

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

WRIT PETITION NO.3549 OF 2014

WITH

INTERIM APPLICATION NO.150 OF 2024

Raj Kumar Awasthi Son of Kishanlal Awasthi, Age - 40 years, Occu.-Business and Social Activist, B - 14, Shanti Nagar, Kurla (W), Mumbai 400 070.	} } }	... Petitioner
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Versus

The State of Maharashtra (Summons to be served upon Ld. Public Prosecutor appointed u/s. 24 of Code of Criminal Procedure, 1973)	} } }	... Respondent
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Mr.Rajkumar Awathi, Petitioner in-person, present.

Dr.A.A. Takalkar, A.P.P. for the Respondent-State.

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***CORAM : BHARATI DANGRE, &
MANJUSHA DESHPANDE, JJ.***

DATE : 25th OCTOBER, 2024.

JUDGMENT (PER : MANJUSHA DESHPANDE, J.)

The Petitioner who appears in person has approached this Court under Articles 226 and 227 of the Constitution of India, read with Section 482 of the Code of

Criminal Procedure, 1973, (Cr.P.C.), with prayer to quash and set aside the order dated 04.09.2014, passed under Exhibit 5, as illegal, null and void with further directions to the learned Metropolitan Magistrate 51 Court, Kurla, Mumbai, to close the prosecution case bearing No.125/PW/2006.

2. It is the case of the Petitioner that on 11.10.2005, Kurla Police Station, registered First Information Report (FIR) No.313 of 2005, alleging non cognizable offence under Sections 323, 427 and 506(ii) of the Indian Penal Code (IPC), as alleged by the complainant, and the Petitioner sought anticipatory bail pursuant to its registration.

The charge has been framed in the said matter in the year 2006.

3. The Petitioner had filed Application before the Metropolitan Magistrate to declare the trial as void and vitiated, as according to him the offences alleged are non cognizable, therefore, police had no power to investigate it, and file chargesheet, unless necessary order was obtained from the Court of Metropolitan Magistrate as contemplated by Section 155(2) of Cr.P.C.

4. The learned APP had filed say opposing the said Application on the ground that, offence under Section 506(ii) of IPC is cognizable in Greater Bombay, hence, permission is not required for conducting investigation.

5. The application of the Petitioner was heard and decided by the Metropolitan Magistrate 51 Court, Kurla, Mumbai, on 04.09.2014. It is against this order of the Metropolitan Magistrate, the Petitioner has approached this Court.

6. It is argued by Mr.Awasthi that Section 506(ii) of IPC is non cognizable and bailable as per Schedule I of the Code of Criminal Procedure, there is no amendment made either by the Parliament or by the State Legislature in the said section. The ground of challenge raised in the Writ Petition is that, though Section 506(ii), 504, 323 and 427 of IPC, all are non cognizable offences, the police have registered FIR under Section 154 of the Cr.P.C. as if they are cognizable offences.

The Petitioner has heavily relied on the judicial pronouncement in the case of ***Vishwajeet P. Rane Vs. State of Goa and Ors.***¹, wherein validity of the Notification issued, by the State of Goa making offences under Section 188 or 506 of the IPC cognizable and non bailable in the State of Goa was challenged, and it was held that, the State Government had no

¹ LAWS(BOM.)-2010-7-132

power to amend the first Schedule of Code of Criminal Procedure, by issuing a notification. It was also observed that, investigation of non cognizable offences without obtaining order under section 155 (2) of the Cr.P.C., was not permissible.

The Metropolitan Magistrate, has referred to the Judgment of this Court in the case of ***State of Maharashtra Vs. Rajkumar Sitti @ Kundalla Malhotra***², wherein view has been taken that considering the Notification issued by the State of Maharashtra in its Home Department (Special) No.S.B.I/CIA/1060/26963, dated 04.10.1962, as amended by (Special) S.B.I/CIA/1061/27115 dated 10.08.1962, the offence under Section 506(ii) of IPC is cognizable and non-bailable, in the area of Greater Bombay.

A further reference was made to Criminal Writ Petition No.77 of 2011 in the case of ***Anil Menghraj Gehi Vs. Charanjeet Chanderpal @ Chander Kumar Gehi and Ors.***, wherein the powers of the Government of Maharashtra for making an offence under Section 506(ii) of the IPC cognizable and non - bailable in the Greater Bombay area in exercise of powers under Notification dated 10.08.1962 was referred to the Full Bench. The reference was not decided by the Full Bench till the orders were passed by the Metropolitan Magistrate.

² 1988 (1)(Bom CR 15

7. Therefore when the Metropolitan Magistrate was confronted with such situation, he has passed an order holding that the case is registered as a warrant case, and, therefore, it proceeds under Chaptre XIX of Criminal Procedure Code (Cr.P.C.). After framing of charge under Section 240 of the Cr.P.C., the only option left with the Magistrate is to proceed with the trial. There is no provision to discharge, after framing of charge or to drop the proceedings.

Therefore, in view of the restricted powers vested in him the Magistrate has observed that he has no inherent powers under Section 482 of Cr.P.C., and hence, he is not empowered to drop the proceedings, after framing of charge in warrant case, therefore, the application of the Petitioner was rejected.

The Petitioner has filed an Interim Application No.10 of 2024, seeking amendment to the Writ Petition, as per Schedule 'A' to the Application, seeking permission to add certain additional grounds of challenge, to the Writ Petition after the decision of the Full Bench of this Court in W.P.2841 of 2013, in Kahera Sayed Vs. State of Maharashtra and Others, alongwith other connected Writ Petitions, upholding the validity of Notification dated 04.10.1962.

The APP has filed reply to the Interim Application No.150 of 2024. Where it is stated by the Assistant Police Inspector Kurla Police Station, Mumbai, that Notification dated 04.10.1962 still holds the field, as held by the decision of Full Bench of this Court *vide* its judgment dated 05.04.2017, in Writ Petition No.2841 of 2013, alongwith other connected Writ Petitions including the present Writ Petition.

8. The issues which were referred for consideration of Full Bench read thus:

“(A) Whether the powers under Section 10 of the Criminal Law Amendment Act, 1932 can be exercised by the State of Maharashtra after 1/4/1974 by reading the words “the Criminal Procedure Code 1973” in place of the words “Criminal Procedure Code, 1898” in view of the scheme of Section 8 of the General Clauses Act, 1897?

(B) Whether the State Government retains the power to issue a notification under Section 10 of the Criminal Law Amendment Act, 1932 after 1/4/1974 when the Code of 1898 has been repealed and unless in Section 10(1) of the said Act the words “Criminal Procedure Code 1898” are substituted by the words “Criminal Procedure Code, 1973?

(c) Whether the impugned notification amounts to amendment in the First Schedule to the Code of 1973, by the State Government, when the said notification is only for the limited area of greater Mumbai?

(D) Whether the notification dated 4/10/1962 issued by the State of Maharashtra is applicable to the area of greater Mumbai even after the Code of 1973 has been brought into force and the Code of 1898 has been repealed?”

9. All the above issues have been answered in affirmative, by the Full Bench by placing reliance on the judgment of the Hon'ble Apex Court in the case of ***Aires Rodrigues Vs. Vishwajeet P. Rane & Others***. It is the contention of the Petitioner that though he had raised a ground that, Section 10 of the Criminal Law Amendment Act, 1932, itself is ultra vires to the Constitution of India, the Full Bench has refused to decide the issue on the ground that the said issue had not been referred for determination before the Full Bench. Therefore he is challenging it, in the present Writ Petition, by adding proposed grounds.

12. The matter was referred before the Full Bench of this Court due to the difference of opinion in the view taken by the Division Bench at Goa in *Vishwajeet P. Rane Vs. State of Goa and Others* (Supra) and the Division Bench of the Principal seat at Bombay, in a group of Writ Petitions. Writ Petition No.2211 of 2010 (*Mangesh Digambar Advilkar Vs. The State of Maharashtra*), being the lead petition.

The relief claimed in these Petitions read thus :-

- (1) *to quash the FIR registered for the offences punishable under Section 506(ii) of IPC; and*
- (2) *to set aside the Notification dated 04.10.1962, issued by the State of Maharashtra.*

13. The Code of Criminal Procedure, 1973, was brought into force with effect from 01.04.1974, by repeal of Code of Criminal Procedure Code 1898. During the subsistence of old Code, the Criminal Law Amendment Act, 1932, was brought into force.

Section 10 of the Criminal Law Amendment Act, 1932, conferred powers on the State to make certain offences cognizable and non bailable.

In exercise of this power, the State of Maharashtra issued Notification dated 04.10.1962, making offences under Section 506 (ii) of the IPC cognizable and non bailable within the limits of Greater Mumbai.

14. There arose difference of opinion between view taken by the Principal seat at Bombay and Bench at Goa, of this Court, as stated above, about the applicability of Notification dated 04.10.1962, after coming into force of Criminal Procedure Code, 1973, as the Code of Criminal Procedure, 1898, stood repealed.

The question that arose for determination was whether the Notification issued under the provisions of Cr.P.C., 1898, would remain in force after its repeal.

While answering the issues, the Full Bench, held that there is no inconsistency in the old as well as new Act.

The Criminal Law Amendment Act, 1932, is a Central Legislation and therefore, there is no implied repeal of the said Act, and the question of inconsistency between Central Act and State Act does not arise, more particularly when the Central Act has delegated powers to the State Government.

15. Section 484 of the Cr.P.C. 1973, expressly saved certain provisions, by providing as under:-

“484. Repeal and savings. – (1)The Code of Criminal Procedure, 1898 (V of 1898) is hereby repealed.

(2)Notwithstanding such repeal, –

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898), as in force immediately before such commencement (hereinafter referred to as the old Code), as if this Code had not come into force :Provided that every inquiry under Chapter XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code;

(b) all notification published, proclamations issued, powers conferred, forms prescribed, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the old Code and which are in force immediately before the commencement of this Code, shall be deemed, respectively, to have been published, issued, conferred, prescribed, defined, passed or made under the corresponding provisions of this Code;

(c) any sanction accorded or consent given under the old Code in pursuance of which no proceeding was commenced under that Code, shall be deemed to have been accorded or given under the corresponding provisions of this Code and proceedings may be commenced under this Code in pursuance of such sanction or consent;

(e) the provisions of the old Code shall continue to apply in relation to every prosecution against a Ruler within the meaning of Article 363 of the Constitution.”

16. Moreover, by referring to Section 8 of the General Clauses Act, it is held that all the Notifications issued under the old Act shall continue to operate, as it was issued by exercising power vested in by the Government by virtue of Criminal Law Amendment Act, 1932, and continue to be in force even after the old act is repealed.

Finally upholding the validity of the Notification, it is held that Notifications which are issued under Section 10 of the Criminal Law Amendment Act, 1932 are saved in view of Section 484 of Cr.P.C.1973 and Section 8 of the General Clauses Act.

17. The Full Bench gainfully has relied on the decision of the Hon'ble Apex Court in the case of ***Aires Rodrigues Vs. Vishwajeet P. Rane and Ors.*** decided on 01.07.2017, where the Apex Court was pleased to set aside the Judgment of the

Division Bench of this Court at Goa Bench in ***Vishwajeet P. Rane Vs. State of Goa and Ors.(Supra)*** upholding the validity of Notification dated 27.06.1973 and corrigendum to the said Notification dated 05.07.1973, which were issued in exercise of powers under Section 10 of Criminal Law Amendment Act, 1932, which are similar to the Notification issued by State of Maharashtra on 04.10.1962.

It is further held by the Hon'ble Apex Court that, there is no dispute that, the 1932 Act is a Central Legislation and even today it is operative and the powers conferred under Section 10 of the Act can be exercised.

Relying on the authoritative pronouncement of the Hon'ble Apex Court, the Full Bench of this Court has taken a view as above.

18. The present Writ Petition was also part of the group of Writ Petitions which were referred to the Full Bench for determination of the issues which were referred to it. After the decision of Full Bench, the Petitioner has filed an Interim Application seeking amendment to the Writ Petition by adding certain grounds as well as prayer A-1.

It is the contention of the Petitioner, who is appearing

in-person, that the issue raised by him in the present Writ Petition, was raised before the Full Bench, but the Full Bench has not decided it, as the issue was not referred to it.

19. The sum and substance of the challenge which is raised by way of proposed amendment is that Article 246 of the Constitution of India, empowers the Parliament and State Legislature to make laws as per Seventh Schedule. The State Legislature is empowered to legislate only on the matters mentioned in the list II and II of the VII Schedule.

It is contention of Petitioner that, the State Government is not vested with any such powers to legislate or issue Notification declaring Section 506(ii) of IPC, as cognizable and non-bailable after coming into force of the Constitution of India 1950.

According to the Petitioner, considering the supremacy of Constitution, the State Government does not possess power to amend First Schedule of Code of Criminal Procedure, thereby making Section 506(ii) of IPC from non cognizable and bailable to cognizable and non bailable, by exercising power under Section 10 of the Criminal Law Amendment Act, 1932. It is his contention that, this issue has also not been dealt by the

Hon'ble Supreme Court of India in the case of ***Aires Rodrigues Vs. Vishwajeet P. Rane & Others (Supra)***.

As per Mr.Awasthi, who appears in-person, it is only within the powers of the Parliament to legislate or amend Central Acts in view of Article 246 of the Constitution of India. It is not within the competence of the State Legislature, to amend the Central Act, that too by issuance of a Notification.

20. When the Interim Application was placed before this Court on 11.06.2024, considering that the Petition is already admitted, it was ordered that, the Interim Application can be heard alongwith Writ Petition at the time of final disposal. Initially the relief sought by the Petitioner was limited only to the extent of quashing of the order passed by the learned Metropolitan Magistrate dated 04.09.2014, in which Petitioner had made a prayer to hold that the trial before the Court, which is instituted on a police report is in violation of Section 155(2) of Cr.P.C., as it was without valid order under Section 155(2), which was decided on 04.09.2014. The Petitioner prayed to close CC No.125/PW/2006, as void, in exercise of inherent powers of this Court under Section 482 of Cr.P.C. as well as Articles 226 and 227 of the Constitution of India.

21. The issue of Section 506 (ii) of IPC being made cognizable and non bailable offence in Greater Bombay, is answered by the Full Bench

Even after the decision of the Full Bench, the Petitioner is questioning the validity of Notification dated 04.10.1962, by seeking leave to add a prayer [A-1], which reads thus:

“[A-1] That this Hon’ble Court may be pleased to hold that the State Government possess no powers to legislate including amending sec.506[2] of I.P.Code as cognizable and non – bailable on and from the commencement of Constitution of India, 1950 either from impugned notification dated 04.10.1962 or otherwise and this Hon’ble Court may be further be pleased to issue appropriate Writ, order quashing the impugned notification dt 04.10.1962”

By making the said amendment, the Petitioner is seeking a declaration contrary to the decision given by the Full Bench, for quashing the impugned notification dated 04.10.1962, validity of which is already upheld by the Full Bench of this Court, following the decision of the Apex Court in case of *Aires Rodrigues Vs. Vishwajeet P. Rane and Ors. (supra)*. The Hon’ble Apex Court has categorically dealt with Section 10 of Criminal Law Amendment Act, 1932 and has upheld the validity of the same.

Therefore, the challenge to validity of the Notification

would not be maintainable in view of the decision of the Apex Court, which has already upheld the validity of Section 10 of Criminal Law Amendment Act, 1932, which delegate powers to the State Government to issue Notifications for amending the provisions in the Code.

22. The very source of power while issuing Notification of 04.10.1962, is a Criminal Law Amendment Act, 1932. Though the Code of Criminal Procedure Court, 1898, has been replaced by the new Code of Criminal Procedure, 1973, which has come into force on 01.04.1974, due to the saving clause the Criminal Law Amendment Act, 1932 has been saved and still holds the field.

Hence, the Notification issued in exercise of powers granted under Section 10 of Criminal Law Amendment Act, 1932, by the State Government cannot be held to be void or unconstitutional.

23. Therefore, the challenge to the Notification which is issued in exercise of power under Section 10 of Criminal Law would not survive. Even the challenge to the order passed by the Metropolitan Magistrate 51 Court, Kurla, Mumbai, dated 04.09.2014, as well as the subsequent challenge to the

Notification, which is made in the prayer in the Interim Application would not survive, as the issue in the present Writ Petition is already covered by the decision of the Full Bench of this Court. For the reasons mentioned hereinabove, the Writ Petition is rejected.

24. Interim Application also stands disposed off accordingly.

25. When the Judgment is pronounced, the Petitioner appearing in-person makes oral request seeking leave to file Appeal before the Hon'ble Supreme Court, which we deem fit to grant.

(MANJUSHA DESHPANDE,J.)

(BHARATI DANGRE J.)