the association to be unlawful and, therefore, it has confirmed the said notification. In the inquiry before the Tribunal, the only material produced by the Central Government was a resume prepared on the basis of some intelligence reports and the affidavits of T.N. Srivastava, Joint Secretary in the Ministry of Home Affairs and N.C. Padhi, Joint Director, lB., both of whom spoke only on the basis of the records and not from personal knowledge. In rebuttal, affidavits were filed on behalf of the association of persons whose acts, it was alleged, constituted the grounds for issue of the notification under Section 3(1) of the Act. The deponents of the affidavits were also cross-examined. This constitutes the entire material on which the Tribunal rendered its decision on the question of existence of sufficient cause for declaring the association unlawful. The matter has, therefore, to be decided on this material alone.

5. Briefly stated, the submission of Shri Soli J. Sorabjee, learned counsel for the appellant-association is that none of the grounds on which the notification is based, even assuming them to be proved, constitutes "unlawful activity" as defined in Section 2(f) of the Act to render the appellant an unlawful association within the meaning of Section 2(g) of the Act. Learned counsel also submitted that the only material produced at the inquiry does not constitute legal evidence for the purpose inasmuch as it is, at best, hearsay and that too without disclosing the source from which it emanates to give an opportunity to the appellant to effectively rebut the same. The further submission is that in rebuttal there is legal evidence in the form of sworn testimony of the persons to whom the alleged activities are attributed Shri Sorabjee contended that the inquiry contemplated by the Tribunal under the Act is judicial in nature, which must be in the form of adjudication of a lis giving a reasonable opportunity to the association to rebut the correctness of allegations against it, and negative the same. It was urged by Shri Sorabjee that in the absence of the provisions being so construed, they would suffer from the vice of unconstitutionality. The writ petition has been filed to project the alternative argument.

6. The learned Solicitor General, on -the other hand, contended that this enact-

ment is, in substance, in the nature of a preventive detention law and the Tribunal constituted under the Act is like an Advisory Board under the preventive detention law required to examine only the existence of material sufficient to sustain formation of the opinion of the kind required for preventive detention. Learned Solicitor General submitted that such opinion can be formed not only on the basis of legal evidence but also other materials including intelligence reports received from

undisclosed sources. According to the learned Solicitor General, the requirement of natural justice in such a situation is satisfied by mere disclosure of the information without disclosing the source of the information. This submission of the learned Solicitor General is in addition to the claim of privilege based on public interest available under the general law.

7. The Central Government's right to claim privilege against disclosure of certain information, in public interest, in the manner prescribed by law, is not in controversy- Confidentiality of matters in respect of which the Central Government's claim of privilege is upheld by the Tribunal is not questioned. The question is only of the material in respect of which no such privilege is claimed in the manner prescribed or of which the claim of privilege is not upheld by the Tribunal-

8. It is in this background, the debate regarding the kind of material required for examining the sufficiency of cause lot declaring the association unlawful in the inquiry held by the Tribunal, has to be examined. We would now examine the provisions of the Act and the Rules framed thereunder. The relevant provisions of the Act and the Rules are as under:-

> The Unlawful Activities (Prevention) Act, "2. Definitions. - In this Act, unless the context otherwise requires, -
>
> (a) "association" means any combination or body of individuals;
>
> (b) "cession of a part of the territory of India" includes admission of the claim of any foreign country to any such part;
>
> (c) "prescribed" means prescribed by rules made under this Act;
>
> (d) "secession of a part of the territory of India from the Union" includes the assertion of any claim to determine whether such part will remain a part of the territory of India;
>
> (e) "Tribunal" means the Tribunal constituted under Section 5;
>
> (f) "unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise), -
>
> (i) which is intended, or suppOrts any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession;
>
> (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India.
>
> (g) "unlawful association" means any

association -

(i) which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or

(ii) which has for its object any activity which is punishable under Section 153-A or Section 153-B of the Indian Penal Code, 1860 (45 of 1860), or which encourages or aids persons to undertake any such activity or of which the members under take any such activity:

Provided that nothing contained in sub-clause

(ii) shall apply to the State of Jammu and Kashmir.

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CHAPTER II
UNLAWFUL ASSOCIATIONS
3. Declaration of an association as

unlawful. - (1) If the Central Government is of opinion that any association is, or has become, an unlawful association, it may, by notification in the Official Gazette, declare such association to be unlawful.

(2) Every such notification shall specify the grounds on which it is issued and such other particulars as the Central Government may consider necessary:

Provided that nothing in this sub section shall require the Central Government to disclose any fact which it considers 10 be against the public interest to disclose. (3) No such notification shall have effect until the Tribunal has, by an order made under Section 4, continued the declaration made therein and the order is published in the Official Gazette:

Provided that if the Central Government is of opinion that circumstances exist which render it necessary for that Government to declare an association to be unlawful with immediate effect, it may, for reasons to be stated in writing, direct that the notification shall, subject to any order that may be made under Section 4, have effect from the date of its publication in the Official Gazette.

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4. Reference to Tribunal. - (1) When any association has been declared unlawful by a notification issued under sub-section (1) of Section 3, the Central Government shall, within thirty days from the date of the publication of the notification under the said sub-section, refer the notification to the Tribunal for the purpose of adjudicating

whether or not there is sufficient cause for declaring the association unlawful.

(2) On receipt of a reference under sub-

section (1), the Tribunal shall call upon the association affected by notice in writing to show cause, within thirty days from the date of the service of such notice, why the association should not be declared unlawful. (3) After considering the cause, if any, shown by the association or the office-bearers or members thereof, the Tribunal shall hold an inquiry in the manner specified in Section 9 and after calling for such further information as it may consider necessary from the Central Government or from any office-bearer or member of the association, it shall decide whether or not there is sufficient cause for declaring the association to be unlaw-

ful and make, as expeditiously as possible and in any case within a period of six months from the date of the issue of the notification under sub-section (1) of Section 3, such order as it may deem fit either confirming the declaration made in the notification or cancelling the same.

(4) The order of the Tribunal made under sub-section (3) shall be published in the Official Gazette.

5. Tribunal. - (1) The Central Government may, by notification in the Official Gazette, constitute, as and when necessary, a tribunal to be known as the" Unlawful Activities (Prevention) Tribunal" consisting of one person, to be appointed by the Central Government:

Provided that no person shall be so appointed unless he is a Judge of a High Court.

XXX xxX xXX (5) Subject to the provisions of Section 9, the Tribunal shall have power to regulate its own procedure in all mailers arising out of the discharge of its functions including the place or places at which it will hold its sittings.

(6) The Tribunal shall, for the purpose of making an inquiry under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely '-

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document or other material object producible as evidence;

(c) the reception of evidence on affidavits;

(d) the requisitioning of any public record from any court or office;

(e) the issuing of any commission for the examination of witnesses.

(7) Any proceeding before the Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860) and the Tribunal shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (5 of 1898).

6. Period of operation and cancellation of notification.

- (1) Subject to the provisions of sub-section (2), a notification issued under Section 3 shall, if the declaration made therein is continued by the Tribunal by an order made under Section 4, remain in force for a period of two years from the date on which the notification becomes effective.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, either on its own motion or on the application of any person aggrieved, at any time cancel the notification issued under Section 3, whether or not the declaration made therein has been continued by the Tribunal.

7. Power to prohibit the use of funds of an unlawful association. -

8. Power to notify places for the purpose of an unlawful association. (1) Where an association has been declared unlawful by a notification issued under Section 3 which has become effective under sub-section (3) of that Section.

the Central Government may, by notification in the Official Gazette, notify any place which in its opinion is used for the purpose of such unlawful association. Explanation. - For the purposes of this sub-section, "place" includes a house or building, or part thereof, or a tent or vessel.

xXX XXX XXX (3) If, in the opinion of the District Magistrate, any articles specified in the list are or may be used for the purpose of the unlawful association, he may make an order prohibiting any person from using the articles save in accordance with the written orders of the District Magistrate.

XXX XXX XXX (8) Any person aggrieved by a notification issued in respect of a place under sub-section (1) or by an order made under sub-section (3) or sub-section (4) may, within thirty days from the date of the notification or order, as the case may be, make an application to the Court of the District Judge within the local limits of whose jurisdiction such notified place is situate -

(a) for declaration that the place has not been used for the purpose of the unlawful association; or

(b) for setting aside the order made under sub-section (3) or sub-section (4), and on receipt of the application the Court of the District Judge shall, after giving the parties an opportunity of being heard, decide the question.

9. Procedure to be followed in the disposal of applications under this Act. -

Subject to any rules that may be made under this Act, the procedure to be followed by the tribunal in holding any inquiry under sub-section (3) of Section 4 or by a court of a District Judge in disposing of any application under sub-section (4) of Section 7 or sub-section (8) of Section 8 shall, so far as may be, be the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), for the investigation of claims and the decision of the Tribunal or the Court of the District Judge, as the case may be, shall be final.

CHAPTER II1 OFFENCES AND PENALTIES

10. Penalty for being members of an unlawful association. - Whoever is and continues to be a member of an association declared unlawful by a notification issued under Section 3 which has become effective trader sub-section (3) of that section, or takes part in meetings of any such unlawful association, or contributes to, or receives or solicits any contribution for the purpose of, any such unlawful association, or in any way assists the operations of any such unlawful association, shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine.

11. Penalty for dealing with funds of an unlawful association. - If any person on whom a prohibitory order has been served under sub-section (1) of Section 7 in respect of any moneys, securities or credits pays, delivers, transfers or otherwise deals in any manner whatsoever with the same in contravention of the prohibitory order, he shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both and notwithstanding anything contained in the Code of Criminal Procedure. 1898 (5 of 1898), the court. trying such contravention may also impose on the person convicted an additional fine to recover from him the amount of the moneys or credit or the market value of the securities in respect of which the prohibitory order has been contravened or such part thereof as the court may deem fit.

12. Penalty for contravention of an order made in respect of a notified place. - (1) Whoever uses any article in contravention of a prohibitory order in respect thereof made under sub-section (3) of Section 8 shall be punishable with imprisonment for a term which may extend to one year, and shall also be liable to fine.

(2) Whoever knowingly and wailfully is in, or effects or attempts to effect entry into, a notified place in contravention of an order made under sub-section (4) of Section 8 shall be punishable with imprisonment for a term which may extend to one year, and shall also be liable to fine.

13. Punishment for unlawful activities. - (1) Whoever-

(a) takes part in or commits, or

(b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

(2) Whoever, in any way, assists any unlawful activity of any association, declared unlawful under Section 3, after the notification by which it has been so declared has become effective under subsection (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

(3) Nothing in this section shall apply to any treaty, agreement or convention entered into between the Government of India and the Government of any other country or to any negotiations therefor carried on by any person authorised in this behalf by the Government of India.

14. Offences to be cognizable. Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence punishable under this Act shall be cognizable."

The Unlawful Activities (Prevention) Rules, 1968 "2. Definitions. - In these rules, unless the context otherwise requires, -

(a) "the Act" means the Unlawful Activities (Prevention) Act, 1967 (37 of 1967);

(b) "section" means a section of the Act;

(c) words and expressions used in these rules but not defined, and defined in the Act, shall have the meanings respectively assigned to them in the Act.

3. Tribunal and District Judge to follow rules of evidence. - (1) In holding an inquiry under sub-section (3) of Section 4 or disposing of any application under sub-section (4) of Section 7 or subsection (8) of Section 8, the Tribunal or the District Judge, as the case may be, shall, subject to the provisions of subrule (2), follow, as far as practicable, the rules of evidence laid down in the Indian Evidence Act, 1872 (1 of 1872).

(2) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), where any books of account or other documents have been produced before the Tribunal or the Court of the District Judge by the Central Government and such books of account or other documents are claimed by that Government to be of a confidential nature then, the Tribunal or the Court of the District Judge, as the case may be, shall not,

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(a) make such books of account or other documents a part of the records of proceedings before it; or

(b) allow inspection of, or grant a copy of, the whole of or any extract from, such books of account or other documents by or to any person other than a party to the proceedings before it.

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5. Documents which should accompany a reference to the Tribunal. - Every reference made to the Tribunal under subsection (1) of Section 4 shall be accompanied by -

(i) a copy of the notification made under sub- section (1) of Section 3, and

(ii) all the facts on which the grounds specified in the said notification are based:

Provided that nothing in this rule shall require the Central Government 10 disclose any fact to the Tribunal which that Government considers against the public interest to disclose.

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14. Power of Tribunal or District Judge to sit in private.. - Where any request is made by the Central Government so to do, it shall be lawful for the Tribunal or the District Judge, as the case may be, to sit in private and to admit at such sitting such persons whose presence is considered by the Tribunal or the District Judge, as the case may be, to be necessary for the proper determination of the matter before it or him."

9. Clauses (f) and (g) of Section 2 contain definitions of "unlawful activity" and "unlawful association"

respectively. An "unlawful activity", defined in clause (f), means "any action taken" of the kind specified therein and having the consequence mentioned. In other words, "any action taken" by such individual or association constituting an "unlawful activity "must have the potential specified in the definition. Determination of these facts constitutes the foundation for declaring an association to be unlawful under subsection (1) of Section 3 of the Act. Clause (g) defines "unlawful association" with reference to "unlawful activity" in subclause (i) thereof, and in sub-clause (ii) the reference is to the offences punishable under Section 153-A or Section 153-B of the Indian Penal Code. In sub- clause (ii), the objective determination is with reference to the offences punishable under Section 153-A or Section 153-B of the I.P.C. while in sub-clause (i) it is with reference to "unlawful activity" as defined in clause (f). These definitions make it clear that the determination of the question whether any association is, or has become, an unlawful association to justify such declaration under sub- section (1) of Section 3 must be based on an objective decision; and the determination should be that ' 'any action taken" by such association constitutes an "unlawful activity" which is the object of the association or the object is any activity punishable under Section 153A or Section 153-B, 1.P.C. It is only on the conclusion so reached in an objective determination that a declaration can be made by the Central Government under sub-section (1) of Section 3.

10. Sub-section (2) of Section 3 requires the notification issued under subsection (1) to specify the grounds on which it is issued and such other particulars as the Central

Government may consider necessary. This requirement indicates that performance of the exercise has to be objective together with disclosure of the basis of action to the association. The proviso to sub-section (2) permits the Central Government not to disclose any fact which it considers to be against the public interest to disclose. Ordinarily a notification issued under sub-section (1) of Section 3 becomes effective only on its confirmation by the Tribunal by an order made under Section 4 after due inquiry; but in extraordinary circumstances, which require that it may be brought into effect immediately, it may be so done for 'reasons to be stated in writing' by the Central Government, and then also it is subject to any order made by the Tribunal under Section 4 of the Act. Section 3 requires an objective determination of the matter by the Central Government and Section 4 requires confirmation of the act of the Central Government by the Tribunal.

11. Section 4 deals with reference to the Tribunal. Sub-

section (1) requires the Central Government to refer the notification issued under sub-section (1) of Section 3 to the Tribunal "for the purpose of adjudicating whether or not there is sufficient cause for declaring the association unlawful". The purpose of making the reference to the Tribunal is an adjudication by the Tribunal of the existence of sufficient cause for making the declaration. The words "adjudicating" and "sufficient cause" in the context are of significance. Sub-section (2) requires the Tribunal, on receipt of the reference, to call upon the association affected 'by notice in writing to show cause' why the association should not be declared unlawful. This requirement would be meaningless unless there is effective notice of the basis on which the declaration is made and a reasonable opportunity to show cause against the same. Sub- section (3) prescribes an inquiry by the Tribunal, in the manner specified, after considering the cause shown to the said notice. The Tribunal may also call for such other information as it may consider necessary from the Central Government or the association to decide whether or not there is sufficient cause for declaring the association to be unlawful. The Tribunal is required to make an order which it may deem fit "either confirming the declaration made in the notification or cancelling the same". The nature of inquiry contemplated by the Tribunal requires it to weigh the material on which the notification under sub-section (1) of Section 3 is issued by the Central Government, the cause shown by the association in reply to the notice issued to it and take into consideration such further information which it may call for, to decide the existence of sufficient cause for declaring the association to be unlawful. The entire procedure contemplates an objective determination made on the basis of material placed before the Tribunal by the two sides; and the inquiry is in the nature of adjudication of a lis between two parties, the outcome of which depends on the weight of the material produced by them. Credibility of the material should, ordinarily, be capable of objective assessment. The decision to be made by the Tribunal is "whether or not there is sufficient cause for declaring the association unlawful". Such a determination requires the Tribunal to reach the conclusion that the material to support the declaration outweighs the material against it and the additional weight to support the declaration is sufficient to sustain it. The test of greater probability appears to be the pragmatic test applicable in the context.

12. Section 5 relates to constitution of the Tribunal and its powers. Sub-section (1) of Section 5 clearly provides that nO person would be appointed "unless he is a Judge of a High Court". Requirement of a sitting Judge of a High Court to constitute the Tribunal also suggests that the function is judicial in nature. Sub-section (7) says that any proceeding before the Tribunal shall be deemed to be a "judicial proceeding" and the Tribunal shall be deemed to be a "Civil Court" for the purposes specified. Section 6 deals with the period of operation and cancellation of notification. Section 8 has some significance in this context. Sub-section (8) of Section 8 provides' the remedy to any person aggrieved by a notification issued in respect of a place under sub-section (1) or by an order made under sub-section (3) or subsection 4, by an application made to the District Judge who is required to decide the same after giving the parties an opportunity of being heard. This also indicates the judicial character of the proceeding even under Section 8. Section 9 prescribes the procedure to be followed in the disposal of applications under the Act. Provisions of Section 9 of the Act lay down that the procedure to be followed by the Tribunal in holding an inquiry under sub-section (3) of Section 4 or by the District Judge under Section 8 shall, so far as may be, be the procedure prescribed by the Code of Civil Procedure for the investigation of claims. Sections 10 to 14 in Chapter III relate to "offences and penalties" which indicate the drastic consequences Of the action taken under the Act including a declaration made that an association is unlawful. The penal consequences provided are another reason to support the view that the inquiry contemplated by the Tribunal under Section 4 of the Act is judicial in character since the adjudication made by the Tribunal is visited with such drastic consequences.

13. In our opinion, the above scheme of the Act clearly brings out the distinction between this statute and the scheme in the preventive detention laws making provision therein for an Advisory Board to review the detention. The nature of the inquiry preceding the order made by the Tribunal under Section 4 of the Act, and its binding effect, give to it the characteristic of a judicial determination distinguishing it from the opinion of the Advisory Board under the preventive detention laws.

14. In Section 4, the words "adjudicating" and "decide" have a legal connotation in the context of the inquiry made by the Tribunal constituted by a sitting Judge of a High Court. The Tribunal is required to 'decide' after 'notice to show cause' by the process of 'adjudicating' the points in controversy. These are the essential attributes of a judicial decision.

15. In Volume 2 of the Words and Phrases, Permanent Edition, by West Publishing Co., some of the meanings given of "adjudicate; adjudication" are as under:-

> "An "adjudication" essentially plies a hearing by a court, after notice, of legal evidence on the factual issue involved ..... xxx XXX XXX Generally, "adjudication" of any question implies submission of question to a court of record."

16. Volume 1 of the Shorter Oxford English Dictionary on Historical Principles, Third edition, says, the word "adjudicate" means "to try and determine judicially"

17. The reference to the Tribunal is for the purpose of adjudicating whether or not there is sufficient cause for declaring the association unlawful. Obviously the purpose is to obtain a judicial confirmation of the existence of sufficient cause to support the action taken. The confirmation is by a sitting High Court Judge after a judicial scrutiny of the kind indicated. This being the nature of inquiry and the purpose for which it is conducted, the materials on which the adjudication is to be made with opportunity to show cause given to the association, must be substantially in consonance with the materials required to support a judicial determination. Reference may be made at this stage to the decision in State of Madras v.V.G. Row, [1952] SCR 597 on which both sides place reliance.

18. In State of Madras v. V.G. Row, [1952] S.C.R. 597, the question for decision related to the constitutional validity of a law empowering the State to declare associations illegal by notification, wherein there was no provision for judicial inquiry or for service of notification on the association or its office bearers. The absence of a provision for judicial inquiry and notice to the association of the basis for the action taken was held to be an unreasonable restriction on the right to form associations under Article 19(1)(c) read with Article 19(4) of the Constitution as it then stood. By the Constitution (Sixteenth Amendment) Act, 1963, the expression "the sovereignty and integrity of India or" was inserted prior to "public order or morality" to permit reasonable restrictions to be imposed also .in the interests of the sovereignty and integrity of India in addition to those in the interests of public order or morality. The significance, however, is that in V.G. Row, the absence of a provision for judicial inquiry to scrutinise the reasonableness of restrictions on the exercise of the right conferred by sub-clause (c) of clause (1) of Article 19 was the ground on which the law was held to be constitutionally invalid. The test of reasonableness of the restrictions imposed was indicated thus :-

> "..... It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict ..... "

(at page 607) The argument of the learned Attorney General in V.G. Row placing reliance on the decision in Dr. N.B. Khare v. The State of Delhi, [1950] S.C.R. 519, wherein the subjective satisfaction of the Government regarding the necessity for the externment of a person coupled with a reference of the matter to an Advisory Board was considered to be reasonable procedure for restricting the right conferred by Article 19(1)(b), was rejected. A distinction was drawn between the requirement for preventive detention or externment of a person with declaration of an association to be unlawful on the ground that the former was anticipatory or based on suspicion whereas the latter was based on grounds which are factual and capable .of objective determination by the Court. This distinction was emphasised as under:-

" ..... These grounds, taken by themselves, are factual and not anticipatory or based on suspicion. An association is allowed to be declared unlawful because it "constitutes" a danger or "has interfered

or interferes" with the maintenance of public order or "has such interference for its object", etc. The factual existence of these grounds is amenable to objective determination by the court, ... "

> (emphasis supplied) (at page 609) " ..... For all these reasons the decision in Dr. Khare's case, [1950] S.C.R. 519, is distinguishable and cannot rule the present case as claimed by the learned Attorney General. Indeed, as we have observed earlier, a decision dealing with the validity of restrictions imposed on one of the rights conferred by article 19(1) cannot have much value as a precedent for adjudging the validity of the restrictions imposed on another right, even when the constitutional criterion is the same, namely, reasonableness, as the conclusion must depend on the cumulative effect of the varying facts and circumstances of each case."

(at page 611)

19. In our opinion, the test of factual existence of grounds amenable to objective determination by the court for adjudging the reasonableness of restrictions placed on the right conferred by Article 19(1)(c) to form associations, in the scheme of the Unlawful Activities (Prevention) Act, 1967, is equally applicable in accordance with the decision in V.G. Row It is, therefore, this test which must determine the meaning and content of the adjudication by the Tribunal of the existence of sufficient cause for declaring the association to be unlawful under the Act. A different construction to equate the requirement of this Act with mere subjective satisfaction of the Central Government, when the power to declare an association to be unlawful depends on the factual existence of the grounds which are amenable to objective determination, would result in denuding the process of adjudication by the Tribunal of the entire meaning and content of the expression "adjudication' '

20. As earlier mentioned, the requirement of specifying the grounds together with the disclosure of the facts on which they are based and an adjudication of the existence of sufficient cause for declaring the association to be unlawful in the form of decision after considering the cause, if any, shown by the association in response to the show cause notice issued to it, are all consistent only with an objective determination of the points in controversy in a judicial scrutiny conducted by a Tribunal constituted by a sitting High Court Judge, which distinguishes the scheme under this Act with the requirement under the preventive detention laws to justify the anticipatory action of preventive detention based on suspicion reached by a process of subjective satisfaction. The scheme under this Act requiring adjudication of the controversy in this manner makes it implicit that the minimum requirement of natural justice must be satisfied, to make the adjudication meaningful. No doubt, the requirement of natural justice in a case of this kind must be tailored to safeguard public interest which must always outweigh every lessor interest. This is also evident from the fact that the proviso to sub-section (2) of Section 3 of the Act itself permits the Central Government to withhold the disclosure of facts which it considers to be against the public interest to disclose. Similarly, Rule 3(2) and the proviso to Rule 5 of the Unlawful Activities (Prevention) Rules, 1968 also permit nondisclosure of confidential documents and information which the Government considers against the public interest to disclose. Thus, subject to the non-disclosure of information which the Central Government considers to be against the public interest to disclose, all information and evidence relied on by the Central Government to support the declaration made by it of an association to be

unlawful, has to be disclosed to the association to enable it to show cause against the same. Rule 3 also indicates that as far as practicable the rules of evidence laid down in the Indian Evidence Act, 1872 must be followed. A departure has to be made only when the public interest so requires. Thus, subject to the requirement of public interest which must undoubtedly outweigh the interest of the association and its members, the ordinary rules of evidence and requirement of natural justice must be followed by the Tribunal in making the adjudication under the Act.

21. To satisfy the minimum requirements of a proper adjudication, it is necessary that the Tribunal should have the means to ascertain the credibility of conflicting evidence relating to the points in controversy. Unless such a means is available to the Tribunal to determine the credibility of the material before it, it cannot choose between conflicting material and decide which one to prefer and accept. In such a situation, the only option to it would be to accept the opinion of the Central Government, without any means to test the credibility of the material on which it is based. The adjudication made would cease to be an objective determination and be meaningless, equating the process with mere acceptance of the ipse dixit of the Central Government. The requirement of adjudication by the Tribunal contemplated under the Act does not permit abdication of its function by the Tribunal to the Central Government providing merely its stamp of approval to, the opinion of the Central Government. The procedure to be followed by the Tribunal must, therefore, be such which enables the Tribunal to itself assess the credibility of conflicting material on any point in controversy and evolve a process by which it can decide whether to accept the version of the Central Government or to reject it in the light of the other view asserted by the association. The difficulty in this sphere is likely to arise in relation to the evidence or material in respect of which the Central Government claims non-disclosure on the ground of public interest.

22. It is obvious that the unlawful activities of an association may quite often be clandestine in nature and, therefore, the source of evidence of the unlawful activities may require continued confidentiality in public interest. In such a situation, disclosure of the source of such information, and, may be, also lull particulars thereof, is likely to be against the public interest. The scheme of' the Act and the procedure for inquiry indicated by the Rules framed thereunder provide for maintenance of confidentiality, whenever required in public interest. However, the non-disclosure of sensitive information and evidence to the association and its office bearers, whenever justified in public interest, does not necessarily imply its non-disclosure to the Tribunal as well. In such cases where the Tribunal is satisfied that non-disclosure of such information to the association or its office bearers is in public interest, it may permit its non- disclosure to the association or its office bearers, but in order to perform its task of adjudication as required by the Act, the Tribunal can look into the same for the purpose of assessing the credibility of the information and satisfying itself that it can safely act on the same. In such a situation, the Tribunal can devise a suitable procedure whereby it can itself examine and test the credibility of such material before it decides to accept the same for determining the existence of sufficient cause for declaring the association to be unlawful, The materials need not be confined only to legal evidence in the strict sense. Such a procedure would ensure that the decision of the Tribunal is an adjudication made on the points in controversy after assessing the credibility of the material it has chosen to accept, without abdicating its function by merely acting on the ipse dixit of the Central Government. Such a course would satisfy the minimum requirement of natural justice tailored to suit the circumstances of each case, while protecting the

rights of the association and its members. 'without jeopardising the public interest. This would also ensure that the process of adjudication is not denuded of its content anti the decision ultimately rendered by the Tribunal is reached by it on all points in controversy after adjudication and not by mere acceptance of the opinion already formed by the Central Government.

23. In John J. Morrissey and (7. Donald Booher v. Lou B. Brewer, 33 L.Ed. 2d 484, the United States Supreme Court, in a case of parole revocation, indicated the minimum requirements to be followed, as under:

> " ..... Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary., evidence;
>
> (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ' 'neutral and detached"

hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."

(emphasis supplied) (at pages 498-499)

24. In Paul Ivan Birzon v. Edward S. King, 469 F.2d. 1241 (1972), placing reliance on Morrissey, while dealing with a similar situation, when confidential information had to be noted on, it was indicated that the credibility issue could be resolved by the Board retaining confidentiality of the information but assessing the credibility itself; and a modified procedure was indicated as under:-

> ". ..... the board was required to decide whether it would believe the informants or the parolee and his witnesses. The infirmity that we see in the hearing and dctemination by the parole board is that it resolved the credibility issue solely on the basis of the state report, without itself taking the statements from the informants. Thus the board had no way of knowing how reliable the informants were and had no real basis on which to resolve the credibility issue against time parolee ..... We do not mean to intimate that the board should have taken testimony from the informants at the hearing and given the parolee the opportunity to cross-examine. What we do mean is that the board should have received the information directly from the informants (although not necessarily in the presence of the parolee), instead of relying solely on the state report.* The board could then have reached its own conclusions about the relative reliability of the informants' statements and those of

> the parolee and his witnesses.
>
> Similarly, the board could then have made its own decision about how realistic were the claims of potential danger to the informants or to state paro1e officers if their identity was disclosed, instead of placing exclusive reliance_on the state report. Thus, we hold that in relying exclusively on the written synopsis in the state report, which was the only' evidence of a parole violation, in the face of the parolee's denial and his presentation of the testimony of other witnesses, the revocation of Satz's parole was fundamentally unfair to him and was a denial of due process of law."

(at pages 1244-.1245)

25. Such a modified procedure while ensuring confidentiality of such information and its source, in public interest, also enables the adjudicating authority to test the credibility of the confidential information for the purpose of deciding whether it has to be preferred to the conflicting evidence of the other side. This modified procedure satisfies the minimum requirements of natural justice and also retains the basic clement of' an adjudicatory process which involves objective determination of the factual basis of the action taken.

26. An authorised restriction saved by Article 19(4) on the freedom conferred by Article 19(1)(c) of the Constitution has to be reasonable. In this statute, provision is made for the notification to become effective on its confirmation by a Tribunal constituted by a sitting High Court Judge, on adjudication, after a show cause notice to the association, that sufficient cause exists for declaring it to be unlawful. The provision for adjudication by judicial scrutiny, after a show cause notice, of existence of sufficient cause to justify the declaration must necessarily imply and import into the inquiry, the minimum requirements of natural justice to ensure that the decision of the Tribunal is its own opinion, formed on the entire available material, and not a mere imprimatur of the Tribunal affixed to the opinion of the Central Government. Judi--

cial scrutiny implies a fair procedure to prevent the vitiating element of arbitrariness. What is the i'air procedure in a given case, would depend on the materials constituting the factual foundation of the notification and the manner in which the Tribunal can assess its; true worth. This has to be determined by the Tribunal keeping in view the nature of its scrutiny, the minimum requirement of natural justice, the fact that the materials in such matters arc not confined to legal evidence in the strict sense, and that the scrutiny is not a criminal trial. The Tribunal should form its opinion on all the points in controversy after assessing for itself the credibility of the material relating to it, even though it may not be disclosed to the association, if the public interest so requires.

27. It follows that, ordinarily, the material on which the Tribunal can place reliance for deciding the existence of sufficient cause to support the declaration, must be of the kind which is capable of judicial scrutiny. In this context, the claim of privilege on the ground of public interest by the Central Government would be permissible and the Tribunal is empowered to devise a procedure by which it can satisfy itself of the credibility of the material without disclosing the same to the association, when public interest so requires. The requirements of natural justice can be suitably

modified by the Tribunal to examine the material itself in the manner it considers appropriate, to assess its credibility without disclosing the same to the association. This modified procedure would satisfy the minimum requirement of natural justice and judicial scrutiny. The decision would then be that of the Tribunal itself.

28. On the above construction made of the provisions of the Act, the alternative argument relating to constitutionality does not merit consideration

29. Having indicated the requirements of a valid adjudication by the Tribunal made under the Act, we now proceed to examine the merits of this case.

30. The allegations made by the Central Government against the association Jamaat-E-Islami Hind - were totally denied. It was, therefore, necessary that the Tribunal should have adjudicated the controversy in the manner indicated. Shri Soli J. Sorabjee, learned counsel for the association, Jamaat-E-Islami Hind, contended that apart from the allegations made being not proved, in law such acts even if proved, do not constitute "unlawful activity" within the meaning of that expression defined in the Act. In the present case, the alternative submission of Shri Sorabjee does not arise for consideration on the view we arc taking on his first submission. The only material produced by the Central Government to support the notification issued by it under Section 3(1) of the Act, apart from a resume based on certain intelligence reports, are the statements of Shri T.N. Srivastava, Joint Secretary, Ministry of Home Affairs and Shri N.C. Padhi, Joint Director, lB. Neither Shri Srivastava nor Shri Padhi has deposed to any fact on the basis of personal knowledge. Their entire version is based on official record. The resume is based on intelligence reports submitted by persons whose names have not been disclosed on the ground of confidentiality. In other words, no person has deposed from personal knowledge whose veracity could be tested by cross examination. Assuming that it was not in public interest to disclose the identity of those persons or to produce them for cross-

examination by the other side, some method should have been adopted by the Tribunal to test the credibility of their version. The Tribunal did not require production of those persons before it, even in earners, to question them and test the credibility of their version. On the other hand, the persons to whom the alleged unlawful acts of the association are attributed filed their affidavits denying the allegations and also deposed as witnesses to rebut these allegations. In such a situation, the Tribunal had no means by which it could decide objectively, which of the two conflicting versions to accept as credible. There was thus no objective determination of the factual basis for the notification to amount to adjudication by the Tribunal, contemplated by the statute. The Tribunal has merely proceeded to accept the version of the Central Government without taking care to know even itself the source from which it came or to assess credibility of the version sufficient to inspire confidence justifying its acceptance in preference to the sworn denial of the witnesses examined by the other side. Obviously, the Tribunal did not properly appreciate and fully comprehend its role in the scheme of the statute and the nature of adjudication required to be made by it. The order of the Tribunal cannot, therefore, be sustained.

31. In this view of the matter, the challenge to the constitutionality of the said Act made in the writ petition does not survive.

32. Needless to say, our conclusion on the appeal is based upon the material placed before the Tribunal and its treatment of it. Our conclusion shall not be taken to debar action under the said Act against the association hereafter if the necessary material is available

33. Consequently, the civil appeal is allowed. The order dated 11.4.1994 passed by the Tribunal is quashed. The writ petition is dismissed.