SECTION 506 OF THE INDIAN PENAL CODE : LEGAL POSITION IN UTTARAKHAND

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Section 506 of the Indian Penal Code, 1860 as applicable in the State of Uttarakhand is often subject of debate as to whether the offence punishable under this section is cognizable or non-cognizable and also whether it is bailable or non-bailable. Of course, we all know the answer. But, in this paper, an attempt is being made to discuss the combined effect of section 10 of the Criminal Law Amendment Act, 1932, notification of the erstwhile State of Uttar Pradesh issued in exercise of powers conferred by the said section, sub-section (1) of section 8 of the General Clauses Act, 1897 and section 86 of the Uttar Pradesh Reorganization Act, 2000.

2. In 1898 when the Code of Criminal Procedure, 1898 came into force, it made the offence punishable under Section 506 of the Indian Penal Code, 1860 non-cognizable and bailable. In the year 1974, the Code of 1898 was repealed and the new Code came into force. The Code of Criminal Procedure, 1973 did not change the classification and retained the same as non-cognizable and bailable.

3. The Code of Criminal Procedure, 1973 is central legislation and there appears no doubt that the same cannot be amended by the State Government. Yes, State Legislature may do so since criminal law is in concurrent list, but even then assent of the President is required under Article 254(2) of the Constitution. Further, it is also very strange to see that the Code may be amended by the State Governments and that too vide a notification. However, in the year 1932 with coming into force of the Criminal Law Amendment Act, 1932, it was made possible that effect of amendment could be given to certain provisions of the Code by the State Governments after issuing notification in this behalf.

4. The Criminal Law Amendment Act, 1932 came into force in the year 1932 with the object to supplement the criminal law in force in then India. The Act is still in force and section 10 thereof reads as follow-

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> ***"10. Power of State Government to make certain offence cognizable and non-bailable-*** *(1) The State Government may by notification in the Official Gazette, declare that any offence punishable under Sections 186, 189, 188, 190, 295A, 298, 505, 506 or 507 of the Indian Penal Code, when committed in any area specified in the notification shall notwithstanding anything contained in the Code of Criminal Procedure, 1898 be cognizable and thereupon the Code of Criminal Procedure, 1898 shall, while such notification remains in force, be deemed to be amended accordingly.*
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> *(2) The State Government may, in like manner and subject to the like conditions, and with the like effect, declare that an offence punishable under Section 188 or Section 506 of the Indian Penal Code shall be non-bailable."*

5. On perusal of above said provision, it may be observed that in exercise of powers conferred by Section 10 of the Act, State Government may, by issuing notification in the Official Gazette, declare that any offence punishable under Sections 186, 189, 188, 190, 295A, 298, 505, 506 or 507 of the Indian Penal Code be a non-cognizable. Further, the Government in like manner i.e. by issue of notification may, declare that offence punishable under Section 188 or Section 506 of the Indian Penal Code shall be non-bailable.

6. One of the purposes of section 10 of the Act of 1932 as it appears is that we being a very diverse country, an offence not very serious in one part of the country may be seen very serious by society living in the other part. For example, life threat may form part of usual talk of people in one state and thus not very serious thing, but on the other hand it may be a very serious offence in another state as people there may take it as a real and imminent threat to the life. Accordingly, under section 10 State Governments were given power to change the classification of certain offences.

7. In the year 1989, the erstwhile State of Uttar Pradesh issued notification no. 777/VIII-9-4(2)-87 dated 31-07-1989 and the same was published in the State Gazette on 02-08-1989. Vide the notification, the

Government, in exercise of the powers conferred by Section 10 of the Criminal Law Amendment Act, 1932, declared the offence punishable under Section 506 of the Indian Penal Code, cognizable and non-bailable in whole of then Uttar Pradesh. The notification whose validity was and is still doubted by many reads as follow-

> *"In exercise of the powers conferred by Section 10 of the Criminal Law Amendment Act, 1932 (Act no XXIII of 1932) read with Section 21 of the General Clause Act, 1897 (Act no 10 of 1897) and in super session of the notifications issued in this behalf, the Governor is pleased to declare that any offence punishable under Section 506 of the Indian Penal Code when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Act no 2 of 1974) be cognizable and non-bailable."*

8. Accordingly, consequent upon the said notification, the offence punishable under Section 506 of the Indian Penal Code, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Act no 2 of 1974) became cognizable and non-bailable in the whole of erstwhile State of Uttar Pradesh. However, as the time passed, validity of the notification was doubted by many and some of them filed writ petitions before the Hon'ble High Court. The notification was primarily challenged on two grounds. Firstly, the State Governments cannot amend the Code and that too by a notification. Secondly, the Code of Criminal Procedure, 1898 is mentioned in Section 10 of the Criminal Law Amendment Act, 1932, and, therefore, with repeal of the old Code and the passing of the Code of Criminal Procedure, 1973, Section 10 of the Act has become redundant and otiose.

9. On plain reading of Section 10 of the Criminal Law Amendment Act, 1932 the notification dated 31-07-1989 issued by the erstwhile State of Uttar Pradesh appears to be valid. Further, the full bench of the Hon'ble High Court of Allahabad vide its judgment dated 08-09-1995, delivered in *Mata Sewak Upadhyay and Anr. v. State of Uttar Pradesh and ors.* 1995 JIC 1186 All., also held that the notification is valid and accordingly, the offence punishable under Section 506 of the Indian Penal Code shall have effect of cognizable and non-bailable one in the whole of the State.

However, in the year 2002, the validity of the notification was again challenged before the Hon'ble Court in another case *Crl. Misc. Writ Petition No. 4188 of 2002 Virendra Singh v. State of Uttar Pradesh*. This petition was decided on 01-08-2002 and the Hon'ble Court held that the notification classifying the offence as cognizable and non-bailable is illegal.

10. Now, with two judgments having different opinions, we can not escape from discussing the later judgment of the Hon'ble Court passed in *Virendra Singh's* case in which it was held that the notification making the offence punishable under Section 506 of the Indian Penal Code cognizable and non-bailable is illegal. First of all, it is necessary to mention that seven years before judgment in *Virendra Singh's* case, in 1995 the full bench of the Hon'ble High Court of Allahabad in Mata Sewak Upadhyay's case had already held that the notification issued by the Government is valid. This means that the judgment in *Virendra Singh's* case is *per incuriam* and that being the case, this judgment holding the notification as invalid have no effect. In this regard, things have also recently been clarified by the Hon'ble High Court of Allahabad in its order dated 21-04-2011 passed in *Criminal Misc. Case No. 1768 of 2011 Neelu and ors. v. State of UP and ors*. where in the Hon'ble Court held as under-

> *"..the offence committed under Section 506 of the Indian Penal Code has been held as cognizable offence by the full bench of this Court in Mata Sewak Upadhyay and Anr. v. State of Uttar Pradesh and ors. 1995 JIC 1186 All (FB), in light of which I am of the view that it is absolutely incorrect to say that the offence constituted against the petitioner is non-cognizable offence. Once the offence is cognizable offence, the learned Magistrate has rightly taken cognizance of the offence as a police case, as is permissible under the law..."*

11. It appears that, in *Virendra Singh's* case, it is not only the full bench judgment of *Mata Sewak Upadhyay* case which was not referred to, but there is also one provision of the General Clauses Act, 1897 which the learned advocates should have argued before the Hon'ble High Court.

It appears that, had the provision been argued before the Hon'ble Court, the judgment in *Virendra Singh's* case might have been otherwise.

12. In the *Virendra Singh's* case, one of the reason of not holding the notification as valid one was that since in section 10 of the Criminal Law Amendment Law, 1932 under which the notification was issued, there is reference of the old Code i.e. the Code of Criminal Procedure 1898, therefore, after repeal of the old Code and coming into force of the Code of Criminal Procedure, 1973, Section 10 of the Amendment Act has become redundant and otiose. It means that once the new Code had come into force, no notification under Section 10 could have been issued. In this regard, in para 8 of the judgment, the Hon'ble Court held as under-

> *"Section 10 of the Criminal Law Amendment Act, 1932 does not give power to the State Government to amend by notification any part of the Criminal Procedure Code 1973. Since the Criminal Procedure Code of 1898 has been repealed by Section 484 of the Criminal Procedure Code 1973, we are of the opinion that Section 10 of the Criminal Law Amendment Act, 1932 has become redundant and otiose. Hence, in our opinion no notification can now be made under Section 10 of the Criminal law Amendment Act, 1932. Any such notification is illegal for the reason given above…."*

13. It is observed that the learned counsels arguing in the case should have invited kind attention of the Hon'ble Court to sub-section (1) of section 8 of the General Clause Act, 1897 which reads as follow-

> ***"8 Construction of references to repealed enactments-*** *(1) Where this Act, or any Central Act or regulation made after the commencement of this Act, repeals and re-enact, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."*

14. Section 8(1) of the General Clause Act, 1897 is self explanatory. It provides that in event of references to any other enactment or provision it must be construed that the re-enactment provisions pursuant to repeal or otherwise will apply unless a different intention can be spelt out from the provisions of statute. In other words, it postulates that references in any other provision of the repealed Act, unless a different intention appears, are to be construed as references to the provisions of enactment re-enacted. The object of section 8(1) is very simple. It simply provides that in the event an Act is repealed and is replaced by new enactment, the provisions in the repealed Act, if are referred to in any other Act or instrument shall be construed as reference to the same or similar provision in the new Act. Thus, in the other Acts, legislature is not required to amend the references to the repealed Act to make them references to the new or re-enacted Act.

15. Hence, the effect of the Section 8(1) of the General Clause Act, 1897 in respect of Section 10 of the Criminal Law Amendment Act, 1932 and notification issued there under is that after repeal of the old Code and on coming into force the new Code, references in the section and the notification to the Code of Criminal Procedure, 1898, be construed as references to the Criminal Procedure Code, 1973. In other words, now the words *'Code of Criminal Procedure, 1898'* occurring not only in section 10 but also in whole of the Amendment Act and also in all other Acts and instruments unless a different intention appears, shall be read as the words *'Code of Criminal Procedure, 1973'*.

16. The effect of the Section 8(1) was also clarified in respect of the reference to old Specific Relief Act, 1877 in the Code of Civil Procedure, 1908 in *Narayan Mishra v. Surendranath Das, AIR 1972 Orissa 115* in which it was held as under-

> *"... Where Section 56 of Specific Relief Act, 1877 with slight modification had been enacted as Section 41 of the Specific Relief Act, 1963, any reference to Section 56 of the old Act in the first proviso to Order XXXIX, rule 1 of the Code of Civil procedure must be construed as a reference to Section 41 of the new Act ..."*

17. Thus, in view of the section 8(1) of the General Clauses Act, 1897, the findings of the Hon'ble High Court in *Virendra Singh's* case that after repeal of the old Code and coming into force of the Code of Criminal Procedure, 1973, Section 10 of the Amendment Act has become redundant and otiose, do not appear in accordance with the law. Had the learned counsels arguing in *Virendra Singh's* case invited attention of the Hon'ble Court towards section 8(1) of the General Clauses Act, 1897 or the State Government had mentioned the same in the notification, perhaps the Hon'ble Court might not have given the finding they actually gave.

18. In *Virendra Singh's* case, the Hon'ble Court further held that the State Government cannot amend the Code without obtaining assent of the President under Article 254(2) since same is central legislation. In this regard, the Hon'ble Court held as under-

> *"There is another reason also why the aforesaid notification of 1989 is illegal. The Cr.P.C. of 1973 is a Parliamentary enactment. An Act can only be amended by another Act or by an Ordinance, not by a simple notification. Moreover, a Central Act cannot be amended even by a U.P. Act unless the assent of the President is taken vide Article 254(2) of the Constitution. The notification of 1989 purports to amend a Central Act (the Cr.P.C. of 1973) even without the assent of the President."*

19. In this regard, it appears that in section 10 of the Criminal Law Amendment Act, 1932, the power given to the State Governments is not actually an amending power. In this regard, the words *'thereupon the Code of Criminal Procedure, 1898 shall, while such notification remains in force, be deemed to be amended accordingly'* in the section are very important. It is observed that instead of words *'shall be amended accordingly'* or *shall stand amended accordingly'* words *'deemed to be amended accordingly'* have been used in said section. Hence, by issue of notification under section 10 of the Act, the Code is not actually amended, but is merely deemed to be amended with the only object to give the notification effect. Further, though State Governments cannot issue the notification, they do so only after so authorized by the Central Act known as Criminal Law Amendment Act, 1932. It is also important to see that State Governments have not been given power to issue notification

in respect of every provision of the Indian Penal Code or Code of Criminal Procedure. The power is very limited and is in respect of only specific offences. Further, by issuing the notification, State Governments cannot amend what constitute the offences and punishments prescribed for. What the Governments can only do is that they may only change the classification of only those offences which are mentioned in section 10 of the Amendment Act as to whether they should have effect of a cognizable or non-cognizable offence, and also if they should be treated as bailable or non-bailable.

20. Now, as far as the legal position in State of the Uttarakhand is concerned, the notification dated 31-07-1989 issued by the erstwhile State of Uttar Pradesh was effective in the whole of the State. In other words, immediately before the day i.e. 09-11-2000, the State of Uttarakhand was created, notification was in force in the territories by which it has been formed with. Hence, as per section 86 of the Uttar Pradesh Reorganization Act 2000 read with section 2(f) thereof, the notification is applicable and is in force in the whole of State and shall continue to be so as long as otherwise is provided. The full bench judgment dated 8-9-1995 of the Hon'ble High Court of Allahabad is binding in the State of Uttarakhand. As far as the judgment of the Hon'ble Court delivered in the *Virendra Singh's case* is concerned, same being delivered in the year 2002 when State of Uttarakhand had already got separate High Court and also being inconsistent with the full bench judgment applicable in the State, has no effect in the State. The judgment in the *Virendra Singh's case* is not even applicable in the existing state of Uttar Pradesh as being *per incuriam*. The judgment has only academic value for legal issues which we discussed above.

21. In view of the above, the legal position in respect of Section 506 of the Indian Penal Code, 1860 in the State of Uttarakhand is as follow-

1. The notification no. 777/VIII-9-4(2)-87 dated 31-07-1989 issued by the erstwhile State of Uttar Pradesh is in force in whole of the State of Uttarakhand.

2. Accordingly, the offence punishable under section 506 of the Indian Penal Code is cognizable and non-bailable in whole of the State.

3. The full bench judgment dated 08-09-1995 of the Hon'ble High Court of Allahabad delivered in *Mata Sewak Upadhyay and Anr. v. State of Uttar Pradesh and ors.* 1995 JIC 1186 All. is binding in the State of Uttarakhand and has the effect.

4. The Judgment dated 01-08-2002 of the Hon'ble High Court of Allahabad passed in *Crl. Misc. Writ Petition No. 4188 of 2002, Virendra Singh v. State of Uttar Pradesh*, has no effect not only in the State of Uttarakhand but also in existing State of Uttar Pradesh.

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