Gauri Shanker and ors. Vs. Iiird Additional District Judge and anr.

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Court : Allahabad

Decided On : Nov-02-2004

Reported in : 2005(1)ARC347

Judge : S.N. Srivastava, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 141 - Order 47, Rule 1; Constitution of India - Articles 136 and 141

Appeal No. : Review/Recall Application No. 4374 of 1998

Appellant : Gauri Shanker and ors.

Respondent : iiird Additional District Judge and anr.

Advocate for Def. : M.P. Sinha, ;R.N. Singh and ;S.N. Singh, Advs.

Advocate for Pet/Ap. : V.B. Singh, ;U.S. Singh, ;B.P. Singh and ;L.P. Singh, Advs.

Disposition : Application allowed

Judgement :

S.N. Srivastava, J.

1. This review petition is directed against the judgment/order dated 17.9.1997 passed by a learned Single Judge of this Court whereby this Court rejected the restoration application and also against judgment/order dated 7.10.1994 by which second appeal No. 1396 of 1982 was dismissed for default of Sri B.P. Singh, learned Counsel then appearing for the appellant.

2. Aforestated Second Appeal had been instituted in this Court in the year 1982 against the judgment and order dated 29.1.1982 passed by IIIrd Additional District Judge Ballia. Subsequently, the appeal came to be dismissed for default on 7.10.1994. This gave rise to filing of restoration application, which was also rejected, on 17.9.1997. Thereafter, the matter travelled to Apex Court and the Special Leave petition preferred before the Apex Court also came to be dismissed in limine on 22.12.1997. It is in the above backdrop that review petition has come to be filed before this Court on the strength of oral observation of the Apex Court as revealed from the letter of the Counsel appearing for the appellant in the Apex Court that the appellant should go back to the High Court for appropriate relief.

3. The grounds set out in the review petition boil down to the effect that Sri B.P. Singh, learned Counsel appearing for the appellant in this Court could not appear before the Court on 7.10.1994 as he was in the midst of arguments before Court No. 38 at that time and after he had finished his arguments before Court No. 38, he rushed to the Court in the course of the day and explained his absence and wanted to move application setting out the details about his absence but the Court declined to accept the application and insisted on presenting proper application alongwith affidavit. It is further set out that thereafter Sri B.P. Singh,

learned Counsel sent intimation to the appellant in this regard who reacted by withdrawing his instructions from Sri B.P. Singh and in his place, engaged another Counsel. Sri L.P. Singh who subsequently represented the appellant, moved application shorn of details about absence of the Counsel on the date as he was not the Counsel nor was he aware of what had transpired between him and the Court at that time. The learned Counsel for the appellant stated that it was a new and important piece of evidence, which could not be brought to the cognizance of the Court. It is also set out in the review petition that the appellant had engaged the Counsel and if he failed to appear before the Court, the appellant could not be visited with penalties of dismissal of second appeal for default of his Counsel. It is further set out that as many as three Counsel were displayed to be representing the appellant but as a matter of fact Sri B.P. Singh alone had been instructed to argue the case to the exclusion of other Counsels and since absence of Counsel has been duly explained in the affidavit filed alongwith review application, it furnishes foundation for review as envisaged under Order XLVII, Rule 1 C.P.C. The learned Counsel further submitted that as the case fell within the periphery of grounds enumerated under Order XLVII, Rule 1 C.P.C. i.e. upon discovery of new and important matter which could not be produced by him at the time when earlier application for recall was filed, the order impugned herein is apt to be reviewed. The learned Counsel also canvassed that order dated 17.7.1997 rejecting restoration application cannot by any reckoning be said to have merged with the order dated 19.12.1997 rejecting the Special Leave to Appeal nor the same can be construed to be binding in terms of provisions of Section 141 C.P.C. or principles of resjudicata and therefore, it has been lastly argued, the review petition is maintainable.

4. Per contra, Sri M.P. Sinha, appearing for respondents canvassed by stating that order rejecting restoration application by a Single Judge of this Court dated 17.9.1997 had attained finality between the parties consequent upon rejection of Special Leave Petition and by all reckoning, it had the force of resjudicata and judicial discipline inhibited entertaining any review and therefore, review petition is not maintainable and is apt to be dismissed.

5. It would appear that initially one Kashi Nath who was arrayed as respondent No. 2 in the second appeal, had instituted a suit which ended up in dismissal. A civil Appeal was preferred which was heard and decided by the IIIrd Additional District Judge by which the Lower Appellate Court while allowing Civil Appeal No. 485 of 1980, decreed the suit and dissatisfied, appellant Gauri Shanker and others instituted the second appeal in this Court. From a perusal of order dated 29.11.1982, it would appear that Hon. V.K. Mehrotra, J. admitted the appeal taking into reckoning that grounds No. 5, 6, 8 and 18 raise substantial questions of law for determination in Appeal. Subsequently, the second appeal was expedited on 23.11.1998 and it was posted for hearing before Single Judge on 7.9.1997. As stated supra, since there was no appearance for the appellant on the date, the said appeal came to be dismissed for default and subsequently when restoration application was also dismissed by the learned Single Judge, Special Leave Petition was preferred which was summarily dismissed by the Apex Court by means of order dated 19.12.1997 observing as under:

'The order of the High Court says that the learned Advocates who failed to appear had not come forward with any justifiable reasons for their absence. The application seeking recall has been read to us and that statement is indeed correct. Even assuming that the High Court was in error in talking of the learned advocates when there was only one, it was necessary that the reason why that advocate could not appear when the case was called out should have been stated in the application for recall. The SLP is dismissed'.

6. It leaves no manner of doubt that the S.L.P. was dismissed at admission stage without issuing notice. Subsequently, it is evinced from the record, the appellant entered the portals of this Court with review petition in hand backed and encouraged by the contents of letter sent by the Counsel representing the appellant before the Apex Court which revealed that the Apex Court while dismissing S.L.P. had made some oral remarks that the petitioner (appellant) should go back to the High Court and file review bringing correct facts including absence of the Counsel who were present at that time. It is also manifested from a perusal of the record that thereafter, the appellant who had earlier withdrawn instructions from the Counsel in whose absence appeal was dismissed in October 1994, again engaged him and instructed him to file the present

review application on 18.8.1998 which was presented before this Court on 2.11.1998. In Paragraph 3 of the affidavit filed in support of review petition, it is clearly spelt out that at the time when case was called out for hearing, Sri B.P. Singh learned Counsel representing the appellant was locked in arguments in Court No. 38; that Sri B.P. Singh appeared before Court in the course of the day with an application setting out details of the cause that he was busy in Court No. 38 and as such he could not appear when the case was called out the Court refused to accept the application and asked the Counsel to make proper application alongwith accompanying affidavit. This assertion has not been denied in Paragraph 6 of the counter affidavit. The contents of Paragraph 6 of the counter affidavit reads as under:

'That in reply to the contents of Paragraph No. 3 of the affidavit, the deponent submits that there is no application on record filed by Sri B.P. Singh Advocate on 7.10.1994. A manufactured application after dismissal of leave to appeal by Supreme Court of India has been annexed.'

7. What has been averred in Paragraph 3 is that there is no application on the record. It is nobody's case that any application was brought on record. What has been stated is that Sri B.P. Singh appeared before the Court in the course of the day with an application in which details were set out about his absence but the Court refused to accept the same and insisted that proper application with accompanying affidavit be filed. Therefore, it follows that the Counsel who was earlier representing the appellant in appeal had appeared before the Court and had explained his absence on the date when the appeal was dismissed but since the appellant at that time, had reacted by withdrawing instructions from Sri B.P. Singh and made over his case to Sri L.P. Singh, Advocate who happened not to be the Counsel of the appellant at the time when appeal was dismissed, it is incomprehensible how either the appellant or his Counsel could be aware of these facts, in the circumstances, it leaves no manner of doubt that the facts were of pivotal significance which revealed that Counsel then representing the appellant did not show lack of diligence in prosecuting the matter after the appeal had been dismissed for default and sufficient cause had been shown constituting valid ground as envisaged under Order XLVII, Rule 1 C.P.C. A scrutiny into the record also reveals that the factum of making application containing details of absence of the Counsel could not be brought to the notice of the Court rejecting the application as the said application had not been filed by the Sri B.P. Singh who then represented the appellant in the Court and in my considered view, this factum elucidated in the review petition constitutes important piece of evidence which has not been repudiated and furnishes ample foundation for review.

8. In this connection I am also of the considered view that leaving apart whether there was any fault on the part of the Counsel or not, the very absence deliberate or intentional on the part of Counsel to appear and argue the case, cannot be visited on a litigant to his detriment. In Rafiq v. Munshilal, AIR 1981 SC 1400, the Apex Court held that view that the litigant should not suffer for the fault of Counsel. The relevant observation made by the Apex Court may be excerpted below.

'.....the problem that agitates us is whether it is proper that the party should suffer from the inaction, deliberate omission or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order.....'

9. In the above perspective, and also considering the decisions aforestated, I am also convinced that the delay in filing the review petition has been properly explained also taking into account the fact that the appellant had thereafter preferred Application for Special Leave Petition and he preferred the present review petition immediately after dismissal of S.L.P, and receipt of letter from his lawyer representing him in the Apex Court. In the circumstances, the delay in filing the review petition is condoned accordingly.

10. Reverting to the merit of the review petition, from the galaxy of arguments made across the bar by the

learned Counsel for the parties, the questions of considerable nicety that emerges for consideration are Whether while rejecting Special Leave Petition at admission stage without notice, the order passed by the Apex Court debars making review application after rejection of the restoration application by the High Court and whether no review would lie in following cases- (i) if the order of inferior Court merged with the order of superior Court and on principle of doctrine of merger, the order of inferior Court merged with the order of Superior Court and did not survive; (ii) if the order or judgment passed by a superior Court has force of resjudicata; (iii) if the judgment of the Apex Court is hit by principles of Article 141 of the Constitution in which it is envisaged that law declared by the Supreme Court shall be binding on all Courts within the territory of India and (iv) if the order passed by the Apex Court is final and in view of judicial discipline, the High Court cannot entertain review of the order/judgment. In view of the above the following questions also arise for consideration- (1) Whether in view of the order passed by the Apex Court while rejecting application for Leave to appeal under Article 136 of the Constitution of India without issuing notice of hearing to Opp. Parties, the order of the High Court shall be deemed to be merged with the order of Apex Court; (2) Whether the judgment of the Apex Court dated 19.12.1997 has the force of resjudicata and subsequent proceeding of review in the High Court is barred and not maintainable; (3) whether the judgment passed by the Apex Court dated 19.12.1997 is a law declared under Article 141 of the Constitution and review of the same is not maintainable and (4) whether the order passed by the Apex Court has the effect of being binding on the High Court in view of Judicial discipline and also whether the order passed by the Apex Court was binding between the parties and High Court had no power to entertain the review application.

11. Closely interknit with the first question is the question whether doctrine of merger would be applicable to the facts of the present case and therefore, it would be appropriate to delve into effect and application of doctrine of merger to the present case. The word 'merge' means to sink or disappear in something else or to be absorbed or extinguished; to be combined or to be swallowed up. In law, 'merger' means absorption of things of lesser importance by a greater. The order passed by the Apex Court on the S.L.P. under Article 136 of the Constitution of India thereby rejecting application without issuing notice exparte does not have the effect of reversing or modifying the decree or order. In connection with this question, decision of the Apex Court in Kunhayammed v. State of Kerala, (2000) 6 SCC 356, bearing on the point, may be referred to in which the Apex Court while elaborating on doctrine of merger held that doctrine of merger is merely a common law doctrine based on principles of propriety in the hierarchy of judicial system and it postulates merger of the subordinate forum's decision in the decision of the appellate or revisional forum, modifying, reversing or affirming such decision and thereafter only the latter and not the former exists in the eye of law. The Apex Court further held that the doctrine is not of universal or unlimited application and its applicability has to be determined keeping in view of the nature of jurisdiction exercised by the superior forum and the content or subject matter of the challenge. The Apex Court further held that dismissal at the stage of special leave by non-speaking order does not constitute res judicata and does not culminate in merger of the impugned decision and hence it would not by itself preclude the aggrieved party from seeking relief in writ jurisdiction or review jurisdiction of the High Court. The Apex Court further clarified that rejection of special leave petition without notice by speaking or reasoned order also does not culminate in merger of the impugned decision but reasons stated therein, if contain a point of law, would amount to a declaration on appoint of law and would attract Article 141 of the Constitution. The Apex Court further summed up the legal position as under:

(1) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;

(2) If the petition-seeking grant of leave to appeal is dismissed, it is an extension of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out.

(3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the

appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him though in an appropriate case, inspite of having granted leave to appeal the Court may dismiss the appeal without noticing the respondent.

(4) Inspite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted; the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.'

12. In the light of the above ratio, I would now revert to scan it dismissal of S.L.P. by the Apex Court would attract principles of merger in the facts of the present case. The order passed in S.L.P. by the Apex Court is an order of dismissal simplicitor inasmuch as the Apex Court simply refused to grant the gate-pass to the petitioner for decision on merits and what has been stated was merely an expression of opinion by the Apex Court that a case for invoking appellate jurisdiction of the Court was not made out. The order could have the effect of having been reversed or modified only after the Apex Court had assumed the appellate jurisdiction after granting leave to appeal. If the order before the Supreme Court cannot be reversed or modified at S.L.P. stage it also cannot be affirmed at S.L.P. stage and as such it cannot be said that the order stood merged with the order of the Supreme Court rejecting Special Leave Petition or order of the Supreme Court and doctrine of merger cannot be called in aid for application. In case the appellate Court had issued notice and passed orders on S.L.P. after hearing both the parties, the order of the High Court informed with reasons in certain cases could have been said to be merged with the judgment of the Supreme Court but in the present case where Special Leave Petition was rejected at the motion hearing stage without issuing notice or hearing parties by which neither the Court modified or reversed the order and obviously could not confirm also, the doctrine of merger is not attracted for application.

13. Coming to the second question whether judgment of the Apex Court is binding under Article 141 of the Constitution of India and whether it can be said to be law declared by the Apex Court which shall be binding on all the Courts, I have traversed upon the arguments advanced across the bar and also the law laid down by the Apex Court and I veer round to the view that the order rejecting Special Leave petition does not stand substituted in place of the order under challenge and it can merely be said that the Court was not inclined to exercise its discretion so as to allow the appeal being filed. As spelt out by the Apex Court itself in Paragraph 40 of its decision in Kunhayammed v. State of Kerala (supra), the Special. Leave petition may be rejected on number of grounds such as barred by time or being a defective presentation, the petitioner having no locus standi to file the petition, or the conduct of the petitioner disentitling him to any indulgence by the Court, the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the Country and so on. If the order of dismissal was passed by a non-speaking order and no reasons have been assigned, no law can be said to have been declared by the Apex Court. It has been clarified by the Apex Court that the dismissal is not of the appeal but of the special leave petition. Even if the Apex Court has gone into merits of the special leave petition, it would be confined to merits of the special leave petition only and not that of the order under challenge. In connection with this question the observation made by the Apex Court in Kunhayammed v. State of Kerala (supra) may be aptly excerpted below.

'The revision can be filed even after S.L.P. is dismissed is clear from the language of Order XLVII, Rule 1 (a) of the C.P.C. Thus the words 'no appeal' has been preferred in Order XLVII, Rule 1 (a) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior Court. Therefore, the review can be preferred in the High Court before special leave is granted but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Court's order vests in the Supreme Court and the High Court cannot entertain a review thereafter unless such a review application was preferred in the High Court before special leave was granted.'

In concluding part, the Apex Court held as under:

(v) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

14. Considering of what has been discussed and held by the Apex Court (supra), the question whether the order of the Apex Court had the force of resjudicata lends itself for answer. As referred to and discussed above considering the ratio of the decision in Kunhayammed v. State of Kerala (supra), the exparte dismissal at the stage of special leave and on this question also rejection of application for leave and refusal to exercise discretion in granting leave to file appeal does not amount to resjudicata in subsequent proceeding between the parties. This is also clear from the law laid down by the Apex Court in Ramnik Vallabhdas Madhvani v. Taraben Pravinlal Madhavani, (2004) (1) SCC 497. Paragraphs 20 of the judgment being germane to the controversy involved in this matter may be excerpted below.

'It follows that disposal of SLP against a judgment of the High Court does not mean that the said judgment is affirmed by such dismissal. The order on a special leave petition is also never res judicata. In the present case, we are at a stage where we are hearing appeals i.e. leave no appeal has already been granted and these are full-fledged appeals against the judgment of the High Court before us. Therefore, we are entitled to go into the question of legality and correctness of the impugned judgment.'

15. In the above perspective, I am of the view that the order passed in S.L.P. by the Apex Court is not fraught with the consequence of operating as resjudicata.

16. In the perspective of the above ratiocination of the Apex Court, I feel called to examine the next question whether the order passed by the Apex Court contained reasons and had the effect of being binding within the meaning of Article 141 of the Constitution. The order of the Apex Court spells out that 'The application seeking recall has been read to us and that statement is indeed correct. Even assuming that the High Court was in error in talking of the learned Advocates when there was only one, it was necessary that the reason why that advocate could not appear when the case was called out should have been stated in the application for recall.' In connection with the contention whether reasons assigned in the order of dismissal of S.L.P. could be assumed to be reasons having binding force and inhibiting review if any, before the High Court, the observation of the Apex Court is of pivotal importance and may be adverted to. In Para 40 the Apex Court explicitly expounded that 'where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court.' The observation of the Apex Court in the order rejecting S.L.P. as aforestated, does not, in my opinion, have the effect of finding which would bind the parties thereto and also the Court, tribunal or authority in subsequent proceeding by way of judicial discipline inasmuch as it has already been held in the preceding part of this judgment that valid materials relating to absence of Sri B.P. Singh learned Counsel could not be brought to the cognizance of this Court owing to the reasons that Sri B.P. Singh, who was the Counsel representing the appellant had been disengaged by the appellant and in his place Sri L.P. Singh who had been instructed to file appropriate application before the High Court could not be said to be aware of the details about absence of Sri B.P. Singh and also the details about what transpired between him and the Court at that time and it is this circumstance which satisfactorily explains the absence of necessary averments and it would thus crystallise

that in the absence of correct facts before the Apex Court the S.L.P. came to be dismissed. The absence of relevant averments in the application for restoration was the ground for rejection of the S.L.P. Although there is nothing in the order of the Apex Court permitting the appellant to bring all those facts which are missing in the original application to constitute sufficient cause through a review but at the same time considering the observation of the Apex Court in Para 40 of its decision in Kunhayammed (supra) that even if reasons have been assigned in the order rejecting an SLP still the order remains the one rejecting prayer for the grant of leave to appeal and having regard to the contents of the letter issued from the learned Counsel representing the appellant in the Apex Court to the effect that the petitioner should go back to the High Court for appropriate relief and also regard being had that Sri B.P. Singh had been disengaged by the appellant and, the new Counsel engaged by the appellant could not be said to be aware of what had transpired between Sri B.P. Singh and the Court, I am of the considered view that reasons assigned in the order rejecting S.L.P. would not constitute law declared by the Supreme Court within the meaning of Article 141 of the Constitution operating as an obstacle in the way of filing review petition as envisaged under Order XLVII, Rule 1 C.P.C. In connection with the above, the provisions of Order XLVII, Rule 1 C.P.C. may also be reckoned with. Order XLVII, Rule 1 of the C.P.C. may be excerpted below.

'1. Application for review of judgment.- (1) Any person considering himself aggrieved (a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, (b) by a decree or order from which no appeal is allowed, or (c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.'

17. Considering the aforestated provisions of Order XLVII, Rule 1, it leaves no misgiving creeping in my mind that the fact that details were not available to the new Counsel engaged by the appellant after dismissal of the second appeal and as such he could not furnish details, does constitutes a case of discovery of new and important evidence which could not be brought to the notice of the Court earlier owing to reasons as set out in the affidavit filed in support of review application. In this connection, observation of the Apex Court may be referred to which quintessentially spells out that the review can be filed even after S.L.P. is dismissed, is clear from the language of Order XLVII, Rule 1 (a) C.P.C. Thus the words 'no appeal' has been preferred in Order XLVII, Rule 1 (a) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior Court. Therefore, the review can be preferred in the High Court before special leave is granted but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Court's order vests in the Supreme Court and the High Court cannot entertain a review thereafter unless such a review application was preferred in the High Court before Special leave was granted. In the instant case, S.L.P. was dismissed end considering the ratio of decision of the Apex Court, the review can he filed on any ground and entertained inasmuch as no appeal would be deemed to be pending before the Apex Court. It is also notice worthy that new and importance evidence was not available before the Apex Court so as to enable it to pronounce its opinion. Therefore, on this count also, the review preferred by the appellate cannot be said to be barred within the meaning of Article 141 of the Constitution of India.

18. In the perspective of contentions advanced across the bar, a subsidiary question has surfaced for consideration whether entertainment of review in the wake of order of dismissal of S.L.P. by the Apex Court would amount to subversion of judicial discipline. The elucidation on this aspect is also essential to obviate the misgiving least any observation in this judgment be construed as an attempt to overreach the order of the Apex Court dismissing the S.L.P. and in consequence, it be construed to mean subversive of judicial discipline. In its decision in Kuhayammed v. State of Kerala (supra), the Apex Court was seized of the ratio of a three-judge Bench decision in Abbai Maligai Partnership Firm v. K. Santhakumaran, (1998) 7 SCC 386. It was a

matter involving eviction proceeding initiated before the Rent Controller. The order passed therein was subjected to appeal and then revision before the High Court. Special Leave petitions were preferred before the Supreme Court where the respondents were present on caveat. Both the sides were heard through the Senior Advocates representing them. The special leave petitions culminated in dismissal. Thereafter the High Court entertained review petitions which were highly belated and having condoned the delay reversed the orders made earlier in civil revision petitions. The orders in review were taken in challenge by filing appeals under leave granted on special leave petitions. The Apex Court observed that what was done by the learned Single Judge was subversive of judicial discipline. It is obvious from close scrutiny of the ratio the said decision that in that case both sides were heard through the Senior Advocates representing them and the Apex Court was also of the view that tenants in that case were indulging in vexatious litigations abusing the process of the Court by approaching the High Court and in this perspective entertainment of review petition and then reversing the earlier orders was deemed to be an affront to the order of the Apex Court while in the case in hand, the S.L.P. was dismissed without hearing the Opp. Parties and without issuing notice to them. Besides it is also noticeable in the instant case that certain material facts regarding absence of Sri B.P. Singh Advocate on the date and also the facts as to what transpired between Sri B.P. Singh and the Court on the said date which were exclusively within the knowledge of Sri B.P. Singh alone Who had been disengaged by the appellant immediately after intimation by the Counsel were not before the Apex Court as a fresh material in this regard and this led to making of the order containing reasoning that 'it was necessary that the reason why that advocate could not appear when the case was called out should have been stated in the application for recall'. Since the aforesaid facts constituted material and important evidence under Order XLVII, Rule 1 of the C.P.C. it could be made the basis to entertain the review petition filed by the appellant in the face of new and important evidence as envisaged under Order XLVII, Rule 1 of the C.P.C. inasmuch as refusal to entertain review petition on new and important evidence as contemplated under Order XLVII, Rule 1 C.P.C. is not intended in the entire decision rendered in Kunhayammed v. State of Kerala (supra) and in the circumstances, in my considered opinion, upon a punctilious reading of the judgment in entirety, entertainment of review petition on new and important evidence as contemplated under Order XLVII, Rule 1 C.P.C. as noticed in the foregoing part of this judgment, in the facts and circumstances of the present case is not intended to mean subversive of judicial discipline. Normally, a decision of the Higher Court or of a division bench is followed on principles, of judicial comity to avoid conflict of authority and to secure certainty and uniformity in the administration of justice. As stated supra, the appellant has carved out a strong case for reviewing the matter not only on new and important evidence as contemplated under Order XLVII, Rule 1 C.P.C. but also considering that both the parties will now get opportunity to present their respective cases and will be heard on merits of the second appeal. In consequence, I am of the view, the respondent would not in any way be prejudiced in case the matter is heard and decided on merits. I would also not scruple to say that it has been held in the foregoing part of this judgment that the appellant who had initially engaged Sri B.P. Singh, Counsel to argue the case on merits was not in a position to reach the Court to appear in the second appeal and therefore, cannot be said to be at fault. In view of this, non-appearance of his Counsel and also regard being to settled position in law that a litigant who entrusted his case to a Counsel to appear and argue the case cannot be made to suffer for the fault of his Counsel, it would be a fair inference to make that appellant cannot be made to suffer for non-appearance of his Counsel and there is strong case for review on this count also.

19. I have also adverted to the decisions cited across by the bar by Sri M.P. Sinha. The cases relied upon by Sri Sinha are, 1994 (1) ACJ Page 55, 1997 (1) ACJ Page 586, 1998 (2) ACJ 1270, 1999 (2) ACJ 1396, 2002 (2) ACJ 1328, 2003 (1) ACJ 268 and 2004 (1) ACJ 712, Firstly, it may be noticed that the decisions cited do not deal with finer aspects as dealt and discussed by the Apex Court in Kunhayammed (supra) and secondly, the decisions cited have been rendered in different context. After surveying all the above decisions, I would confine myself to saying that judgments cited are illuminating but they do not squarely apply to the facts of the present case. It would suffice to say that decisions cited by Sri M.P. Sinha, are unavailing and cannot be brought to bear to prop up the case of the respondents.

20. However, as a result of foregoing discussion, the review application is allowed and the order passed by this Court dated 17.9.1997 dismissing the restoration application and also the order dated 7.10.1994 dismissing the second appeal are set aside and in consequence, the second appeal shall stand restored to its original number.