

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

WA.NO. 1367 OF 2012 () IN WP(C).29355/2011

AGAINST THE ORDER/JUDGMENT IN WP(C) 29355/2011
OF HIGH COURT OF KERALA DATED 20-06-2012

APPELLANT(S)/APPELLANTS:

1. KURIACHAN CHACKO
S/O.P.V.CHACKO, PALACKAL HOUSE, G-288
PANAMPILLY NAGAR, ERNAKULAM.

2. ACHAMMA CHACKO, W/O.P.V.CHACKO,
PALACKAL HOUSE, G-288, PANAMPILLY NAGAR
ERNAKULAM.

3. LINU JOY, W/O.JOY JOHN,
POWATHAIL HOUSE, ASSUMPTION CHURCH ROAD
CHANGANACHERRY.

4. P.V.CHACKO, PALAKKAL HOUSE,
KURUPPAMTHARA, KOTTAYAM.

5. RENISH C.G., S/O.GIRIRAJAN,
CHAKKALAPADAM, LFC ROAD, KALOOR
KOCHI.

6. VINOD V.LUKA, S/O.LUKA,
VALLOMPARAIL HOUSE, VADAKODU P.O., PUTHIYA ROAD
ERNAKULAM.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.SAJU J PANICKER

WA.NO. 1367 OF 2012 () IN WP(C).29355/2011

RESPONDENT(S)/RESPONDENTS:

1. THE SECRETARY TO GOVERNMENT
HOME (C) DEPARTMENT, GOVERNMENT OF KERALA
THIRUVANANTHAPURAM - 695001.

2. SRI. BERNAD DEV,
THE ASSISTANT COMMISSIONER OF POLICE, NARCOTIC CELL
IDUKKI - 685603.

3. SRI. T. P. SEN KUMAR,
TRANSPORT COMMISSIONER, THIRUVANANTHAPURAM - 695014.

4. SRI. S. SREEKUMAR, ADVOCATE,
NEAR ERNAKULAM TOWN NORTH POLICE STATION
KACHERIPADI, ERNAKULAM, KOCHI-682018.

5. SRI. JOSEPH SAJU
ASSISTANT COMMISSIONER OF POLICE, NARCOTIC CELL
ERNAKULAM - 682024.

R1 BY SHRI T. ASAF ALI, DIRECTOR GENERAL OF PROSECUTION
BY SENIOR GOVERNMENT PLEADER SHRI KOCHUMOL KODUVATH
R3 BY ADV. SRI. K. R. RADHAKRISHNAN NAIR
R4 BY ADV. SRI. P. MARTIN JOSE
R4 BY ADV. SRI. P. PRIJITH

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 25.11.2015,
THE COURT ON 23-12-2015 DELIVERED THE FOLLOWING:

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

=====

W.A. No.1367 of 2012

=====

Dated this the 23rd day of December, 2015

J U D G M E N T

Ashok Bhushan, C.J.

This Writ Appeal has been filed against the judgment and order dated 20.06.2012 in W.P(C) No.29355 of 2011 by which judgment, the Writ Petition filed by the appellants challenging the appointment of the 4th respondent as Special Public Prosecutor to conduct a criminal case in which they are accused has been dismissed.

2. In the Writ Petition counter affidavit was filed by the 5th respondent, Assistant Commissioner of Police, Ernakulam. Affidavit dated 27.05.2015 by the appellants has also been filed in this appeal bringing certain documents on record. Aggrieved by the dismissal of the Writ Petition, this Writ Appeal has been

filed by the petitioners.

3. Brief facts of the case as emerged from the materials on record are as follows: Petitioners are accused in Crime No.672 of 2006 which is now pending trial before the learned Additional Chief Judicial Magistrate, Ernakulam as C.C. No.850 of 2011. Petitioners have been charged under Sections 3, 4 and 5 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 along with Section 420 of the Indian Penal Code. The Crime was registered on the directions issued by the third respondent who at the relevant time was working as Inspector General of Police, South Zone, Thiruvananthapuram. Petitioners had filed W.P(C) No.12775 of 2006 for quashing the FIR which prayer was refused by judgment dated 05.07.2006 of this Court reported in **Achamma Chacko v. Government of Kerala** (2007 [2] KLT SN 68 [Case No.91]). Petitioners again brought Cr1.R.P. No.4126 of 2006 to get discharge of the offences levelled against them attributing mala fides on the part of the 3rd respondent. This Court decided

the Revision rejecting the prayer for discharge which is reported in **Kuriachan Chacko v. State of Kerala** (2007 [3] KLT 843). Before the trial court applications were filed on behalf of the Prosecution for suspending further trial and directing re-investigation for bringing more evidence which application was rejected. The 3rd respondent who was transferred from his earlier post and working as Additional Director General of Police and Transport Commissioner wrote a letter dated 24.06.2011 to the Honourable Chief Minister of Kerala requesting intervention in the matter for bringing evidence and witnesses for trial as stated in the letter of Senior Assistant Public Prosecutor sent to the Director General of Prosecution and request was made to the DGP for taking emergency measures. It was further stated that considering importance of the case, a Special Public Prosecutor (Shri S.Sreekumar, Former CBI Counsel) be appointed for the benefit of the case and for other similar money chain cases. After receipt of the aforesaid letter by the

Government, the Government by letter dated 08.07.2011 directed the DGP to examine the letter sent by the 3rd respondent and offer his views on the appointment of Special Public Prosecutor. The DGP submitted his report dated 25.08.2011 to the Government recommending that the 4th respondent be appointed as Special Public Prosecutor to conduct the case. After considering the report dated 25.08.2011, the Government appointed the 4th respondent as Special Public Prosecutor by order dated 20.09.2011. Petitioners, aggrieved by the said appointment of the 4th respondent as Special Public Prosecutor, filed the Writ Petition praying for quashing Ext.P7 order dated 20.09.2011. Learned Single Judge by his elaborate judgment dated 20.06.2012 upheld the appointment of the 4th respondent as Special Public Prosecutor repelling the objections raised by the petitioners to such appointment. This Writ Appeal has been filed challenging the judgment of the learned Single Judge.

4. Shri K.Ramakumar, learned Senior Advocate

appearing for the appellants in support of the Writ Appeal has raised the following submissions:

- i. The appointment of Special Public Prosecutor by the State Government has been done without following the consultative procedure as required by Section 24(4) 24(5) of the Code of Criminal Procedure. For appointment of Special Public Prosecutor under Section 24(8) of the Code, the consultative procedure as prescribed in Section 24 of the Code has to be followed. The appointment as per Ext.P7 having been not done following the mandatory procedure, the same deserves to be set aside.
- ii. Appointment of Public Prosecutor can only be made on public interest. The appointment of 4th respondent as State Public Prosecutor has not been made on public interest but rather on a request made by the 3rd respondent who is also a witness in the criminal case. Thus the appointment of the 4th respondent cannot be said to be in public interest and deserves to be set aside.
- iii. The 4th respondent is a designated Senior Advocate by the High Court and a designated Senior Advocate cannot act as a Special Public Prosecutor since under the Rules framed by the Bar Council of India under the Advocates Act, 1961, a Senior Advocate is prohibited from acting on behalf of a client/party directly. Designation of the 4th respondent as Senior Advocate thus prohibits him to be appointed as Special Public Prosecutor.
- iv. The 4th respondent is not eligible for appointment as Special Public Prosecutor. The 4th respondent is not a person of high

integrity nor he is eligible to be appointed as the Special Public Prosecutor by the State Government.

5. Submissions made by the learned counsel for the petitioners have been refuted by **Shri T.Asaf Ali**, Director General of **Prosecution** appearing on behalf of the respondents. It is submitted by the DGP that appointment of the Special Public Prosecutor by Ext.P7 has not been made on the asking of the 3rd respondent rather after receipt of the letter, the State Government called for report from the DGP and other relevant details including the case diary. The State Government after scrutinizing all the materials and applying its mind made the appointment of the Special Public Prosecutor. State has power and jurisdiction to make appointment of Special Public Prosecutor for a particular case or class of cases. For appointment of Special Public Prosecutor consultative procedure prescribed under Section 24(4) and 24(5) is not applicable. The procedure prescribed in Section 24(4) and 24(5) is applicale only for appointment of Public

Prosecutor. As contemplated under Section 24(8), appointment of Special Public Prosecutor is an exception and the State/Central Governments have given power to make appointment of Special Public Prosecutor on being satisfied that the appointment is necessary for a particular case or class of cases. It is further submitted that designation of the 4th respondent as Senior Advocate is not a bar or prohibition for his appointment as Special Public Prosecutor. The Special Public Prosecutor can examine and cross-examine the witnesses and plead the case on behalf of the State. The mere fact that the 4th respondent is designated as a Senior Advocate is no ground to hold the 4th respondent is ineligible for appointment as Special Public Prosecutor. It cannot be said that there is no public interest in the appointment of the Special Public Prosecutor. The crime in question of which petitioners have been charged involved swindling of money amounting to Rs.450 Crores. Petitioners collected the aforesaid amount from the public on hollow promises with

deception practised on them by the accused. Large number of persons have been cheated and the case involves public interest, hence the State being satisfied that the case involved public interest, has made the appointment. It is submitted that appointment of Special Public Prosecutor cannot be said to be invalid merely on the ground that letter Ext.P3 was sent by the 3rd respondent requesting for such appointment. The 3rd respondent cannot be said to be unconnected with the matter. It was the 3rd respondent under whose direction the crime was registered and the 3rd respondent was also a witness cited in the case. It is submitted that the accused are being defended in the case by an Advocate who is a designated Senior. It is submitted that the 4th respondent being a designated Senior Advocate cannot be said to be lacking eligibility for appointment. It is submitted that the 4th respondent who was the former Public Prosecutor for CBI has sufficient experience and the petitioner's case that the 4th respondent is not

eligible for appointment cannot be accepted. Lastly it was submitted that it is for the State to consider the competence and eligibility of a person to be appointed as Special Public Prosecutor and the petitioners have no locus to challenge the said appointment.

6. We have considered the submissions of learned counsel for the parties and perused the records.

7. The first submission raised by the learned Senior Advocate for the petitioners is that appointment of the 4th respondent as Special Public Prosecutor is vitiated since the procedure prescribed under Section 24(4) and (5) has not been followed. Section 24(4) and (5) of the Code which provides for appointment of Prosecutor and Special Public Prosecutor is as follows:

“24. Public Prosecutors.-

.....

4. The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

5. No person shall be appointed by the State Government as the Public Prosecutor or Additional Public

Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4)".

A perusal of the provisions of Section 24(4) and (5) would indicate that for appointment of Special Public Prosecutor a Panel has to be prepared by the District Magistrate in consultation with the Sessions Judge and no person can be appointed by the State Government as Public Prosecutor or Additional Public Prosecutor for a District unless his name appears in the Panel of names prepared by the District Magistrate under Section 24(4). Present is a case where appointment has been made under Section 24(8). Appointment under Section 24(8) is to be made by the State/Central Government for a particular case or class of cases of a person who have been practising as an Advocate for not less than 10 years. It is relevant to note that for appointment of Public Prosecutor or Additional Public Prosecutor a person is required to have practice as Advocate for not less than 7 years. For appointment under Section 24(8) practice required is 10 years. The Legislature is well

aware of the difference between Public Prosecutor/Additional Public Prosecutor and Special Public Prosecutor whereas in Section 24(5) there is a specific requirement that no person shall be appointed as Public Prosecutor/Additional Public Prosecutor unless his name appears in the panel of names prepared by the District Magistrate in consultation with learned Sessions Judge under Section 24(4), no such requirement can be read in Section 24(8). In Section 24(5) it has been specifically provided for appointment of Public Prosecutor/Additional Public Prosecutor name should be in the Panel. Had the Legislature intended that Special Public Prosecutor may also be appointed from the Panel prepared by the District Magistrate in consultation with the learned Sessions Judge there was no impediment in making any such indication in the provision. A reading of Section 24 and its various sub-sections clearly indicate that for appointment under Section 24(8) it is not contemplated that the name should emanate from the Panel prepared by the District

Magistrate in consultation with the learned Sessions Judge. Section 24(8) gives special power to the State/Central Government to engage a Special Public Prosecutor. State is a Prosecutor in all criminal cases. Administration of Criminal Justice is entrusted with the State and discretion has been given to State to appoint Special Public Prosecutor for a particular case or class of cases looking to the need and requirement. A Special Public Prosecutor requires standing of 10 years. Thus the distinction between two category is more than apparent.

8. A Division Bench of the Andhra Pradesh High Court in **State of Andhra Pradesh and Another v. Margadarsi Financiers and Others** (2009 Cr1. L.J. 2705) had occasion to consider the provisions in Section 24 (4), (5) and (8). Learned Single Judge in **Paramjit Singh Sadana v. State of A.P.** (2008 KHC 4851) had held that for appointment of Special Public Prosecutors also mandatory procedures in Section 24(4) and (5) have to be adhered to. The State filed an appeal against the

said judgment of the learned Single Judge which was allowed by the Division Bench in **State of Andhra Pradesh and Another v. Margadarsi Financiers and Others** (supra). The Division Bench after considering the provisions of Section 24(4), (5) and (8) has held that the procedure as prescribed under Section 24(4) and (5) for appointment of Public Prosecutor is not applicable for appointment of a Special Public Prosecutor. It is useful to extract paragraphs 15 and 16 of the judgment which is to the following effect:

“15. Coming to the ground situation, de hors the facts involved, at the outset on a reading of the above provision, it falls in Chapter 2 of the code, referring to the constitution of the criminal Courts and offices and the contemplation is for appointing a Public Prosecutor and the Additional Public Prosecutors in the High Court, apart from the Public Prosecutors and Additional Public Prosecutors for the Districts. Sub-clause (1) and (2) take care of the procedure for appointing the Public Prosecutors and Additional Public Prosecutors in High Court for conducting the prosecution, appeal or other proceedings on behalf of the Central or State Governments. Similarly, Sub-clauses (3) to (7) take care of the appointments and certain other aspects in regard to the Public Prosecutors or Additional Public Prosecutors in the districts for the self-same reason of conducting the cases on behalf of the State. In the

process of such an appointment for those posts, Sub-clause (4) envisages that appointment shall be made by the concerned District Magistrate in consultation of the Sessions Judge from the panel of names of the persons who are fit to be appointed as such. Sub-section (5) specifically bars any appointment of a person to the said office unless the name appears in the panel of the names prepared by the District Magistrate under Sub-clause (4) as mentioned above. Sub-clause (6) envisages for appointment to the office from the regular cadre of prosecuting officers de hors the bar prescribed under Sub-clause (5). Sub-clause (7) envisages a qualification of having a standing or practice as an advocate for not less than 7 years. Thus, from these above provisions, the process of appointment has to be only by means of panel, except to the extent of a regular cadre of prosecuting officers, even though, there is no such specific prescription provided for similar offices in the High Court under Sub-clauses (1) and (2). Now comes the Sub-clause (8) where it is contemplated for appointment of a person as a Special Public Prosecutor. The only qualification prescribed therefore is a standing or practice at the Bar as an Advocate for not less than 10 years. Sub-clause (9) is enabling provision for the purpose of calculating the practicing period in respect of those who already held similar such office. The other requirement under sub-clause 8 is that such appointment of a Special Public Prosecutor can be for the purpose of any case or class of cases. The power to appoint a person to any of these three classes of offices at different situations and stages vests with the Government, the Central or the State and such power is a discretionary one. However, a clear distinction is apparent between the first of such type of office with that of the

second one, viz., in regard to the appointment to an office in the High Court or as a Special Public Prosecutor, as evident from the Sub-clause (1) and (2) on the one side and Sub-clause (8) on the other, no consultation or preparation of a panel is envisaged. It is only in regard to the appointment to such office for a District, the consultation and panel is required to be followed and having regard to the expression "shall" which is used, undoubtedly the same is mandatory, which gets further reiteration under Sub-clause (5) thereof. Therefore, such a condition precedent cannot be dispensed with. Further without following such procedure, any appointment made in the teeth of the said provision would be illegal. In respect of first two classes of offices viz., for the purpose of High Court and in the Districts, the office is described as Public Prosecutor, which is defined under Section [2\(v\)](#) of the Code, which reads as follows:

“Public Prosecutor means any person appointed under Section [24](#), and includes any person acting under the directions of a public prosecutor.”

16. Thus, it only relates to the nature of appointment of a person to such an office. However, the expression "Special Public Prosecutor" as contemplated under Sub-clause (8) of Section [24](#) of the Code, does not get defined in the Code. Therefore, necessarily it need not take in all the connotations of an office of a regular Public Prosecutor. The expression used "Special" adjacent to "Public Prosecutor" and the reasons required for such appointment as mentioned therein viz., for the purpose of any case or class of cases, necessarily shows it stands apart. In a given situation and facts and circumstances, as the exigencies may arise, the concerned Government may appoint an individual person as a Special Public Prosecutor at their choice and discretion. This appointment,

naturally will be in addition to the regular Public Prosecutors functioning in the respective Courts, and for the reasons as the Government may feel necessary to appoint such Special Public Prosecutors. It is not necessary to dwell into or lay down any specific reasons for such appointment, since they may vary from case to case and facts to facts. Therefore, where it felt necessary, the option is left to the Government for appointing a Special Public Officer in respect of a special case or class of cases. Thus, this provision independently stands on its own and cannot and does not have any similarity with appointments to the offices as provided for in the preceding sub clauses. Apparently, the consultation and panel as prescribed for the purpose of District is not provided for. It shows that such procedure is not necessary for making an appointment to the post of Special Public Prosecutor. The discretion apparently is a total and absolute one with a complete option on the part of the State Government to virtually pick and choose. Though the duties of every Public Prosecutor runs on the same lines, but, however the restrictions vary from between these three offices. A person who has been appointed as Special Public Prosecutor for the purpose of any case or class of cases cannot claim as a regular Public Prosecutor, be it High Court or in the District, nor can he be permitted to prosecute the other cases on behalf of the State. Similarly, the built in area of operation gets restricted for all such regular Public Prosecutors in claiming any right to appear on behalf of the State in respect of such case or class of cases where a Special Public Prosecutor gets appointment. Having regard to such clear distinction laid down by the legislature in its wisdom it has dispensed with the consultation and processing through a panel.

Having made into a separate class itself as a Special Public Prosecutor and prescribing its own procedure specifically, the other procedure in earlier clauses for other offices cannot be applied in toto. The intention of the legislature is quite clear and apparent. Therefore there cannot be any other interpretation of provision otherwise. It is now well established that when the legislature lays down the procedure in contradiction to the various situations, it cannot be said or interpreted to bring down the uniform procedure or bring forth with or apply the procedure applicable to that of the other situations. The exclusion of the consultation cannot be imported. While interpreting a provision in a statute, the expression and contents have to be read in the manner it is contemplated. Neither there is any permissibility of exclusion of the expressions or additions. Applying the criteria in one provision or from one end cannot be ushered in other provision or end. It virtually amounts to a clear legislation by the Courts, which is not permissible. In fact, it deviates the purpose and object under Sub-clause (8) in appointing a Special Public Prosecutor. Therefore, it cannot be said that there is any requirement of consultation or preparation of panel for appointment of a Special Public Prosecutor under Sub-clause (8) of Section [24.](#)"

Judgment of the learned Single Judge in **Paramjith Singh's Sadana's case** (supra) was overruled.

9. A learned Single Judge of this Court had occasion to consider provisions of Section 24 and its various sub-sections in **Jigesh P and Another v. State**

of Kerala and Another (2013 [1] KHC 601). The learned Single Judge in the said judgment reiterated that for appointment of Special Public Prosecutor consultative process as envisaged under Section 24(4) and (5) is not applicable. In paragraphs 13 and 14, the following has been held:

“13. With regard to the reliance placed by the petitioners on the decision of this Court reported in Narayanankutty v. State of Kerala and Others (1982 KLT 605), it is to be noted that, the said decision never holds or suggests that, 'consultation' has to be there, as provided under Sub Sections 4 and 5 of Section 24, in respect of appointment of a Special Public Prosecutor under Section 24 (8) as well. The observation made by the learned Judge in paragraph '3' is enough to hold that Section 24 (8) stands on a different footing, than the rest, being a Special Provision, which spells out an 'exception' to the General Rule. The relevant portion of paragraph 3 is extracted below:

“ Normally, Sessions Cases before Sessions Courts are expected to be conducted by the Public Prosecutors appointed by the State Government under S.24 of the Code of Criminal Procedure (for short the 'Code'). Sub-section (8) of S.24 which spells out an exception to the general rule states that the Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person, who has been in practice as an advocate for not less than 10 years, as Special Public Prosecutor. The legislative policy underlying sub-section (8) of S.24 of the Code is to preserve the interests of the State and to protect public interest in individual cases or class of cases; for that purpose power is vested in the Government to appoint Special Public Prosecutors in appropriate cases, where Public interest demands such a course.”

14. The fact that no such consultation is ever contemplated under Section 24 (8), becomes more clear from the contents of paragraph '8' of the very same decision, which reads as follows:

“ 8. Since the Government are already satisfied that this is a fit case for appointing Special Public Prosecutor, a direction is issued to the first respondent - State to appoint a suitable person as Special Public Prosecutor in the place of the second respondent to conduct Sessions Case No. 16 of 1980 on the file of the Sessions Court, Palghat within two weeks from the date of receipt of a copy of this judgment by the first respondent. The Sessions Judge, Palghat will not take up the Sessions Case 16 of 1980 for trial during a period of three weeks from to-day. This original petition is disposed of in this manner, but without costs.”

It was a case, where a Special Public Prosecutor (2nd respondent therein) was appointed without any financial commitment to the State, which was heavily deprecated by the Court, alerting the Government as to the High Office of the 'Special Public Prosecutor' and the role he has to play. It has been held that, the Government cannot appoint a Special Public Prosecutor at the cost of a private party, abdicating the Government's financial responsibility, which otherwise will lead to evil consequences. The Court also expressed the 'fine gesture' expressed by the 2nd respondent – a Senior member of the Bar whose appointment as the Special Public Prosecutor was in dispute, gracefully withdrawing the consent for appointment and thus relieving the Court of the duty of pronouncing upon the validity of his appointment under the impugned order (as observed in the opening sentence/paragraph). Observing that the existence of the 'public interest' and the necessity to appoint a Special Public Prosecutor were not in dispute and that the Government had already decided to appoint a Special Public Prosecutor in the case, the learned Judge (vide paragraph '8')

directed the State to appoint a suitable person as Special Public Prosecutor in place of the 2nd respondent to conduct the concerned Sessions Case within 'two weeks'. The crucial aspect to be noted is that, such a direction was given by the learned Judge, after referring to the 'Exception' carved out to the General Rule vide Sub Section 8 of Section 24 for appointing a Special Public Prosecutor. To put it more clearly, the Court did not find it necessary to have consultation or to complete the formalities as provided under Sub Sections 4 and 5 of Section 24 of Cr.P.C, before appointing a new Special Public Prosecutor. This by itself shows that, the 'concept of consultation' and satisfaction of the modalities prescribed under Sections 24 (4) and 24 (5) of Cr.P.C. do not govern the special situation contemplated under Section 24 (8) dealing with the appointment of a 'Special Public Prosecutor'. As such, the decision cited by the petitioners, reported in *Narayanankutty v. State of Kerala and Others* (1982 KLT 605) stands virtually against the petitioner, in so far as the question of 'consultation' is concerned."

To the similar effect is the judgment of the learned Single Judge in *Yousuf K.M. v. State of Kerala* (2014 [3] KHC 413).

10. In view of the foregoing discussion, we are of the view that the learned Single Judge in the impugned judgment did not commit any error in holding that for appointment of Special Public Prosecutor, the procedures

prescribed in Section 24(4) and (5) are not applicable. We thus do not find substance in the above submission of the learned Senior Advocate for impeaching the appointment of the Special Public Prosecutor.

11. Second submission is that appointment of Special Public Prosecutor can only be made in public interest. On the request made by the 3rd respondent who is a witness in the criminal case, the State Government could not have made appointment of Special Public Prosecutor. It is submitted that there is no public interest in the present case in making the appointment of the 4th respondent as Special Public Prosecutor. Whether the State could not have taken any steps towards appointment of Special Public Prosecutor on a letter addressed by the 3rd respondent is one of the questions to be answered. A perusal of Section 24(8) indicate that discretion is given to the State Government to make appointment of Special Public Prosecutor. It is clear that after receipt of the letter from the 3rd respondent, Ext.P3 report was called for by the State from the DGP

and thereafter order dated 20.09.2011 was issued. As noted above, FIR against the petitioners was registered on the direction of the 3rd respondent who was working as Inspector General of Police at the relevant time. The 3rd respondent was also shown as one of the witnesses in the criminal case. The 3rd respondent at the relevant time who wrote a letter on 24.06.2011 was not having any control over the investigation or prosecution. The 3rd respondent in his letter dated 24.06.2011 has highlighted about the serious nature of the case and has also referred to the different steps taken by the Senior Assistant Public Prosecutor including an application for obtaining an order for further investigation. The letter noticed that application by the Senior Assistant Public Prosecutor for further investigation was rejected and with regard to which a report was sent to the DGP for filing a criminal case against the order of the trial court. It is relevant to note the following contents of the letter:

“It is essential that documents relating to the information

regarding the purchase of lottery tickets by LIS from Kerala Lottery Department, prizes won on those lotteries, prizes and commission received by the agent are to be brought as the evidence of this case and concerned officials has to be tried for evidences of this case.

Advocate General or Director General of Prosecution has to take immediate action in the High Court in order to set aside the illegally allowed procedures by the trial court immediately which is very essential for the successful conduct of this case as well as other money chain cases which has recently come up. Besides, the State Government must give permission and include Sec.58 of the RBI Act in this case and other LIS cases. For this purpose it is hereby requested to give instructions to DGP and other investigation officers.

A copy of the letter by Mr.P.A.James, Senior Assistant Prosecutor, served to the Director General of Prosecution in this regard is required for brining the evidence and witnesses for the Trial of this case as explained in this letter. I humbly request you to direct the Director General of Prosecution to take emergency measures regarding this.

Considering the importance of this case, if a Special Public Prosecutor (Mr.S.Sreekumar, Former CBI Counsel as Special Prosecutor) is appointed, it will be most suitable for the benefit of this case and for other similar money chain cases.”

12. The letter thus requested the Government to act for directing the DGP for taking emergency measures regarding this. While making the aforesaid request it was also requested that a Special Public Prosecutor be

appointed (S.Sreekumar, Former CBI Counsel). The Government after receipt of the letter did not immediately issue any order for appointment of Special Public prosecutor rather a report was called for from the DGP. Petitioners themselves by Annexure A1 in I.A. No.656 of 2015 in this Writ Appeal has brought on record the said letter of the Government dated 08.07.2011 asking the DGP to submit his views on the appointment of Special Government Pleader in view of Circular dated 25.03.1992. The DGP also requested the Sub Inspector of Police to sent the case diary of the case to enable the DGP to furnish appropriate report to the Government. The Director General of Police submitted a letter dated 25.09.2011 giving details of the different steps. It was clearly opined in the letter that the case has become sensational and public are keenly watching the trial of the case. The DGP clearly recommended for appointment of the 4th respondent as Special Public Prosecutor. It is useful to extract the following statement in the report:

“On examination of the facts and circumstances of this case, it appears that this case has become sensational and the general public are keenly watching the very progress of the trial of this case. I could gather from the case records that so many witnesses are to be examined and number of documents to be marked in this case. So many question of law have to be raised in this case, which has to be answered by the prosecution. This case should be prosecuted properly and effectively. Otherwise, the efficacy and efficiency of the prosecution machinery in this case will badly be affected. Keeping in view of the gravity and nature of this case, I feel that this is a fit case coming under the purview of the Circular No.6f1183/C2/91/Home dated 25.03.1992.

The Regular Prosecutor attached to the court wherein the case is coming for trial would not get much time to give special attention to this case and will find difficult to get rid of the legal hurdles involved in this case. It has been reported that Shri S.Sreekumar, Advocate, Ernakulam North Police Station, Chittoor Road, Kacheripady, Ernakulam is to be appointed as a Special Public Prosecutor to conduct this case. It is learnt from sources that he is competent and efficient criminal lawyer of Ernakulam Bar and has conducted many prosecution cases in a successful manner. As per the reference second cited, it is informed by the District Collector, Ernakulam that he is duly intimated to the Advocate for getting his willingness to conduct this case. The concerned lawyer has informed that he is already tendered his willingness letter to the District Collector, Ernakulam. The willingness letter will be forwarded as and when the same is made available with this office.

In view of the facts and circumstances aforementioned, I

feel that it is a fit and proper case wherein a service of Special Public Prosecutor is absolutely necessary to conduct this case in an effective manner. Therefore, Sri.S.Sreekumar, Advocate, Near Ernakulam North Police Station, Chittoor Road, Kacheripady, Ernakulam, Kochi-18 may be appointed as a Special Public Prosecutor to conduct this case subject to the conditions by accepting the Regulation fee prescribed as per the Kerala Government Law Officers (Appointment and conditions of service and conduct of cases) Rules, 1978."

13. Facts as stated by the DGP which were sent to the Government and the Government after taking into consideration the said report as document No.2 has passed an order on 29.09.2011 for appointment of the 4th respondent. The Government refers to the above report before issuing the order which indicates that report and other materials were looked into before forming the appropriate opinion and was satisfied that appointment of Special Public Prosecutor is in public interest.

14. Learned counsel for the petitioners has cited two judgments of this Court reported in **Narayanankutty v. State of Kerala** (1982 KLT 605), **Abdul Khader v. Government of Kerala** (1992 [2] KLT 948)

and a judgment of the Apex Court reported in **Mukul Dalal v. Union of India** ([1988] 3 SCC 144) where it has been held that appointment of Special Public Prosecutor has to be made in public interest and not to vindicate the grievance of a private person such as close relation of the deceased. In Narayanankutty's case, the following was observed in paragraph 7:

“7. Special Public Prosecutor, it is needless to say, cannot be appointed with a view to secure conviction at all costs. Special Public Prosecutor could be appointed only when public interest demands it and not to vindicate the grievances of a private person, such as close relation of the deceased. In order that he discharges his duties properly, he should look to the State for remuneration for his services; if he looks to a private party for his remuneration, his capacity and ability to perform his role as Public Prosecutor properly will be endangered. Government cannot appoint Special Public Prosecutor on such terms, abdicating their financial responsibility or directing him to receive his remuneration from any private individual or expecting him to work without remuneration.”

Similar observations have been made in **Abdul Khader's** case (supra) in paragraph 10 which is to the following effect:

“ 10. It is in the aforesaid background that the power

conferred on the Government to appoint a special public prosecutor need be understood. S.24(8) of the Code reads thus:

"The Central Government or the State Government may, appoint for the purposes of any case or class of cases a person who has been in practice as an advocate for not less ten years as a Special Public Prosecutor."

The philosophy involved which can be discerned from the sub-section is two fold. First is that there should be special circumstances for making such appointment. Second is that, when a situation arises for appointing a special public prosecutor, Government shall consider a more experienced advocate for the assignment. Though circumstances may differ in different situations, the very idea behind conferment of the power is to meet special situations. In other words, a special public prosecutor is not to be appointed in ordinary circumstances. Bhat, J. (as His Lordship then was) has pointed out in *Narayanankutty v. State of Kerala* (1982 KLT 605) that "Special Public Prosecutor could be appointed only when public interest demands it and not to vindicate the grievances of a private person, such as close relation of the deceased."

The Apex Court in **Mukul Dalal's case** (supra) had occasion to consider the provisions of Sections 24(8) and 25 of the Code. In the above case State of Maharashtra appointed a Special Public Prosecutor for conducting prosecution. The accused challenged the appointment before the High Court. The High Court

dismissed the Writ Petition. In the above case, cases were instituted on private complaint and on a request made by private party, Special Public Prosecutor was appointed by the Government. Rule 22 of the Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984 also came up for consideration. The grounds of challenge and the observations of the High Court were noticed in paragraph 5 of the judgment which is to the following effect:

"5. Challenge by the appellants to the notifications in question is on the ground that the Code confers a special status on the Public Prosecutor; whenever it has been considered necessary, law has prescribed the interest to be represented by the Public Prosecutor and it would not be in proper exercise of power by the State Government to make appointment of a Special Public Prosecutor to support a private transaction and provide for his remuneration from private source. The High Court referred to some decisions of the different Courts supporting and opposing the view canvassed before it and came to hold:

"According to us, the conduct of prosecution by a lawyer appointed and paid by the private party does not affect his capacity and ability to perform his role as a Public Prosecutor. To accept such a proposition is to invalidate all private prosecutions."

Negativating the plea advanced by the appellants, the High Court has further held:

"For the reasons given above, with respect, it is not possible for us to agree that a pleader engaged by a private person is a de facto complainant and cannot be expected to be as impartial as a pleader appointed by the State to conduct public prosecution. On the other hand, we are of the view that as stated earlier, permission to engage an advocate should be given freely to the complainant. The complainant has as much a right as the accused to represent his case effectively before the court."

The High Court also negated the challenge against the appointment of the Assistant Public Prosecutors under S.25 by holding:

"Hence the absence of a provision such as S.24(8) will not bar appointment of an Assistant Public Prosecutor specially to conduct a case or class of cases."

While dealing with the matter at a different place in the judgment the High Court observed:

"But apart from this, we are of the view that guidelines or no guidelines, whenever there is a request made by a private party to engage an advocate of his choice to be paid for by him, the request should be granted as a rule. The complainant in such cases is either a victim of the offence or is related to the victim or otherwise an aggrieved person. He has a right to be heard and vindicated. As stated earlier, the right to be heard implies a right to be effectively represented at the hearing of the case. He has therefore a right to engage an advocate of his choice. There is therefore no reason why the State should refuse him the permission to conduct the prosecution with the help of his advocate....."

Appellant's counsel have challenged these conclusions of the High Court. Under the Criminal Procedure Code, the Public Prosecutor has a special status, and his is a statutory appointment. Under some of the provisions made in the Code, he receives special recognition. S.2(u) of the Code defines the Public Prosecutor. S.199 (2), S.225, S.301(1), S.301(2), S.302, S.308, S.321, S.377 and S.378 are some of the provisions in the Code which confer a special position upon the Public Prosecutor. From the spirit

contained in the scheme of the Criminal Procedure Code it is clear that it is the duty of the Public Prosecutor to support prosecutions initiated by the State. Trial before a court of session has to be conducted by the Public Prosecutor as required under S.225 of the Code. Cases instituted on a police report are intended also to be handled by a Public Prosecutor. Cases instituted on a complaint, however, stand on a different footing and the complainant has choice of his own counsel. A set of rules known as Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984 made in exercise of powers conferred by proviso to Art.309 read with Art.165 of the Constitution have been placed before us in course of the hearing. Chapter III of those rules lays down qualifications of the Government Pleader and Public Prosecutor while Chapter IV prescribes the duties of the Public Prosecutor. Another set of rules known as The Rules for the Conduct of the Legal Affairs of the Government, 1984, which appears to be administrative in character, was also placed before us. Chapter III of these Rules provides for Special Counsel and Special Public Prosecutors and R.22 thereof provides:

"If in any case, civil or criminal, a request is made by any private party, interested in the case, for the appointment of its own advocate as a Special Counsel or Special Public Prosecutor, as the case may be, on the condition that the payment of fees of such advocate will be borne by that party, the Remembrancer of Legal Affairs may, after considering such case on merits, appoint such advocate for the particular case or cases."

Appellant's counsel challenged the validity of R.22 and contended that such a Rule is contrary to the spirit of the Code of Criminal Procedure and this rule affects the special status conferred on the Public Prosecutor and would cause prejudice to that public office."

The Apex Court held Rule 22 bad in law and allowed the appeals. The following was laid down in paragraphs 9 and 10:

“9. Two questions have now to be dealt with - whether as a rule whenever there is a request made by a private complainant for the appointment of a Special Public Prosecutor, should the same be accepted and whether such Special Public Prosecutor should be paid by the private party availing his services. In most of the States, as we have already observed, the Remembrancer of Legal Affairs looks after the State litigations. He is a responsible officer and normally with judicial experience. When an application for the services of a Special Public Prosecutor or an Assistant Public Prosecutor is made in a given case the power would be vested in him to examine the facts and take decision as to whether the case merits the appointment of a Special Public Prosecutor or an Assistant Public Prosecutor. It would not be appropriate to accept the position that whenever an application is made it should be allowed and a Special Public Prosecutor should be appointed would be contrary to the spirit of the scheme of the Code. There may be cases where a powerful complainant may have begun a proceeding to victimize his opponent. If in such a case the State concedes to the request for appointment of a Special Public Prosecutor there will be travesty of justice. Without screening on the basis of guidelines prescribed or to be prescribed, the services of a Special Public Prosecutor should not be made available to a private complainant. The primacy given to the Public Prosecutor under the scheme of the Code has a social purpose and the same would be lost if the

procedure adopted by R.22 of Maharashtra Rules referred to above is accepted or what the High Court has indicated is adopted. We are inclined to observe that the request for appointment of a Special Public Prosecutor should be properly examined by the remembrancer of Legal Affairs and only when he is satisfied that the case deserves the support of a Public Prosecutor or a Special Public Prosecutor that such a person should be appointed to be in charge of the case.

10. The next question would be whether the Special Public Prosecutor should be permitted to be paid by the private complainant. There is considerable force in what has been stated by the Kerala High Court in the case we have referred to above. There may be certain cases where exception may be made, such as where the prosecutor is a public sector undertaking, a bank whether nationalised or not, an educational institution and the like. The rate of fees should be prescribed and the private complainant should be called upon to deposit the fees either with the Remembrancer of Legal Affairs or a prescribed State agency from where the fees would be drawn by the Special Public Prosecutor. To leave the private complainant to pay to the Special Public Prosecutor would indeed not be appropriate. We would make it clear that we do not support the conclusion of the High Court that as a rule whenever there is request of appointment of a Special Public Prosecutor or an Assistant Public Prosecutor, the same should be accepted. The Remembrancer of Legal Affairs should scrutinise every request, keeping a prescribed guideline in view and decide in which cases such request should be accepted, keeping the facts of such case in view. Ordinarily the Special Public Prosecutor should be paid out of

the State funds even when he appears in support of a private complainant but there may be some special case where the Special Public Prosecutor's remuneration may be collected from the private source. In such cases the fees should either be deposited in advance or paid to a prescribed State agency from where the Special Public Prosecutor could collect the same. In view of these conclusions and our disagreeing with the view of the High Court, the appeals shall stand allowed. R.22 of the Maharashtra Rules, referred to above, in our view is bad and the State Government should properly modify the same keeping our conclusions in view. The Remembrancer of Legal Affairs of the Maharashtra Government will now decide as to whether in the three cases referred to here, the services of a Special Public Prosecutor, a Public Prosecutor or an Assistant Public Prosecutor should be provided and in case he comes to the conclusion that such provision should be made, he should decide as to whether the State administration should pay for such Public Prosecutor or the private complainant should bear the same. There would be no order as to costs."

15. The present crime is registered as police case and was not based on a private complaint nor any private party was paying the remuneration of the Special Public Prosecutor. It is true that the Apex Court in the above case has approved the view that appointment of Special Public Prosecutor has to be made when public interest demands.

16. There cannot be any dispute to the proposition of law laid down by this Court in the aforesaid cases and the Apex Court in **Mukul Dalal's case** (supra). State is the prosecutor of the criminal case and crimes are against the State and State has to take all steps for administration of justice. Appointment of Public Prosecutor/Additional Public Prosecutor are steps towards securing ends of administration of justice. There cannot be any dispute to the proposition that appointment of Special Public Prosecutor under Section 24(8) for a particular case or class of cases has to be on valid reason after due application of mind. In the counter affidavit filed in the Writ Petition by the 5th respondent the facts of the case have been stated. It has been stated that the case involved hefty amount of Rs.450 Crores collected with typical designated scheme, namely, LIS Deepasthambam. It is useful to quote paragraph 11 of the counter affidavit:

“11. The accused after receipt of hefty amount to the tune of 450 crores of rupees in the year 2005 from the public with a

typical designated scheme, namely, "LIS Deepasthambham" described to double the amount in a short time by purchasing lottery tickets (later found to be money circulation scheme) by Police as well as Honourable High Court of Kerala and Supreme Court of India) acted contrary to the so called scheme and deceived the public by investing the said money in real state with dishonest and fraudulent intentions. To this effect, it has been revealed from the records obtained from Mattancherry Sub Registrar Office on 21.06.2011 that the accused had purchased land worth 3½ worth crores of rupees in 2005 with this ill gotten wealth soon after the commission of the offence and sold out to Kerala Cricket Association for 25.5 crores of rupees in the year 2010."

Thus it is clear that the present case cannot be said to be a case which does not involve any public interest in the appointment of Special Public Prosecutor. Further, mere fact that letter was sent by the 3rd respondent did not disentitle the State to proceed to consider the request for appointment of Special Public Prosecutor. The State did not mechanically make any appointment of the 4th respondent, after receipt of request from the 3rd respondent, the State called for a report from the DGP and other materials and after being satisfied, made the appointment. Thus the submission of the

learned counsel for the petitioners that appointment of the 4th respondent was not in public interest cannot be accepted. Further no fault can also be found in the appointment of the 4th respondent as Special Public Prosecutor on the ground that request was made by the 3rd respondent by letter, Ext.P3. In this context it will not be out of place to mention here that this Court had occasion to note that even in the earlier round of litigation initiated by the petitioners for their discharge from the offence, they had made allegations against the 3rd respondent attributing mala fides. Registration of the crime by the 3rd respondent was also challenged. The role of the 3rd respondent in registering the crime was also appreciated. It is useful to quote the following observations made by the High Court in Criminal Revision Petition filed by the petitioners in **Kuriachan Chacko v. State of Kerala** (2007 [3] KLT 843):

“40.....These petitions are not under S.482 of the CrPC and are filed with a prayer to invoke the revisional jurisdiction. That

technicality notwithstanding, no reason is shown as to why and how it is alleged and assumed that the police officer is actuated by mala fides. The Inspector General of Police had got the crime registered. It is contended that this shows his mala fides. The crime has been registered after the declaration of elections to the State Legislature. Why did he not register the crime earlier? Why did he not wait for the popular Government come into power before he registered the crime? Probably the police officer felt that when the political executive takes over he may not have the freedom and liberty to register such a crime and initiate action. Whatever be the reason, I am certainly of opinion that the Inspector General of Police who registered the crime has not acted beyond his jurisdiction in registering the crime. He has the obligation under S.149 of the CrPC to interpose the commission of cognizable offences. The aggressive advertisement campaign resorted to by the accused must have aroused doubts and dissatisfaction in the mind of right thinking members of the polity as to why the State and its functionaries were sleeping and inactive. That the Inspector General of Police registered the crime during the transition of power from one Government to the other after the elections were declared, does not, in any way, affect the validity of the charges raised. That at least one police officer opened his eyes and swung into action belatedly while all the other powers that be feigned slumber is no evidence of his mala fides."

(underlined by us)

17. The 3rd respondent at whose instance the crime was registered and who is still in the police

department as Director General of Police/Transport Commissioner, cannot be said to be a person wholly unconcerned and the fact that he brought into the notice of the Government raising certain questions regarding the various steps taken by the DGP and suggesting appointment of the Special Public Prosecutor cannot be a reason for annulling the appointment of Special Public Prosecutor.

18. Coming to the third submission of the learned Senior Advocate for the appellants, it is submitted that the 3rd respondent being a designated Senior Advocate is incompetent and ineligible to act as a Special Public Prosecutor. Submission is that in accordance with the Rules framed by the Bar Council of India under Sections 16(3) and 49(1)(g) of the Advocates Act, 1961 a Senior Advocate is debarred from accepting any instruction to draft pleading or affidavit, advice on evidence or to act in any court or Tribunal. He cannot be appointed as Special Public Prosecutor since he has to act on behalf of the State while discharging his duties as

Special Public Prosecutor.

19. For appreciating the submissions made by the learned counsel it is useful to refer to the Rules framed under Section 16(3) and 49(1)(g) of the Advocates Act, 1961. Chapter I of the Rules is to the following effect.

“Senior Advocates shall, in the matter of their practice of the profession of law mentioned in Section 30 of the Act, be subject to the following restrictions:

(a) A Senior Advocate shall not file a vakalatnama or act in any Court, or Tribunal, or before any person or other authority mentioned in Section 30 of the Act.

Explanation : “To act” means to file an appearance or any pleading or application in any court or Tribunal or before any person or other authority mentioned in Section 30 of the Act, or to do any act other than pleading required or authorised by law to be done by a party in such Court or Tribunal or before any person or other authorities mentioned in the said Section either in person or by his recognised agent or by an advocate or an attorney on his behalf.

(b) (i) A Senior Advocate shall not appear without an Advocate on Record in the Supreme Court or without an Advocate in Part II of the State Roll in any court or Tribunal or before any person or other authorities mentioned in Section 30 of the Act.

(ii) Where a Senior Advocate has been engaged prior to the coming into force of the rules in this Chapter, he shall not continue thereafter unless an advocate in Part II of the State Roll is engaged along with him. Provided that a Senior Advocate may continue to appear without an advocate in Part II of the State Roll in cases in

which he had been briefed to appear for the prosecution or the defence in a criminal case, if he was so briefed before he is designated as a senior advocate or before coming into operation of the rules in this Chapter as the case may be.

(c) He shall not accept instructions to draft pleading or affidavits, advice on evidence or to do any drafting work of an analogous kind in any Court or Tribunal or before any person or other authorities mentioned in Section 30 of the Act or undertake conveyancing work of any kind whatsoever. This restriction however shall not extend to settling any such matter as aforesaid in consultation with an advocate in Part II of the State Roll.

(cc) A Senior Advocate shall, however, be free to make concessions or give undertaking in the course of arguments on behalf of his clients on instructions from the junior advocate.

(d) He shall not accept directly from a client any brief or instructions to appear in any Court or Tribunal or before any person or other authorities in India.

(e) A Senior Advocate who had acted as an Advocate (Junior) in a case, shall not after he has been designated as a Senior Advocate advise on grounds of appeal in a Court of Appeal or in the Supreme Court, except with an Advocate as aforesaid.

(f) A Senior Advocate may in recognition of the services rendered by an Advocate in Part-II of the State Roll appearing in any matter pay him a fee which he considers reasonable.”

Senior Advocate is designated by the High Court after being satisfied with his ability and merit. Senior Advocate who has been designated by the High Court has to conduct himself as per the statutory restrictions noticed above. Question is as to whether the statutory restrictions noted above debar a Senior Advocate to be

appointed as Special Public prosecutor.

20. According to the Rules as noticed above, a Senior Advocate shall not file Vakalathnama or act in any court. Senior Advocate is entitled to practice the profession of law. What is prohibited is that he shall not file Vakalathnama or act in any court. The Explanation defines the expression “to act”. The explanation itself clearly provides that what is prohibited is filing an appearance or pleading or application in any court or to do any act other than pleading required. The provision clearly indicate that Senior Advocate can plead in a court. A reading of Special Rule (c) indicate that Senior Advocate shall not accept instructions to draft pleading or affidavits, advice on evidence or to do any drafting work of an analogous kind in any Court or Tribunal or before any Court or Tribunal or undertake any conveyancing work of any kind. However, the last portion of the rules states that “this restriction however shall not extend to settling any such matters

as aforesaid in consultation with an advocate in Part II of the State Roll”. Thus Senior Advocate is statutorily entitled to settle pleadings, affidavits and other matters which he is directly prohibited to do, in consultation with an Advocate on State Rolls. Further in Rule (b)(ii) it is stated that in a case where a Senior Advocate has been engaged prior to the coming into force of the rules in this Chapter, he shall not continue thereafter unless an Advocate in Part II of the State Roll is engaged along with him. However, the said sub rule contain a proviso which provides that “a Senior Advocate may continue to appear without an advocate in Part II of the Sate Roll in cases in which he had been briefed to appear for the prosecution or the defence in a criminal case, if he was so briefed before he is designated as a Senior Advocate or before coming into operation of the rules in this Chapter as the case may be.” Thus in a criminal case where he is briefed to appear for prosecution can continue without even engaging an Advocate in the State Roll. The rule

thus clearly contemplates appearing of Senior Advocate in criminal case for prosecution or defence. When the rules itself contemplate appearing of Senior Advocate in criminal cases, it cannot be held that there is any prohibition in the rules to appoint a Senior Advocate as Special Public Prosecutor. Service of Senior Advocate cannot be denied either to prosecution or to the defence in appropriate cases and to hold that the State is debarred from appointing a Special Public Prosecutor in a criminal case is denying both right of Senior Advocate and right of prosecution/defence to avail services of a Senior Advocate. There has been large number of instances where Senior Advocates have been appointed as Special Public Prosecutors. The Apex Court in **Sheonadan Paswan v. State of Bihar** ([1983] 1 SCC 438) has noticed that one Senior Advocate of Patna High Court was appointed as Special Public Prosecutor by the State Government. In paragraph 2 the following was noticed:

“....Though initially Shri Awadhesh Kumar Dutt, Senior

Advocate, Patna High Court, had been appointed as a Special Public Prosecutor by the previous Government for conducting the said case, the State Government (now headed by respondent No. 2) without cancelling Shri Dutt's appointment as Special Public Prosecutor, on 24th Feb., 1981 constituted a fresh, panel of lawyers for conducting cases pertaining to Vigilance Department and Shri Lalan Prasad Sinha, one of the advocates so appointed on the fresh panel was allotted the said case and was informed of the Government's said decision and on 26th March, 1981 he was further requested to take steps for the withdrawal of the case after he had considered the matter and satisfied himself about it."

The Apex Court in the case has quoted with approval the observations made by the that Court in paragraph 15 of **R.K.Jain v. State** ([1980] 3 SCC 435). the Apex Court in R.K.Jain's case has observed the following:

".....The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of S. 321, Criminal Procedure Code. .."

21. Special Public Prosecutor is not a mouthpiece or spokesman of the prosecution, rather he is an officer of the court and dignity of the Senior

Advocate cannot be said to be in any manner compromised by the pleading in a Court as Special Public Prosecutor.

22. From the Rules framed by the Bar Council as noted above, what is prohibited to a Senior Advocate is “the Senior Advocate shall not file any Vakalathnama or act in any court”. It is clear that Vakalathnama cannot be filed by a Senior Advocate. The crucial expression in the Rule is shall not act in any court. What is meant by the expression “to act” has to be looked into. The Explanation defines the expression “to act” which includes the following:

- “(a) to file appearance; or
- (b) any pleading
- (c) application in any court or Tribunal.”

Thus a Senior Advocate cannot do the above three things. The expression “to act” came up for consideration before the Delhi High Court in **Saraswati v. Tulsi Ram** (AIR 1971 Delhi 110). In the above case a suit was filed in a trial court for mandatory injunction. In the suit A

senior Advocate of the Supreme Court and Delhi High Court appearing for the defendant wanted to examine certain witnesses. Objection was raised that Senior Advocate cannot examine or cross-examine a witness. The Subordinate Judge held that examination and cross-examination of a witness is an "act" which is debarred for a Senior Advocate. Revision was filed before the High Court. Learned Single Judge referred the matter to the Division Bench looking into the importance of the question. The Division Bench considered the provisions of the Civil Procedure Code, Advocates Act, 1961 and the Rules framed by the Bar Council of India. The Delhi High Court held that the expression, 'acting' includes examination of witnesses and in event it is held that it does not include examination of witnesses, it will virtually debar a Senior Advocate from all original work. It is useful to refer to paragraphs 24, 25, 26 and 27 which are to the following effect:

"24. Bawa Shivchandran Singh in support of his contention that 'acting' includes examination of witnesses referred to Rule (c)

of Chapter I of Part Vi of the Rules governing Advocates, which lays down the restrictions on senior advocates and pointed out that Rule (c) prohibits a senior advocate from giving 'advice on evidence'. The submission of Bawa Shivcharan Singh was that as this Rule prohibited a senior Advocate from 'giving advice on evidence' it necessarily suggested that he cannot examine witnesses as according to him this expression covers 'the examination of witnesses'. He also submitted that the prohibition of giving 'advice on evidence' shows that the senior advocate was not to have anything to do with the trial and, Therefore, necessarily was debarred from examination of the witnesses. In our view this contention is without any merit. On the other hand the expression 'advice on evidence' is an expression which is used for a stage prior to the start of the trial. In all litigations after the pleadings have been settled and issues struck an interval is provided to determine what evidence should be laid at the trial. It is this work which is called 'advice of evidence' and which is not to be performed by a senior advocate. Orders' 'Principles of Pleading and Practice' 14th Edition deals with 'Advice on Evidence' in Chapter 19, page 256. It is stated therein:-

"As soon as discovery is completed, or in urgent cases even sooner, the papers are laid before counsel for his advice on evidence. This should be done by both sides, even in cases apparently simple, otherwise the action may be lost for want of some certificate or other formal piece of proof".

.....

"Advising on evidence is, perhaps, the most important piece of work which a junior barrister has to do; success at the trial so much depends on the care with which the case is got up beforehand and the solicitor, who may have had but little experience in litigious work, will look to counsel for advice on every necessary detail".

25. The 'trial' is treated separately from a stage prior to that

which is called 'advice on evidence' as is clear from the treatment in this book which mentions the 'trial' in Chapter 20, page 269 separately.

26. The specific prohibition on senior advocate is giving 'advice on evidence' in Rule (c) of the Rules Governing Advocates rather bring out clearly the fact that examination of witnesses is not covered by the expression 'acting'. This is so because if the word 'acting', was to cover the stage of examination of witnesses it would necessarily have covered the stage prior to that, namely 'advice on evidence'. In that case it would have not been necessary to place this restriction in Rule (c) when senior advocate had already been prohibited from 'acting' by Rule (a) of the Rules Governing Advocates. It is quite obvious, Therefore, that the Bar Council when placing a restriction on a senior advocate nor to 'act' in any court was not contemplating to place restriction on him at the trial stage, namely the examination of the witnesses. Similarly the Explanation given in Rule (a) of the Rules and the Explanation given in Rule 2(b), Order 4 of the Supreme Court Rules also indicate that the restriction on a senior advocate to 'act' is being restricted to the acts of filing, pleading or like applications and similar actions.

27. Even from the point of view of practical working it seems to us that if the expression 'acting' was to include the examination of witnesses it will virtually debar the senior advocates from all original work. It is not unusual for courts to hear arguments immediately on the conclusion of evidence if it was to be held that senior advocates cannot examine witnesses they would obviously not be in a position to argue the matter if the arguments were to be heard immediately after the evidence of the witnesses was

concluded. We do not think that it was meant to place such serious restrictions on the rights of senior advocates. It should also be appreciated that examination of witnesses is really presenting and pleading the case of the parties through the mouths of the witnesses. Arguments are only a summary and a condensed form of the case that has been pleaded already by evidence. To deprive a party of the benefit of a senior advocate when his real case is being put forward before the court would be to place the litigant public at a serious disadvantage and the law profession under a serious and unnecessary strain.”

It was held by the Delhi High Court that Senior Advocate is not prevented from examination and cross-examination of witnesses as the same are not covered by the expression “acting”. In another judgment, **Ramesh Kumar v. Ashish Aroara** (2006 KHC 1671) the Delhi High Court after considering the aforesaid provisions has reiterated the same view.

23. The judgment on which much reliance has been placed by Shri K.Ramakumar, learned Senior Advocate appearing for the petitioners is the Division Bench judgment of the Andhra Pradesh High Court in **State of Andhra Pradesh v. Margadarshi financiers and Others** (supra). Before the Division Bench question of a senior

Advocate being appointed as Special Public Prosecutor was up for consideration. The Division Bench after noticing the Notification issued by the State of Andhra Pradesh by which Senior Public Prosecutor was appointed held that since Senior Prosecutor appointed by the State was required to file an application and plaint which is prohibited, hence the appointment of the Senior Advocate as Special Prosecutor is contrary to the Rules of the Bar Council of India. The Division Bench stated the following in paragraph 23:

“23. There is no dispute with regard to the changes brought under the provisions of The Advocates Act, 1961, especially where the distinction between the barrister and advocate was removed, apart from making substantial enabling provision for the legal practitioners. From the reading of the aforesaid provision it is quite clear that the designate senior advocate (though) stands totally on a different but on a higher pedestal than any other legal practitioner. The provision is very clear and object also quite apparent. The right to practice by all the legal practitioners is provided for under Chapter IV of the said Act. Section [30](#) thereof enables every advocate on the rolls as of right to practice, though of course, subject to the provisions of the Act. Section [34](#) of the said Chapter, provides for preparation of Rules. Similarly, Chapter 49 of the said Act also enables the Bar Council of India to make the

Rules, whereunder sub-clause "G" contemplates the preparation of rules in regard to the restriction in the matter of practice to which senior advocates shall be subjected. Accordingly, the aforesaid rules have been framed and it restricts and bars a senior advocate with certain conditions. Necessarily, the senior advocate has to appear only through an Advocate on Record and he has to be engaged as such, without whom he cannot straightaway make any appearance. It contemplates that he shall not file vakalat or act in any Court or Tribunal or before any person or authority as mentioned in Section [30](#). The expression "to act" has been defined very comprehensively and takes in, every act as normally being expected or being done by a regular legal practitioner or advocate. It is this area where the senior advocate is restricted and cannot walk in. He has to necessarily appear only through another advocate on record. Therefore, it cannot be said that the senior advocates or even the second respondent is not bound by these Rules and therefore it can safely be held that no senior advocate can be appointed straightaway to any such office. Whereas, in the present case the impugned Government Order reads to the following effect;

"The Government in exercise of its powers conferred under Section [24\(8\)](#) of Criminal Procedure Code 1973 (Central Act 2 of 1974) hereby appoint Sri S Satyanarayana Prasad, Senior Advocate, High Court of Andhra Pradesh, Hyderabad as Special Public Prosecutor under Section [45T\(1\)](#) for filing applications and for filing complaints under Section [58\(E\)](#) of Reserve Bank of India Act, 1934, and to prosecute the same.

2. Government also, hereby appoint Ms. C Sindhu Kumari, Advocate as Assistant to the Special Public Prosecutor.

3. The above Special Public Prosecutors will be paid remuneration as per rules.

4. The Addl. Director General of Police, C.I.D., Andhra Pradesh, Hyderabad is requested to take necessary follow up action in the matter."

The Division Bench also extracted the Notification of the State Government by which Senior Public Prosecutor was appointed and looking into the nature of the appointment made the following observations in paragraph 24:

“24. It thus specifically authorizes/enables him to file applications and complaints. It is this very action viz., filing of applications and filing complaints do fall well within the expression of "the act" as provided for under the aforesaid Rule and therefore the impugned proceedings in appointing the second respondent as Special Public Prosecutor necessarily to be held with the same is in the teeth of the aforesaid mandatory provisions under the Advocates Act and the Rules made thereunder.”

In the case before the Division Bench of the Andhra Pradesh High Court Special Public Prosecutor was appointed for filing an application and filing complaint under Section 58E of the Reserve Bank of India Act, 1934. The aforesaid facts weighed with the Andhra Pradesh High Court in holding that since Special Public Prosecutor was appointed for an act which comes within the definition of acting, hence he is not eligible.

24. Now we look into the nature of the order of

appointment of the 4th respondent. In the present case, the order of appointment issued by the State Government, Ext.P7 provides as follows:

"ORDER

Government are pleased to appoint Shri S.Sreekumar, Advocate Near Ernakulam North Police Station, Chittoor, Kacheripadi, Ernakulam, Kochi - as Special Public Prosecutor for the conduct of prosecution in Crime No.672/2006 of Ernakulam on payment of regulation fees prescribed in item, 10 of Rule 32 of the Kerala Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules 1978.

2. The Director of Printing, Thiruvananthapuram, will publish the appended notification as Gazette Extraordinary and supply 200 copies to Government in Home (C) Department in 5 days.

(By Order of the Governor)

S.SUKHI

Joint Secretary to Government."

25. Appointment of the 4th respondent has been made by the State Government for the conduct of prosecution. The appointment does not indicate that the Special Public Prosecutor appointed by the State of Kerala has to file an application or draft any pleading. There is no such indication that the State Government requires from the Special Public Prosecutor, 4th respondent to

act.

26. Obviously, the acts which are prohibited under the Rules of the Bar Council of India cannot be performed by a Senior Advocate. But Senior Advocate can examine and cross-examine a witness, plead the case on behalf of the prosecution with regard to which no prohibition can be read in the Bar Council Rules. In the above view of the matter, we are of the view that the Division Bench judgment of the Andhra Pradesh High Court relied by the learned Senior Advocate for the petitioners is distinguishable. Further in event it is to be presumed that the Division Bench of the Andhra Pradesh High Court has laid down that a Senior Advocate can never be appointed a Special Public Prosecutor, then, we for the reasons as indicated above, do not subscribe to the above view taken by the Division Bench of the Andhra Pradesh High Court. It goes without saying that appointment of a Senior Advocate as Special Public prosecutor goes with all its restrictions and prohibitions as contained in the Bar

Council of India Rules. Senior Advocate appointed as Special Public Prosecutor is obliged to follow all restrictions as contained in the Rules. He cannot appear without an Advocate. The Government knowing fully well the restrictions on a Senior Advocate as engaging him as a Special Public Prosecutor. It cannot be said that the Government expected the Senior Advocate to act on behalf of the State which is prohibited under the Rules of the Bar Council of India. But the acts which are not prohibited and permitted on behalf of a Senior Advocate can surely be performed by the Senior Advocate working as a Special Public Prosecutor. We have already noticed Rule (c) where it is clarified by the Statute itself that restrictions to draft pleading or affidavit, advice on evidence or to do any drafting work cannot be performed by the Senior Advocate. But the rule further states that "this restriction however shall not extend to settling any such matter as aforesaid in consultation with an advocate in Part II of the State Roll." Thus Senior

Advocate can settle any pleading, affidavit, advice on evidence in consultation with an Advocate registered in State Rolls which is specifically permitted.

27. Further, in the event it is held that Senior Advocate cannot appear for prosecution or defence in a criminal case or in a civil case, the said interpretation both will be denial of rights of Senior Advocate to appear in the original proceeding Suit and further deprive the large number of parties who are parties in the original suit or trial the experience and knowledge of the Senior Advocate. We thus hold that appointment of the 4th respondent as Special Public Prosecutor by the State cannot be held to be invalid on the ground that the 4th respondent was a designated Senior Advocate by the Kerala High Court.

28. Now we come to the last submission of the learned counsel for the petitioners. Learned Senior Advocate submitted that against the 4th respondent adverse observations are made by the Court and further in an application filed by in W.P(C) No.2234 of 2004

by the DGP certain adverse observations were made against the 4th respondent. Learned Single Judge has adverted to the aforesaid arguments and has held the following in paragraph 12:

“12. Fourth respondent suffers from serious disqualifications from being appointed as Special Public Prosecutor is another challenge to question Ext. P7(2) order. Personal disqualification against 4th respondent is canvassed and projected on the basis of certain comments / criticisms stated to have been made against him in judicial proceedings which are adverted to and referred to in ground 'E' in the petition. Petitioners have referred to comments either made by the Court or by parties in three cases. Strangely enough, while reproducing the comments / statements purported to have been made touching upon the integrity of 4th respondent, it is not affirmed by the petitioners that such criticisms have been made with notice to 4th respondent, and, after hearing him, exception was taken over the act / acts purported to have been done by him. Fourth respondent is a designated senior advocate of this Court. Designation of a senior advocate is undoubtedly an honour bestowed on a member of the legal profession by the High Court. Such designation can be conferred on an advocate only if certain norms prescribed for such honour are fulfilled. Primarily that designation is a recognition of the ability, and more so of the service of the advocate to the legal profession. Fourth respondent continues to be a designated senior advocate. High Court has framed Rules for conferring such recognition titled as "Rules framed by the High Court of Kerala under S.16(2) of the Advocates' Act ((Revised

Rules)". The Rules indicate that no member of the profession can be conferred designation of senior advocate unless he satisfies the qualifications prescribed and also his name is approved for such honour by 2/3rd of the Judges of the High Court present in a meeting convened for the purpose. R.6 of the above Rules reads thus:

"6. The proposal for designation, shall be considered at a meeting of the Honourable the Chief Justice and the other Judges of the High Court. Such proposal shall be considered as accepted only if not less than two - thirds of the total number of Judges present at such meeting decide in favour of accepting the application, by secret ballot."

When an advocate has been designated as a senior advocate by the High Court after being satisfied that he fulfills all the criteria to be conferred with such designation in recognition of the services rendered by him in the legal profession, it has to be taken that he is an honourable member of the profession. Petitioners have no case that they have taken any step to revoke the designation of senior advocate conferred on respondent on any ground whatsoever. They have also not produced with the petition the judgments / orders in which comments have been made against 4th respondent to examine whether 4th respondent was heard in the matter and if so, under what circumstances such criticisms happened to be levelled against him. Imputations made against 4th respondent with reference to a counter - affidavit in a case by a former Director General of Police, and, in a judgment rendered in the writ petition advertent to an anonymous communication, no comment is required. Allegations raised by the petitioners against 4th respondent to impeach his appointment as Special Public Prosecutor under Ext. P7(2) order on the basis of the comments and

criticisms made in the judgment / order / counter - affidavit referred to in ground 'E' of the petition cannot be given any value or merit, especially in the backdrop he continues to be a designated senior advocate of this Court. Other than a bald averment in the affidavit sworn to by the first petitioner that the statement of facts contained in the writ petition is true to the best of his knowledge, information and belief, there is no assertion or affirmation that whatever comments / criticisms made in the judgments referred to were with notice to 4th respondent and after he was heard, they remain un-effaced. So much so, personal disqualification imputed against 4th respondent, to question his appointment as Special Public Prosecutor made in Ext. P7(2) order cannot be given any merit."

We fully endorse the view taken by the learned Single Judge in rejecting the aforesaid submission. The 4th respondent still continues to be a designated Senior Advocate of the High Court. A Senior is designated by the High Court by virtue of Section 16 of the Advocates Act, 1961 after forming an opinion by the High Court that by virtue of his ability, standing at the Bar or special knowledge and experience in law deserves the distinction of a Senior Advocate. Furthermore, these were the questions to be considered by the State Government and on the said ground it cannot be said that

the 4th respondent was ineligible to be appointed as Special Public Prosecutor. In view of the above, we fully endorse the judgment of the learned Single Judge. We do not find any merit in any of the submissions raised by the learned Senior Advocate appearing for the appellants.

Writ Appeal is dismissed.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**

VSV