

(1998) 12 OHC CK 0043
In the Orissa High Court
Case No : O.J.C. No. 13234 of 1997

Prasanta Kumar Das

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 18-12-1998

Acts Referred:

Advocates Act, 1961 — Section 35, 37, 39
Constitution of India, 1950 — Article 165, 226, 227, 32
Criminal Procedure Code, 1973 (CrPC) — Section 250(6), 341, 351, 372, 373
Prevention of Corruption Act, 1988 — Section 13, 13(1)

Citation : (1998) 12 OHC CK 0043

Hon'ble Judges : S.N. Phukan, C.J.; P.C. Naik, J

Bench : Division Bench

Advocate : M.S. Panda, S. Ch. Mishra, S.K. Das and Sisir Das, for the Appellant;

Judgement

P.C. Naik, J.—Claiming to be a social worker and free lancer journalist with an Endeavour for transparency in public life, eradication of corruption and probity in public life, the Petitioner has approached this Court for issuance of an appropriate writ, direction or order, seeking the following reliefs:

- (a) To cancel the appointment of Sri Indrajeet Ray as Advocate General of Orissa and also Special Public Prosecutor for the Vigilance cases as per Annexure-I;
- (b) To appoint suitable alternative counsel to conduct the cases for the prosecution of the aforesaid vigilance cases vide Annexure-I at the cost of the State;
- (c) To direct fresh trial of T.R. Case No. 55/92 or in the alternative direct for sue mote institution of an appeal against acquittal in T.R. Case No. 55/92;
- (d) To direct the State Bar Council to initiate a disciplinary proceeding against Sri Indrajeet Ray for his misconduct as an Advocate; and
- (e) To declare Sri Indrajeet Ray, Advocate:

General, to be unworthy of holding the highly constitutional post of Advocate General and to remove him forthwith from the post of Advocate General.

2. Basically, in this public interest litigation, the Petitioner challenges what according to him is the illegal Mala fide and motivated appointment of Shri Indrajeet Ray, the then Advocate General as Special Public Prosecutor to prosecute some who are at present Cabinet Ministers and Ministers of State and officers who have been charge-sheeted by the State Vigilance Police for acquiring properties disproportionate to their known source of income.

3. Before preceding further, a reference to some facts which are averred in the writ application need to be mentioned. It is the case of the Petitioner that during the period 1980-90 when the Congress Government was in Power, there were allegations of rampant corruption and embezzlement of public funds particularly by some Ministers, bureaucrats and other high officials which were not enquired into. After the Janata Dal came into power in February, 1990 and formed a Government in the State, a House Committee of the Assembly under the Chairmanship of Shri Ashok Das was constituted to look into the charges of corruption against politicians, bureaucrats and officers as a result of which drastic action was taken by way of investigation and raids at several places which led to filing of charge-sheets against a number of politicians, bureaucrats and other officials. Looking to the gravity of the situation, avers the Petitioner, the Special Courts Act was enacted and by virtue of the provisions contained therein, Hon'ble Mr. Justice A. Pasayat was appointed, as the Presiding Officer of the Special Court for hearing and disposal of the said vigilance cases. And, for conducting those cases, a number of special counsel were appointed. After, due trial, one case ended in conviction whereas others were at various stages at a time when fresh elections to the State Assembly were notified. In the elections held in 1995, the Janata Dal lost and the Congress Party again gained majority and thereby formed a Government. The then Advocate General, who had resigned, was replaced by Shri Indrajeet Ray, who (avers the Petitioner) was a member of the Congress Party and as such he was appointed with ulterior motives. Thereafter, the Special counsel who had been appointed by the previous Government to prosecute the cases before the Special Court were replaced and Shri Indrajeet Ray, the then Advocate General was appointed as the Special Public Prosecutor to prosecute the cases before the Special Court and thereafter, it is stated in the writ application due to an un-holy combination of all the Special Courts Act was repealed leading to the transfer of all vigilance cases pending before the Special Court to the Special Judge (Vigilance), Bhubaneswar. One such case being T.R. Case No. 55 of 1992 wherein Shri Kishore Chandra Patel - the Ex-Speaker and presently a Cabinet Minister - was facing the charge, also stood transferred to the court of the Special Judge (Vigilance), Bhubaneswar. In the said case, as asserted by the Petitioner the then Advocate General appeared as a Special Public Prosecutor on behalf of the State and one of his Ex-juniors was representing the accused. The further case of the Petitioner is that due to an unholy alliance between the Government, Prosecutor and the Defense, the case

was not contested in all earnest and as it ought to have been whereby proper evidence was not brought on record and due to deliberate inaction, there were lot of lacunae in the prosecution case which ultimately resulted in. what the Petitioner avers an illegal acquittal of Shri Kishore Chandra Patel in that case. It is the averment of the Petitioner that solely- with the idea of bringing about an acquittal, the prosecution had failed to bring on record and establish the expenses incurred by the said accused in his son's education, the huge investments made by his wife and the ownership of the land from which income is said to have been derived through horticulture. The further averment is that looking to the facts of the case earlier there was reasonable apprehension in the mind of the Petitioner and all law-abiding citizens that the other similar cases pending against other ministers, bureaucrats and high officials will meet similar fate which would be a mockery of justice. It is in this background that the reliefs referred to have been claimed.

4. Notice of hearing on the question of admission was issued to opposite parties 1, 2 and 3 and a counter has been filed in opposition. In reply, it is stated that the various averments made in the writ petition are not proper but are only in the nature of character assignation with the object of reeking of personal vengeance rather than serving any public interest. Regarding the prayer for re-trial of disposed of case and so institution of an appeal, it is averred that apart from the question of locus stand, it also does not involve any public interest. According to these answering opposite parties 1 to 3, it is false to say that there was a deep-rooted conspiracy and an unholy nexus between the prosecution and defense which led to the acquittal of Shri Patel of the charges u/s 13(1)(e) read with Section 13(b) of the Prevention of Corruption Act, 1988. Whatever material, asserted by those opposite parties, was collected the investigating agency was produced before the court which on a due consideration thereof and after proper application of mind returned its verdict. When the case against Shri Patel was transferred to Special Judge (Vigilance), Bhubaneswar, it was almost at the fag end of trial. On transfer, the Public Prosecutor, Bhubaneswar conquered the case on behalf of the prosecution and the remaining witnesses were examined by him and the defense witnesses were duly cross-examined. The then Advocate General was requested to appear at the stage of argument as Shri A.D. Giri, the Solicitor General of India, was to appear on behalf of the defense at the stage of arguments. Except for this, the then Advocate General, according to the answering opposite parties did not appear in that case. While denying the averment that the raids were conducted under the supervision and direction of the House Committee, it is asserted that, the action was taken by the Vigilance Department sue mote on the basis of secret verification and the information received and that they had acted fairly and independently and whatever material was collected at the time of investigation was placed on record. The averment that there was an unholy and secret understanding for getting rid of the vigilance cases pending against leaders of the ruling party, is denied. Likewise, the averment that the prosecutors were changed as a result of sinister design for

obtaining acquittal of the persons accused, is also denied. It is also pleaded that the appointment of the Advocate General and Public Prosecutor is within the domain of the State Government and the Petitioner has no locus stand to challenge the same. An affidavit in support of the counter-affidavit was filed by one Shri H.N. Das who was at the relevant point of time posted as the Additional Superintendent of Police, Vigilance Cell, Cuttack.

5. The counter affidavit filed by opposite parties 1 to 3 led to the filing of a rejoinder by the Petitioner reiterating that he had the locus stand as the petition involve a substantial question of law as to whether the Advocate General can prosecute the criminal cases wherein the present Cabinet Ministers are the accused persons. Objection was also raised that the counter affidavit was not proper as it appeared that it was more on behalf of the then Advocate General rather than the opposite parties 1 to 3, i. e. the State of Orissa through the Chief Secretary, Secretary of the Home Department and Secretary "of the Law Department. This apart, the averments made in the petition were reiterated so also the fact that the entire action of the Government, the Advocate General and the Public Prosecutors was calculated and designed for ultimate acquittal of the accused persons of which the case of Shri Patel was a prelude. In view of the rejoinder and as directed, another affidavit was filed by Shri Uma Shankar Mishra, Director-cum-Inspector General of Police, Vigilance, and Ex-officio Special Secretary to Government of Orissa, General Administration Department, who, on oath, has stated that the counter affidavit was being filed on being duly authorized by the Chief Secretary to the Government of Orissa. and also, another affidavit was filed by Shri Himadri Mohapatra, Legal Remembrance and Additional Secretary to Government of Orissa, Law Department.

6. In his affidavit Shri Mishra states that even while the matters were pending before the Special Court, Cuttack, prior to the repeal of the Special Courts Act, though several prosecutors were appointed, the Advocate General was in overall charge of the prosecution of all the cases. The cases proceeded denying the allegation of deep-rooted conspiracy and unholy nexus between the prosecution and the defense. It is averred that the cases proceeded on the basis of the material collected by the investigating agency which was placed before the court and the Petitioner, who was in no way connected with the investigation nor was present at the time of the trial, has made wild allegations on the basis of conjectures and surmises due to malice. It is reiterated that after transfer of T.R. Case No. 55 of 1992 to the court of the Special Judge (Vigilance), Bhubaneswar, the remaining prosecution witnesses were examined by the public prosecutor, Bhubaneswar who had also cross-examined the defense witnesses. The then Advocate General was personally requested to argue the matter on behalf of the prosecution as Shri A.D. Giri, the Former Solicitor General of India, was to appear and argue the case on behalf of the defense. In this view of the matter, the decision to request the then Advocate General to argue the matter was within the domain of the State Government which thought that as a Senior Advocate was coming from Delhi to argue in the case on behalf of the defense,

the prosecution (State) should also be represented by the Advocate General who was a senior counsel, and not because of any deep-rooted conspiracy and unholy alliance.

7. In the second affidavit, the submissions made in the earlier counter are reiterated and it is stated that there is no question of any unholy alliance, deep-rooted conspiracy and unholy nexus between the prosecution and the defense. It is denied that the change of counsel was at the instance of the then Advocate General or with any ulterior motive. It has further been stated that in the year 1990, the Vigilance Department had conducted secret verification sue. mote and after conducting raids and investigation, had registered cases and submitted charge sheet on the basis of material collected during the investigation. The Petitioner is not correct in alleging that the investigation was under the direction and supervision of the House Committee. Regarding the other pending matters, it is submitted that the apprehension of the Petitioner that these will also end in acquittal, is not correct as proper steps are being taken to proceed with the cases on the basis of material available with the prosecution.

8. In his affidavit, the legal Remembrancer-cum-Additional Secretary to Government of Orissa, Law Department, has stated that the Home Department had moved the Law Department for engagement of the Advocate General as Special Public Prosecutor for conducting the cases pending before the Special Court, Cuttack and pursuant to that request, looking to the nature of the cases, the Advocate General was appointed as a Special Public Prosecutor after obtaining necessary sanction from the Government. It was neither mala fide nor motivated. It was also averred that prior to the appointment of the then Advocate General as the Special Public Prosecutor, a large number of counsel were appointed to look after the various cases and the engagement of a large number of counsel as Special Public Prosecutors was felt unnecessary and expensive and as such, the Government decided that the Advocate General should conduct the cases pending before the Special Court, Cuttack. With reference to the appointment of Shri Indrajeet Ray, the then Advocate General, it is averred that it is prerogative of the Government to appoint a person of its choice and that by appointing Shri Ray, it had merely exercised the powers vested in it under the Constitution. As the Special Courts Act, 1990 stood repealed by Orissa Act 30 of 1995, the cases which were pending before the Special Court, Cuttack, stood transferred to the court of the Special Judge (Vigilance), Bhubaneswar. The Law Department, however, does not maintain a progress chart of the cases as day by day progress is not communicated to it.

9. Before proceeding further, we may state that in the midst of the arguments, a prayer was made for amending the writ application by incorporating an additional prayer, i.e., praying this Court to exercise its revisional/suo mote/inherent powers as provided under the Code of Criminal Procedure for ends of justice.

10. A reference may also be made to an affidavit filed by the Petitioner wherein it is alleged that the appearance of the then Advocate General being unauthorized

as he had no power-of-attorney to conduct prosecution case before the Special Judge (Vigilance), the entire trial is vitiated due to unauthorized conduct and as such, the proceeding needs to be quashed and a retrial should be ordered.

11. From the averments on record, the points which emerge for consideration and have been strenuously urged by the learned Counsel for the Petitioner, are:

- (i) Removal of Shri Indrajeet Ray from the office of the Advocate General,
- (ii) Issuance of a direction to the State Bar Council to initiate a disciplinary proceeding against him, and to declare him to be unworthy of a high constitutional post that of an Advocate General,
- (iii) Issuance of a direction to the State Government and to the Chief Minister to remove Shri Indrajeet Ray from the post of Advocate General, and
- (iv) Issuance of a direction for fresh trial of T.R. Case No. 55/92 State v. Kishore Chandra Patel, or in the alternative, for sue mote institution of an appeal against the order of acquittal recorded in that case.

12. Article 165 of the Constitution of India lies down that the Governor of each State shall appoint a person who is qualified to be appointed as a Judge of the High Court to be the Advocate General for the State. The duty of the Advocate General is to give advice to the Government of the State upon such legal matters and to perform such other duties of a legal character as may from time to time be referred or assigned to him by the Governor and further, to discharge the functions conferred on him by or under the Constitution or any other law for the time being in force. The Advocate General holds office during the pleasure of the Governor and is entitled to receive such remuneration as the Governor may determine. Thus, the appointment of an Advocate General is within the domain of the State for which it does not require the aid, advice or concurrence of any other authority. It is a known fact that with the change of Government, there is a change of the Advocate General and there have also been instances where even a change of the Chief Minister has brought about a change of the Advocate General. There are also instance like in the case of Gujarat, where the Advocate General has been continued though number of Governments have come and gone. But, it cannot be denied that whether to continue a person as the Advocate General or not, is the sole discretion of the State. In this view of the matter, the contention that the appointment of Shri Indrajeet Ray as Advocate General was not proper, was mala fide or motivated, cannot be accepted. The fact that Shri Indrajeet Ray during his student days was a member of the Congress Party and whether or not he was close to people in power, cannot be a ground to presume any mala fide in the appointment. Normally and as the practice is, the Advocate General being the Chief Advisor to the Government in any matters, is a person who has the confidence of the Government and it is for this reason why a change of Government usually brings about a change of Advocate General. The convention normally is, which is well known in the legal world, that once the Government in power loses its majority in the State, the Advocate General

tenders his resignation and if it is accepted, it leads to an appointment of a new incumbent. There is nothing unusual in it because this also happens in case of an Attorney General and other high ranking legal officials of the Government of India. Therefore, this is hardly a matter on which the Petitioner can call upon this Court to interfere with the power of the Government to appoint a person in the post of Advocate General.

13. With regard to the prayer of the Petitioner for issuance of a direction for removal of Shri Indrajeet Ray, the then Advocate General, a preliminary objection was raised by the State that the petition is not maintainable as the Petitioner is a more busy body and has no locus stand. On the other hand, relying on a Single Bench decision of the Madras High Court in the case of Ponnusamy Vs. State of Tamil Nadu and another, , it is averred that such an objection ought not to be entertained as the petition cannot be dismissed at the preliminary stage when the matter involved is of a great public importance and calls for a proper inquiry. The decision referred to relates to a decision on the preliminary issue regarding maintainability. However, it was not been pointed out by either of the learned Counsel as to what was the ultimate result in that case.

14. Be that as it may, the question regarding issuance of a direction for removal of Shri Indrajeet Ray as an Advocate General has now become redundant in view of the fact that before the hearing of this case was concluded, he had tendered his resignation which was accepted on 6-8-1998 and thereafter, Mr. Govind Das, Senior Advocate, has been appointed and has taken over as the Advocate General, Orissa, on 10-8-1998. This being the admitted position, any decision on the question of maintainability of the writ application or the locus stand of the Petitioner to file such a petition praying for issuance of a writ for removal of the Advocate General would be purely academic and as such need not be gone into because in its discretion the courts, in proceedings of this nature, ought not to enter into academic discussions. We, therefore, refrain ourselves from making any further discussion on this issue, as it would, as observed earlier, be redundant.

15. With regard to the prayer for issuance of a direction to the State Bar Council to initiate a disciplinary proceeding against Shri Indrajeet Ray and to declare him to be unworthy of a high constitutional post of an Advocate General, we are of the opinion that the relief cannot be granted. Chapter v. of the Advocate Act, 1961 contains provisions relating to conduct of Advocates. Section 35 which finds place therein provides for punishment to Advocates for misconduct. This provision lays down that where on receipt of a complaint or otherwise, the State Bar Council has reason to believe that any Advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. It further lays down that the said disciplinary committee after giving the Advocate concerned and the Advocate General an opportunity of being heard, may make any of the following orders, namely;

(a) dismiss the complaint or, where the proceedings were initiated at the

- instance of the State Bar Council, direct that the proceedings be filed;
- (b) reprimand the advocate;
 - (c) suspend the advocate from practice for such period as it may discomfit;
 - (d) remove the name of the advocate from the State roll of advocates.

Thus, the Advocates Act provides for a machinery to deal with matters relating to conduct of advocates and take suitable and remedial measures against those who, in the opinion of the disciplinary committee, have been guilty of professional or other misconduct. Under the said provision, proceedings can be initiated on receiving a complaint or sue mote. So, in case the Petitioner desires an action to be taken against Shri Indrajeet Ray, he is free to take recourse to the aforesaid provision which does not appear to have been taken in the instant case. It is not the Petitioner's case that though he had moved the State Bar Council, his complaint has not been attended to. Had that been the case, probably this Court could have issued suitable direction to the State Bar Council to deal with the complaint in accordance with the relevant provision. But, we fail to understand as to why, when the Petitioner has not thought it proper to avail the statutory remedy which is admittedly available to him he should call upon this Court to issue a direction to the State Bar Council for initiation of a disciplinary proceeding against Shri Indrajeet Ray. Of course, had there been some professional or other misconduct on the part of Shri Ray in course of a judicial proceeding before us. We might have exercised sue mote powers and brought such misconduct to the notice of the State Bar Council, but this is not so in the case at hand. Hence, there is no reason why this Court should act as the complainant when the person who has a grievance is not prepared to complain before the appropriate forum.

16. A reference to the decision of the Apex Court in *Ram Naresh Yadav and Ors. v. State of Bihar*. A.I.R 1987 S.C. 1500, in support of the contention that the Court can refer the matter to the State Bar Council, is misplaced. In that case, the challenge was made to the order of the High Court dismissing a criminal appeal for non-prosecution as neither counsel was present. While considering the matter the Court observed that if the counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And, if this happens often, the working of court would become well high impossible. In the said case, the Court further observed that "it was fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their matters are decided on merits. The Court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the Appellant or his counsel" Thus, the observations, that the Court may refer the matter to a Bar Council were made in the context of the conduct of a counsel in not appearing before the court when a case was called. Therefore, that was with reference to something which

happened in a matter which was before the Court. The case at hand is quite different.

17. It was also contended that by accepting the assignment of a special prosecutor Mr. Indrajeet Ray had committed misconduct as he could not act fairly considering that the accused in the case was a member of the State Cabinet. This apart, it was also submitted that it is because of the unholy nexus between the prosecution and the accused that brought about the order of acquittal. The misconduct alleged is the acceptance of the assignment and failure to act fairly as a prosecutor. Whether or not this amounts to misconduct, is again a determination within the realm of Section 35 of the Advocates Act, 1961, a reference to which has already been made above. As we have observed, nothing prevented the Petitioner from putting forth his grievance or complaint before the State Bar Council, as the suspension of an advocate from practice or his removal from the roll of advocates are punishments specifically provided for Under the Advocates Act, 1961. In a given case, once misconduct is proved, it is up to the disciplinary committee of the State Bar Council to impose punishments including removal from the roll. when this is done, the person concerned ceases to be an advocate and naturally will be stripped of all assignments which were assigned to him being an advocate.

18. As observed by us in the earlier part of the judgment, the provisions of the Advocates Act, 1961 contemplate that a complaint alleged against an advocate for professional or other misconduct is to be enquired into by his peers, who, being the members of the profession, are conscious of the professional ethics and conduct which a member of the Bar is to observe. A decision of the disciplinary committee of State Bar Council is, under the Act, subject to appeal to the Bar Council of India u/s 37 and against the appellate order further appeal lies to the Apex Court u/s 39. As observed by the Apex Court in Bar Council of Maharashtra Vs. M.V. Dabholkar and Others, , the constitution of State Bar Councils and Bar Council of India is for one of the principal purposes to see that the standards of professional conduct and etiquette laid down by the Bar Council of India are observed and preserved.

The Bar Councils therefore entertain cases of misconduct against advocates. The Bar Councils are to safeguard the rights, privilege and interests of advocates. One of the principal functions of the Bar Council in regard to conduct and etiquette of advocates is to receive complaints against advocates and if the Bar Council has reason to believe that any advocate has been guilty of professional or other misconduct, it shall refer the case for disposal of its disciplinary committee. In the above premises, to consider whether or not Shri Indrajeet Ray has been guilty of misconduct, would be usurping the functions that are assigned to the disciplinary committee of a State Bar Council u/s 35 of the Advocates Act, 1961.

19. Having dealt with the other submissions raised, what now remains to be considered is the submission relating to quashing of the judgment of acquittal

passed by the Special Judge (Vigilance, Bhubaneswar in T.R. Case No. 55 of 1992 and issuance of a direction for fresh trial or for sue mote institution of an appeal against the order of acquittal recorded in that case. We may deal with the second part of the submission first for which purpose, reference may be made to certain provisions contained in Chapter XIX of the Code of Criminal Procedure, 1973 (in short, "the Code") which deal with appeals.

20. To begin with, reference may be made to Section 372 of the Code which in clear terms lays down that no appeal shall lie from any judgment or order of a criminal court except as provided for by the Code or by any other law for the time being in force. Section 374 relates to appeals from convictions, necessarily those which are filed by accused who have been convicted on being held guilty. Section 377 provides for appeals by State Government against sentences. Under this provision, if the State Governments of the opinion that the sentence imposed in a case is inadequate, it may direct the Public Prosecutor to present an appeal. Then comes Section 378 which deals with appeals against acquittals. In the instant case, as the prayer made to this Court is for sue mote institution of an appeal against the order of acquittal, it would be worthwhile to quote 386 the provision relating to appeals against acquittal, i.e. Section 378 of the Code, extensor.

378. Appeal in case of acquittal.-(1) Save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-sections (3) and (5). the State Government may, in any case, direct the Public Prospector to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Sessions in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code the Central Government may also direct the Public Prosecutor to present an appeal subject to the provisions of Sub-section (3) to the High Court from the order of acquittal.

(3) No appeal under Sub-section (1) or Sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant and sixty days in every other case, computed from the date of that order of acquittal

(6) If in any case. the application under Sub-section (4) for grant of special leave to appeal from an order of acquittal is refused no appeal from that order of acquittal shall lie under Sub-section (1) or under Sub-section (2).

Thus, u/s 378 and appeal can be filed by the State or the Central Government, as the case maybe, and where the order of acquittal is passed in a case instituted upon a complaint, an appeal may be filed by the complainant if the High Court, on an application made to it, grants special leave to appeal from the order of acquittal. So, these are the main provisions with which we are concerned in the case at hand and for this, we have not referred to some of the other provisions like Sections 250(6), 341, 351, 373, 379, 454, etc., which also confer a right of appeal. Therefore, in view of the provisions contained in Section 372, the question of sue mote institution/registration of an appeal by this Court against the order of acquittal does not arise as the same is not contemplated by the Code and to do so, would be contrary to law. Appeal is a creature of the statute. It is not a natural or an inherent right and has, therefore, to be exercised in the manner laid down, for when a right to appeal is given by a statute subject to certain conditions and limitations, it cannot be enlarged so as to nullify the conditions or limitations attached thereto.

21. By making a prayer for a fresh trial, what in substance is prayed for by the Petitioner is a writ in the nature of certiorari for quashing the order of acquittal and directing fresh trial. While the Petitioner contended that such a course can be adopted in exercise of prerogative powers under Articles 226 and 227 of the Constitution of India, learned Counsel for the State submitted the contrary. We are, however, of the opinion that the contention of the learned Counsel for the State that a writ of certiorari cannot at all be issued to set aside erroneous decisions, is not wholly correct. Though it cannot, be denied that the usual remedy to set aside erroneous decisions or orders of an inferior court is by way of an appeal provided for in the statute, there are instances where writ of certiorari has been issued quashing decisions of inferior courts, but the instances are few. Certiorari has been prayed for and obtained in case of a civil proceeding where a court had entertained a suit which was barred by statute and thereby usurped the jurisdiction, as was done in *State of Madhya Pradesh v. Babu Lal and Ors.* A.I.R 1977 SC 1718, or in a case where the judgment and order of a criminal court was assailed on the ground of absence or excess of jurisdiction as in *Banwarilal Agarwalla Vs. The State of Bihar and Others*, , or on the ground of unconstitutionality of the proceedings which was the Case of *The State of West Bengal Vs. Anwar Ali Sarkar*, , in which the proceedings were challenged on the ground that they were in violation of the fundamental rights of the Petitioner. (See *Shorter Constitution of India*, Twelfth Edition, by Durga Das Basu, Pages 693 and 694.)

22. The instant case is altogether on a different footing. It does not involve any such question on which, in exceptional cases, certiorari was issued to quash judgments or orders of a criminal court. But, before exercising the power, it will

have to be seen as to whom desires to set the writ court in motion. Is it the prosecution, the defense, the complainant or a third person? In case of the prosecution the accused or the complainant, any difficulty, other than the limits within which prerogative powers are to be exercised, may not arise. But in case of a third person, what is to be seen is the locus stand of the person, for a petition by a third person will be in the nature of public interest litigation. The question, therefore, would be as to whether public interest litigation in the matters of the type at hand can be entertained. To this our answer would be in the negative.

23. Before proceeding further, it will be worthwhile, in the facts and circumstances of the case, to briefly deal with what in fact would be "public interest" in the context of litigation. "Public interest" in general would mean those interests which concern the public at large. Quoting Campbell, C.J. in *R. v. Bedfordshire*, 4 E and B. 541, 542, in the Law Lexicon, it is mentioned = Matter of public interest "does not mean that which is interesting as gratifying curiosity or love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected". In Black's Law Dictionary, "Public interest" is defined as= Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular locality, which may be affected by the matter in question. Interest shared by the citizens generally in affairs of local, State or national Government "The law Lexicon defines "litigation" to mean-A judicial controversy, a contest in a court of law, a judicial proceeding for the purpose of enforcing a right. Thus, a "Public Interest Litigation" would mean, "A judicial proceeding or action initiated in a court of law for the purpose of enforcing of public interest or general interest in which the public or a class of community has pecuniary interest or some interest by which their legal rights or liabilities are affected. (See *Janata Dal Vs. H.S. Chowdhary and Others*,).

24. While considering the public interest in the context of public interest litigation, what is also required to be seen is, whether the person approaching the court has a right to espouse the cause, or in other words, whether he has any locus stand. The traditional rule of locus stand is, access to the judicial process only to those to whom legal injury was caused or legal wrong was done. But, gradually with the concept of public Interest litigation being recognized and accepted by the courts, the strict rule of locus stand has gradually, over the period, been relaxed and now it is the settled position that any member of the public acting bona fide and having sufficient interest and instituting an action for redressing public wrong or public injury, other than a mere busybody or a mere interloper, can approach the court. As the prayer in this writ application is for quashing the judgment of acquittal and for ordering a re-trial, what in substance is prayed for, and as we have observed earlier, is a writ 390 of certiorari. As observed in *Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and*

Others, , with reference to the English decisions, that in order to have the locus stand to invoke certiorari jurisdiction, the Petitioner should be "an aggrieved person". Dealing with the context of "locus stand" vis-a-vis certiorari, Sarkaria, J. in the said case observed:

It will be seen that in the context of locus stand to apply for a writ of certiorari, an applicant may ordinarily fail in any of these categories; (i) "person aggrieved"; (ii) "Stranger"; (iii) busybody of muddles come interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect. They indulge in the past-time of muddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spooking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

37. The distinction between the first and second categories of applicants, though real, is not always well-demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty, Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of "persons aggrieved", In the grey outer-circle the bounds which separate the first category from the second, intermix interfuse and overlap increasingly in a centrifugal direction. All persons in this outer-zone may not be "persons aggrieved".

25. In the context of locus stand and public interest litigation, we may now refer to the decision of the Apex Court in *Simranjit Singh Mann Vs. Union of India* and another, , in which, while dealing with the question whether a third party who is a total stranger to the prosecution culminating in the conviction of an accused has locus stand to challenge the conviction in a petition under Article 32 of the Constitution, the Apex Court observed that "neither under the provisions of the Code nor under any other statute is a third party stranger permitted to question the correctness of the conviction and sentence imposed by the Court after a regular trial". It is no doubt true that was a case in which an order of conviction was sought to be assailed by way of a public interest litigation, but that, we feel, would not make any difference while considering a prayer for certiorari to quash and order of acquittal, as in either case what is sought to be tested by a third party, a stranger, is the correctness or propriety of the order of a criminal court.

26. Though the learned Counsel for the Petitioner at the time of hearing of the writ application made a reference to the provisions contained in Sections 397, 401 and 482 of the Code, we refrain ourselves from expressing any opinion

thereon in view of the application for amendment of the writ application which was moved in the midst of hearing. By the said petition which was registered as Misc. Case No. 7764 of 1998 the Petitioner sought leave of this Court to amend the writ petition by also styling it as one under Sections 397, 401 and 482 of the Code and by which an alternative prayer is sought to be incorporated praying this Court "to exercise its provisional sue mote inherent powers as provided under the Code of Criminal Procedure for the ends of justice". As the hearing of the writ petition had practically been concluded by this Bench and considering that the jurisdiction to deal with the petition under Sections 397, 401 and 482 of the Code is with a Single Bench, we had ordered that the said misc. case shall be disposed of at the time of passing judgment in the writ application, and accordingly, the same is being dealt with.

27. At the time of hearing of the aforesaid misc. case, there was some dispute between the parties as to whether a proceeding under Sections 397, 401 and 482 of the Code at the instance of the present Petitioner would be maintainable, but we are not inclined to delve into the said question, as we feel that it is to be considered in those proceedings. However, in view of what we have held that a certiorari cannot be issued we feel that in the facts and circumstances of the case, it would be appropriate to allow the prayer for amendment and direct that this writ application be converted to a Criminal Revision or Criminal Misc. Case, as the case may be, and be registered to be dealt with as such.

28. Before concluding we may refer to the contention advanced by the learned Counsel for the Petitioner that the State acted with an impropriety in appointing Shri Indrajeet Ray as a Special Public Prosecutor to appear on behalf of the prosecution when the person facing the charge was a member of the Cabinet. It is probably this what, according to Mr. Panda, learned Counsel for the Petitioner, was the unholy nexus between the prosecution and the accused to bring about an order of acquittal. While we feel that it was within the discretion of the State Government the prosecution - to retain a counsel of its choice, all the same, the State Government should have kept in mind that to appoint an Advocate General to appear in the case against a Cabinet Minister was bound to raise, in the minds of many, an apprehension which the Petitioner has. The apprehension has been raised and it has been contended by Mr. Panda, learned Counsel for the Petitioner that like in the case of Shri Patel, the fate of all other prosecutions will also be the same - all will end up in acquittal - as the State is not serious in securing the conviction. We, however, do not consider it appropriate to express any opinion except to say that looking to the nature of the cases and the persons involved therein, the State may consider whether it would, in the fitness of things, be proper to appoint lawyers of standing and experience, other than the law Officers of the State, as Special Prosecutors whose services can be utilized in cases of the type at hand which are both significant and sensitive.

29. With the aforesaid discussion, we are of the view that this writ petition is not maintainable which is permitted to be converted to a Criminal Revision or

Criminal Misc. Case, as the case may be, as observed by us in paragraph 27 above. We order accordingly.

S.N. Phukan, C.J.

I agree.

Ordered accordingly.