

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Review No.4 of 2016

IN

MA 513 of 2009

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Sri Rajesh Kumar son of Late Yog Narayan Prasad resident of village - Dhanuki Chandpura, P.S. Benipatti, District - Madhubani having local temporary residence at Flat No. 403, Amba Sada, I.A.S. Colony, Kidwaipuri, District - Patna.

.... Petitioner

Versus

Smt. Pushpa Rani wife of Sri Rajesh Kumar resident of Shanti Sadan, Shanti Marg, Mithapur, P.S. Jakkanpur, District - Patna.

.... Respondent

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Appearance :

For the Petitioner : Mr. Y.V. Giri, Sr. Advocate

Mr. Ashish Giri, Advocate

Mr. Pranav Kumar, Advocate

For the Respondent : Mr. S.D. Sanjay, Sr. Advocate

Mrs. Priya Gupta, Advocate

Mr. Binod Kr. Singh, Advocate

Ms. Vagisha Pragya Vacaknavi, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 16-09-2016

Whether dismissal of a Special Leave Petition by the Supreme Court against an order, passed in an appeal arising out of a decree granted for *judicial separation*, bar a petition for review of the appellate decree, whereby the decree for *judicial separation* stood set aside? Subsequent to the granting of decree for *judicial separation*, when a marriage is dissolved by a decree of divorce and one of the parties after the decree of divorce had solemnized his marriage and fathered children, whether these facts are relevant for consideration at the time, when an appellate



Court considers the sustainability of the decree for *judicial separation*? What are the fall out or the effect, when a person, having received the decree for *judicial separation* applies, for divorce, the decree for dissolution is granted and he remarries and fathers children? Whether these facts are relevant for consideration, in an appeal, which arises out of the decree for *judicial separation*, and whether these facts, if relevant, have a bearing on outcome of appeal? Whether such a development, which is subsequent to the granting of a decree for *judicial separation*, is an aspect, which must necessarily be taken into account by appellate Court before it chooses to interfere with the decree for *judicial separation*? These are, amongst others, some of the important questions, which the present review petition has raised.

2. The material facts, which have given rise to the present review application, may, in brief, be set out as under:

(i) The petitioner-husband made an application, under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act'), seeking a decree of divorce on the ground of *cruelty* and *desertion*. This application gave rise to Matrimonial Case No. 567 of 2007, in the Family Court, Patna. Attempts made for conciliation, during the course of matrimonial proceeding having failed on 25.04.2008, the learned Principal Judge, Family Court, Patna,

made, on 22.07.2008, an interim order restraining the parties, i.e., the petitioner-husband and the respondent-wife, from visiting each other's house during the pendency of the matrimonial proceeding unless they allow each other's visit to their respective houses with free consent.

(ii) The respondent-wife herein challenged the order, dated 22.07.2008, before this Court in Civil Revision No.1181 of 2008. However, this Court, on 12.01.2009, while declining to interfere with the order, dated 22.07.2008, directed the learned Principal Judge, Family Court, Patna, to dispose of the matrimonial proceedings within three months.

(iii) Finally, the matrimonial proceedings culminated into a decree, dated 11.08.2009, for *judicial separation* instead of dissolution of marriage. As many as 14 (fourteen) instances of cruelty by the wife were cited in the matrimonial proceedings and 6 (six) more grounds of cruelty were evinced during the course of the evidence in support of the order of judicial separation passed by the learned Principal Judge, Family Court, Patna. The respondent-wife, thereafter, filed Misc. Appeal No.513 of 2009 against the decree for *judicial separation*, dated 11.08.2009. During the pendency of Misc. Appeal No.513 of 2009, this Court, too, made efforts for reconciliation in Misc. Appeal No. 513 of 2009, but the same failed.

(iv) A period of one year having elapsed since



the decree for *judicial separation* had been passed and as there was no resumption of cohabitation between the parties to the marriage for a period of one year since after passing of the decree for *judicial separation*, the petitioner-husband instituted Matrimonial Case No. 646 of 2010, in the Family Court, Patna, seeking a decree for dissolution of marriage under Section 13(1-A)(i) of the Act on the ground that there was no cohabitation between the parties for the past one year since after the decree for *judicial separation* was passed.

(v) At the instance of the respondent-wife, the said Matrimonial Case No.646 of 2010 was transferred to the Court of learned Principal Judge, Family Court, Allahabad. Though it was at the instance of the respondent-wife that the Matrimonial Case No.646 of 2010 had been transferred to the learned Principal Judge, Family Court, Allahabad, the respondent wife had appeared in Matrimonial Case No.646 of 2010 and filed a written statement, but she, thereafter, abstained from the proceeding and the case, thus, remained unattended. Since respondent-wife defaulted in pursuing her case after having filed written statement, the learned Principal Judge, Family Court, Allahabad, proceeded *ex parte* in Matrimonial Case No. 646 of 2010. By the *ex parte* judgment and decree, dated 24.01.2013, the learned Principal Judge, Family Court, Allahabad, dissolved the marriage on the ground that by order, dated 11.08.2009, passed by the learned

Principal Judge, Family Court, Patna, in Misc. Case No.513 of 2009, both the parties stood judicially separated for more than one year.

(vi) Thereafter, the petitioner-husband remarried, on 12.05.2013, after the expiry of the period of limitation for filing appeal, as envisaged by Section 28 of the Hindu Marriage Act, 1955, was over. From the marriage, which so took place, two children were born.

(vii) Aggrieved by the *ex parte* judgment and decree, dated 24.01.2013, the respondent wife filed Misc. Case No.11 of 2013, under Order 9 Rule 13 of the Code of Civil Procedure, in the Family Court, Allahabad. Following this application, the earlier *ex parte* judgment and decree for dissolution of marriage, dated 24.01.2013, aforementioned, came to be set aside by order, dated 18.10.2013, which, at the instance of petitioner-husband, has been impugned in the First Appeal No.100 of 2014 in the High Court of Allahabad, inasmuch as the decree for dissolution of marriage came to be set aside after the petitioner had, as already indicated above, remarried.

(viii) However, the Misc. Appeal No. 513 of 2009, which had arisen out of decree for *judicial separation*, was heard and by order, dated 23.07.2015, the decree for *judicial separation* granted on the ground of cruelty, by the learned Principal Judge, Family Court, Patna, was set aside.



(ix) Aggrieved by the order, dated 23.07.2015, passed by this Court, in Misc. Appeal No. 513 of 2009, the petitioner-husband preferred an appeal before the Supreme Court through Special Leave Petition (Civil) No.29992 of 2015, which was dismissed, on 30.10.2015, without assigning any reason therefore.

(x) The petitioner-husband has, now, filed this *petition* seeking review of the order, dated 23.07.2015, passed in Matrimonial Appeal No. 513 of 2009.

3. Broadly speaking, the petitioner-husband has sought for review of the order, dated 23.07.2015, aforementioned, primarily, on the ground that while hearing the appeal, it escaped the attention of the Court that the period of limitation for preferring appeal against the decree for dissolution of marriage having elapsed, the petitioner-husband had already remarried and had two children from his second marriage. These were such facts, which could not have been ignored inasmuch as any interference with the decree for *judicial separation* would not put the parties, to the decree for *judicial separation*, in the same position in which they were before the decree for *judicial separation*, was granted inasmuch as the parties to the decree for *judicial separation*, on the date of decree for *judicial separation*, were married to each other, whereas, since after the passing of the decree for *judicial separation*, a third party had entered the scene, third



party being petitioner-husband's second wife and her two children. When Court cannot put the parties in the same position in which they were, if the decree for *judicial separation* is interfered with and set aside, it makes the appeal infructuous and the Court should not, it is contended, interfere with such a decree for *judicial separation*; more so, when there was no order of stay against the decree for *judicial separation* restraining the petitioner-husband or causing any impediment on his right to apply for divorce, though the question, whether he was entitled to the divorce or not, is altogether a different question. This apart, interference with the decree would not only render the second marriage illegal, but also render the two children, who were otherwise legitimate, as illegal children, causing, thus, irreparable harm and damage to two minor children, who are innocent and, secondly, there was enough material showing that the petitioner-husband had been subjected to mental cruelty by his wife and, therefore, on this ground, too, the order, dated 23.07.2015, allowing the Misc. Appeal No. 513 of 2009, needs to be reviewed.

4. We make it clear that we do not deem it proper to review judgment and decree, dated 23.07.2015, aforementioned, on the ground that there was enough materials proving that the respondent-wife had subjected the petitioner-husband to cruelty inasmuch as re-examination of



the evidence for the purposes of determining if our finding, on the question of cruelty, had been correctly reached or not, would amount to rehearing of the appeal, which is not permissible in law. The only ground, therefore, of seeking review of the decree dated 23.07.2015, is: *Whether this Court, in the light of the developments, which had taken place subsequent to granting of the decree for judicial separation, ought to have held that since there was no order of stay against the decree for judicial separation and, on the basis of this decree, the marriage having been dissolved by a decree of divorce, the petitioner-husband having already re-married, he having children, the appeal, in question, became infructuous.*

5. We have heard Mr. Y.V. Giri, learned Senior Counsel, appearing for the petitioner-husband, and Mr. S.D. Sanjay, learned Senior Counsel, appearing for the wife-respondent.

6. Mr. S.D. Sanjay, learned Senior Counsel, appearing for the wife-respondent, has opposed the maintainability of the review application on the ground that the Special Leave Petition (Civil) No. 29992 of 2015, which the petitioner-husband had preferred against the order, dated 23.07.2015, passed in Misc. Appeal No.513 of 2009, setting aside the decree for judicial separation, having been dismissed by the Supreme Court on 30.10.2015, the order, dated

23.07.2015, passed in Misc. Appeal No. 513 of 2009, has attained finality and cannot be re-opened inasmuch as the order, dated 23.07.2015, has, according to Mr. S. D. Sanjay, learned Senior Counsel, merged into the order, dated 30.10.2015, passed by the Supreme Court in Special Leave Petition.

7. The resistance so offered at the threshold has been seriously controverted by Mr. Y.V. Giri, learned Senior Counsel, appearing on behalf of the petitioner-husband, by contending that dismissal of Special Leave Petition by the Supreme Court without assigning any reason therefor does not bar filing of review petition against the order, which was impugned in the Special Leave Petition inasmuch as *doctrine of merger*, contends Mr. Giri, learned Senior Counsel, does not apply to such a case. In support of this submission, Mr. Giri, placed reliance on the decision in ***Kunhayammed Vs. State of Kerala***, reported in 2000(6) SCC 359.

8. Reacting to what has been submitted by Mr. Giri, learned Senior Counsel, to show that this review petition is maintainable, Mr. S. D. Sanjay, learned Senior Counsel, has referred to the decisions, in ***Meghmala and others Vs. G. Narasimha Reddy and others***, reported in **(2010) 8 SCC 383**, and also to the decision of the Supreme Court, dated 19th October, 2012, made in ***Khoday Distilleries Ltd. and***

others Vs. Mahadeshwara S.S.K. Ltd. (Special Leave Petition (Civil) No. 490 of 2012), wherein the Supreme Court, having found that there are contradictory decisions on the question of maintainability of review after dismissal of Special Leave Petition, has referred the matter to a larger Bench for authoritative pronouncement.

9. While considering the question as to whether a review petition would stand barred if it is filed after dismissal of the *Special Leave Petition*, the relevant observations made, in **Meghmala** (supra), and relied upon by Mr. S. D. Sanjay, learned Senior Counsel, appearing at paragraph 25, are reproduced hereinbelow:

"25. Thus, the law on the issue stands crystallized to the effect that in case a litigant files a review petition before filing the special leave petition before this Court and it remains pending till the special leave petition stands dismissed, the review petition deserves to be considered. In case it is filed subsequent to dismissal of the special leave petition, the process of filing review application amounts to abuse of process of the court.

10. What the decision, in **Meghmala** (supra), thus, lays down that if review petition has been filed before the Special Leave Petition is filed and dismissed, the review petition still remains pending for consideration and deserves to be considered. However, if such an application for review



was made after dismissal of the review petition, then, the process of filing of such a review application would amount to abuse of process of the Court and would, therefore, not be possible. The conclusion, so arrived at, in **Meghmala** (supra), runs contrary to the law laid in **Kunhayammed** (supra), wherein the Court has held that if the leave to appeal has not been granted at the very threshold without entering into the appellate jurisdiction, the *doctrine of merger* would not apply and, therefore, dismissal of the Special Leave Petition without assigning any reason would not subsume the order against which the Special Leave Petition was filed. Hence, in the light of decision, in **Kunhayammed** (supra), notwithstanding the dismissal of a Special Leave Petition, review petition is still maintainable. The position of law, in this regard, has been summed up, at paragraph 44, in **Kunhayammed** (supra), in the following words:

"44. To sum up, our conclusions are :

(i) Where an appeal or revision is provided against an decree passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the decree put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or decree appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter."

11. There does exist a distinction between an appeal and a leave to apply for appeal. When an appeal is provided and the appeal is preferred, the appeal stands instituted; but when a leave for appeal is applied, then, until the leave is, in such a situation, granted, there is really no



appeal. Hence, the disposal of the *Special Leave Petition* or of any petition for leave to appeal does not subsume the order from which the appeal arose, for, with the rejection of the petition for leave, no appeal survived. Article 136 of the Constitution of India deals with '*special leave to appeal*', which may be granted by the Supreme Court. When *special leave to appeal* is dismissed/disallowed by the Supreme Court with or without a speaking order, the order from which the appeal arose does not merge into such an order, for, as already indicated hereinabove, with the dismissal of the *Special Leave Petition*, no appeal survives and no appeal can be said to have been borne and considered. In fact, when the *special leave to appeal* is declined, there is no appeal. Hence, question of the merger of the order into the order declining to grant special leave to appeal would not, in the light of ***Kunhayammed*** (supra), arise at all.

12. In the light of what have been held in ***Kunhayammed*** (supra), the principles laid down there being three Judge Bench is still binding on us inasmuch as the reference, made to a larger Bench by the order passed by the three Judge Bench in ***Khoday Distilleries Ltd.*** (supra), has not laid down any law, as indicated above, and only referred the matter to a larger Bench. The decision, in ***Meghmala*** (supra), being a two Judge Bench, we are presently bound by the decision in ***Kunhayammed*** (supra), which lays down that

if a Special Leave Petition is dismissed *in limine* without the appeal having come into existence, because of the leave having been declined, the *doctrine of merger* will not apply and, therefore, a petition for review of the order of the High Court remains open.

13. Situated thus, we are clearly of the view that in the light of the decision in ***Kunhayammed*** (supra), this Court does have the power to review if a case for review is made out.

14. Let us, now, deal with the rival submissions made by both the parties and determine the scope and ambit of the power of review of the High Court.

15. Before we enter into the question as to whether the judgment and order, under review, call for review, apposite it is, in our considered view, to bear in mind, that the scope of review, which has undergone, as the days have rolled by, some significant changes inasmuch as there was a time, when it was considered impermissible to review a judgment and order unless a statute provides therefor; but, the Courts, with the passage of time, have concluded that justice is, after all, a virtue, which must prevail over all barriers and that the rules, procedures or technicalities of law must, if necessary, bend before justice and that such a situation may arise, when a court finds that it has rendered a decision, which it would not have rendered, but for an assumption of fact, which, in fact, did



not exist and its adherence to such a faulty decision would result in miscarriage of justice. In such cases, nothing can prevent a court from rectifying its own error, because the doctrine of "*actus curiae neminem gravabit*", (i.e., an act of court shall prejudice none), can be invoked, in such a case, for correcting the error committed by the court.

16. Similarly, at one point of time, it was considered to be a rule of universal application that review by a court of its order is not possible except on three prescribed grounds, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed, (ii) mistake or error apparent on the face of the record or (iii) any such sufficient ground, which is analogous to the two grounds aforementioned. However, it has, now, surfaced in the light of the judicial pronouncements, that the expression, '*any sufficient ground*', must be analogous to the two grounds aforementioned, is no longer a rule of universal application.

17. A review of a judgment and order is, therefore, permissible, where a glaring omission or patent mistake or grave error has crept in, because of judicial fallibility.

18. This Court must remain mindful of the basic principle of review that a review is not a rehearing of a matter on merits and cannot be lightly entertained by the Court.

Observed the Supreme Court, in **Sow Chandra Kanta v. Sk. Habib**, reported in **(1975) 1 SCC 674**, thus:

"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsels certificate, which should be a routine affair or a habitual step."

19. Yet another principle of review is that the power of review has to be exercised to prevent miscarriage of justice or correct grave and palpable error. Laid down the Supreme Court, in **Aribam Tuleswar Sharma v. Aibam Pishak Sharma**, reported in **(1979) 4 SCC 389**, following its earlier decision in the case of **Shivdeo Singh v. State of Punjab (AIR 1963 SC 1009)** as follows:

"There is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on



the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers, which may enable an appellate court to correct all manner of errors committed by the subordinate court."

(Emphasis is supplied)

20. From the underlined portion, it becomes transparent that while an appellate Court is empowered to correct all matters of error committed by the subordinate court, review can be allowed on limited grounds and that the review cannot be sought for, much less allowed, on the ground that the decision was erroneous on merits inasmuch as such an aspect would be exclusively within the province of appellate court. Dealing with this aspect of review jurisdiction, the Supreme Court, in ***Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (AIR 1980 SC 674)***, observed, thus:

*"Whatever be the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case and the finality of the judgment delivered by the Court will not be reconsidered except **where a glaring omission or patent***

mistake or like grave error has crept in earlier by judicial fallibility."

(Emphasis is added)

21. It must be, however, kept in mind that the above observations were made by the Supreme Court, while considering the scope of Article 137 of the Constitution read with Order 47 Rule 1 CPC and Order XL Rule 1 of the Supreme Court Rules, and held, in ***Northern India Caterers (India) Ltd.***(supra), as follows:

"It is well settled that a party is not entitled to seek a review of a judgment merely for the purpose of a rehearing and a fresh decision of the case. The general principle is that a judgment pronounced by a court is final and departure from this principle is justified only when circumstances of a substantial and compelling character make it necessary to do so".

22. For instance, *if the attention of the Court was not drawn to a material statutory provision during the original hearing, the Court will review its judgment.* (See, ***Girdhari Lal Gupta v. D. H. Mehta and Another (AIR 1971 SC 2162)***). The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. (See, ***O.N. Mohindroo v. The District Judge, Delhi and Another (AIR 1971 SC 107)*** and ***Northern India Caterers (India) Ltd.*** (supra).



23. It follows, therefore, that the power of review can be exercised for correction of a mistake, but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. A review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed, no further petition for review can be entertained.

24. While considering the scope of the power of review, what needs to be noted is that under Section 114 of the Code, any person, considering himself aggrieved by a decree or order of a court from which appeal is allowed, but no appeal is preferred, or where there is no provision for appeal against the order or decree, may apply for review of the decree or order, as the case may be, in the court, which made the order or passed the decree.

25. Broadly speaking, thus, under Section 114 of the Code, review of a decree or order is possible if no appeal is provided against such a decree or order or where provisions for appeal exist, but no appeal has been preferred. This is really the substantive power of review. This substantive power of review under Section 114 has not laid down any condition as a condition precedent for exercise of the power of review nor has Section 114 imposed any fetters on the court's power to review its decision. No wonder, therefore, that the Supreme Court, in

Board of Control for Cricket, India and Another v. Netaji Cricket Club and Others (AIR 2005 SC 592), observed:

*"We are, furthermore, of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be ex facie bad in law. Section 114 of the Code empowers a court to review its order if the conditions precedents laid down therein are satisfied. **The substantive provision of law does not prescribe any limitation on the power of the court except those, which are expressly provided in Section 114 of the Code in terms whereof, it is empowered to make such order as it thinks fit.**"*

(Emphasis is added)

26. Lest the subtle but real distinction existing between the power of review, on the one hand, and the power of an appellate court, on the other, disappears completely, Order 47, Rule 1 circumscribes a court's power of review by specifying the three grounds on which review is possible, the specific grounds being, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed, (ii) mistake or error apparent on the face of the record and (iii) for "*any other sufficient reason*".

27. Having taken into account the said three grounds, which Order 47, Rule 1 embodies as the grounds for

review, the Supreme Court, in ***Moran Mar Basselios Cathlicos v. Mar Poulose Athanasius*** reported in **(2005) 4 SCC 741**, held that power of review is circumscribed by the three grounds, which have been specified in Order 47, Rule 1.

28. Explaining the scope of the third ground of review mentioned in Order 47, Rule 1, namely, "*any other sufficient reason*", the Supreme Court, in ***Moran Mar Basselios Cathlicos*** (supra), held that "*any other sufficient reason*" cannot be "*any sufficient reason*", but a reason, which is "*sufficient*" and, at the same time, at least, "*analogous*" to one of the two reasons as indicated hereinbefore, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed and (ii) mistake or error apparent on the face of the record.

29. In short, thus, what ***Moran Mar Basselios Cathlicos*** (supra) laid down was that the expression, "*any other sufficient reason*", cannot be construed as "*any sufficient reason*" and that "*any sufficient reason*" cannot become a ground for review unless even such "*sufficient reason*" is "*analogous*" to one of the other two grounds mentioned in Order 47, Rule 1, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be

produced by him at the time, when the decree was passed or
(ii) mistake or error apparent on the face of the record.

30. Board of Control for Cricket, India (supra) is one of those cases, which has elaborately dealt with the scope of the power of review, particularly, of the High Courts and, having considered the case of **Moran Mar Basselios Cathlicos** (supra), the Supreme Court has clarified, in no uncertain words, in **Board of Control for Cricket, India** (supra), that the rule that "*any other sufficient ground*" must be "*analogous*" to the other two grounds, as mentioned in Order 47, Rule 1, "*is not a rule of universal application*". The relevant observations, made, at paragraph 91, in **Board of Control for Cricket, India** (supra), in this regard, read:

"91. It is true that in **Moran Mar Basselios Cathlicos v. Most Rev. Mar Poulouse Athanasius**, MANU/SC/0003/ 1954 : [1955] 1 SCR 520, this court made observations as regards limitations in the application of review of its order stating: Before going into the merits of the case it is as well to bear in mind the scope of the application for review which has given rise to the present appeal. It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil procedure which is similar in terms of Order 47, Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the

*language used therein. It may allow a review on three specified grounds, namely (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason. **It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule", but the said rule is not universal.***

(Emphasis is supplied)

31. We may pause here to point out that when a judgment of the Supreme Court is explained by a subsequent Bench of the Supreme Court, such an explanation of its own judgment by the Supreme Court carries the same authority as does the decision, which has been explained by it. Hence, in the face of the decision, rendered in **Board of Control for Cricket, India** (supra), it cannot be contended that no ground, other than the grounds mentioned in **Moran Mar Basselios Cathlicos** (supra), can ever become a ground for review of an order or decision by a High Court.

32. In fact, there is plethora of judicial pronouncements of the Supreme Court, which shows that there can be exceptional cases, where a deviation from the grounds of review, as propounded in **Moran Mar Basselios Cathlicos**



(supra), is possible and one of such cases is the case of **Lily Thomas v. Union of India**, reported in **(2000) 6 SCC 224 : 2000 CriLJ 2433**, wherein, having taken into account the facts that (a) the power of review is a creation of statute and not an inherent power, that (b) no power of review can be exercised if not given to a court or Tribunal either specifically or by necessary implication; and that (c) under the guise of review jurisdiction, merit of a decision cannot really be examined, the Supreme Court has, in unequivocal terms, pointed out that justice is, after all, a virtue, which must prevail over all barriers and that the rules, procedures or technicalities of law must, if necessary, bend before justice and that such a situation may arise, when a court finds that it has rendered a decision, which it would not have rendered, but for an assumption of fact, which, in fact, did not exist and its adherence to such a faulty decision would result in miscarriage of justice. In such cases, rules **Lily Thomas** (supra), nothing can prevent a court from rectifying its own error, because the doctrine of "*actus curiae neminem gravabit*", (i.e., an act of court shall prejudice none), can be invoked, in such a case, for correcting the error committed by the court.

33. The real theme of the Supreme Court's decision, in **Lily Thomas** (supra), is that though the power of review cannot be exercised by a court unless the statute confers such a power and that a statutory power of review can

be exercised subject to such limitations as the statute may impose, yet a court is not powerless, in an appropriate and exceptional case, to rectify its error, because "*an act of court shall prejudice none*" and, hence, in exceptional cases, a court can invoke the doctrine of "*actus curiae neminem gravabit*" for correcting an error committed by it.

34. In fact, from the decision in ***Municipal Board, Pratabgarh v. Mahendra Singh Chawla***, reported in **(1982) 3 SCC 331: AIR 1982 SC 1493**, what clearly emerges is that when a High Court acknowledges its error and rectifies its error, which has crept in, what the High Court really does is restore the rule of law and not defeat it. Points out the Supreme Court, in ***Municipal Board, Pratabgarh*** (supra), that laws cannot be interpreted and enforced divorced from their effect on human beings for whom the laws are meant. Further observed the Supreme Court, in ***Municipal Board, Pratabgarh*** (supra), on this aspect of law, thus,

*".... Undoubtedly, rule of law must prevail but as is often said, 'rule of law must run akin to rule of life. And life of law is not logic but experience'. **By pointing out the error, which according to us crept into the High Court's judgment, the legal position is restored and the rule of law has been ensured its pristine glory...**"*

(Emphasis is added)



35. Thus, when a court discovers that a decision rendered by it, was actually based on assumption of a fact, which was non-existent, and that the court's adherence to such a decision, which was based on non-existent fact, would result in miscarriage of justice, the Court cannot be prevented from rectifying its own error, because an act of court, it is trite, shall prejudice none. In ***Board of Control for Cricket in India*** (supra), the Supreme Court laid down that an application for review will be maintainable if "*sufficient reason*" exist therefor and what, in a given case, shall constitute "*sufficient reason*" would be a question of fact and would depend on the facts and circumstances of each case. In ***Board of Control for Cricket in India*** (supra), it was also held that if as a result of misunderstanding of fact or law by a court, a mistake has crept in, which the court finds would cause or has caused miscarriage of justice, such an error can and must be corrected by court by exercising the power of review. A mistake, on the part of the court, would include, according to the decision in ***Board of Control for Cricket in India*** (supra), a mistake in the nature of the undertaking, which may have been given by a counsel meaning thereby that when a counsel, on a mistaken belief or on an erroneous or incorrect instruction, make a statement and the court acts on such a statement; but, on a review application having been subsequently filed, the court finds that it had misunderstood the counsel's submission or had got



misled by a counsel's submission or when the court finds that it had proceeded on an assumption of fact, which did not really exist, or when it finds that it had misinterpreted a provision of law or had acted on a misconception of law and that the error, so crept in, was, as a result of subsequent event or otherwise, apparent on the face of the record, and that such error had caused, or would cause, miscarriage of justice, such a reason would be a '*sufficient reason*' calling for exercise of the power of review.

36. The law, on the subject of review, may, in the light of the discussions held, as a whole, be summarized thus:

(i) Ordinarily, a court or a tribunal cannot review its order or decision if the statute does not confer on the court or the tribunal, as the case may be, the power to review its own order. This apart, whatever limitations are imposed by a statute, while conferring the power of review on a court or a tribunal, the court or the tribunal, as the case may be, must adhere to the limitations, which the relevant statute may impose on the exercise of such power. Section 114 CPC, which embodies the substantive power of review of a civil court, does not impose any limitations on the court's power to review its order or decision; yet the power of review even by a civil court cannot be unguided and uncanalised, for, Order 47, Rule 1 circumscribes the court's power of review.

(ii) Though, at one point of time, it was considered



to be a rule of universal application that review by a court of its order is not possible except on three prescribed grounds, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed and (ii) mistake or error apparent on the face of the record or (iii) any such sufficient ground, which is analogous to the two grounds aforementioned, the subsequent development of law, on the subject of review, has shown that the grounds referred to, namely, that any sufficient ground must be analogous to the two sufficient grounds aforementioned is no longer a rule of universal application.

(iii) One of the cases, which has helped in the expansion of the court's power to review its order is the case of **Lily Thomas** (supra) inasmuch as **Lily Thomas** (supra) ruled that ordinarily, the power of review, being a creature of statute, cannot be exercised as an inherent power, yet such technicalities of law may have to be bent, in an appropriate cases, for the purpose of correcting an order committed by the court if such an error arises out of a presumption of fact, which was nonexistent, and when the court finds that its refusal to review its own error would cause, or has caused, grave miscarriage of justice.

(iv) It is essentially the principle behind the



doctrine of "*actus curiae neminem gravabit*", which has made the court hold, in ***Municipal Board, Pratabgarh*** (supra), that when a court corrects and rectifies an error, it restores the rule of law and not defeat it. Even ***Rajesh D. Darbar v. Narasingrao Krishnaji Kulkarni***, reported in **(2003) 7 SCC 219**, recognises that in an exceptional case, a court may have to review its order by invoking the doctrine of "*actus curiae neminem gravabit*".

37. It is in the backdrop of the above developments of law on the scope of review, that this review petition needs to be, now, dealt with and decided.

38. The contours of power of review which we have discussed above, have been dealt with, and succinctly laid down, by a Full Bench, speaking through one of us, the learned Chief Justice, in ***The High Court of Judicature at Patna Vs. Sri K.K. Pathak***, reported in **2015 (4) PLJR 328**.

39. As to whether a case for review has been made out or not would, however, depend on the facts of a given case.

40. In the light of the law, which we have discussed above, let us now revert to the case at hand. While considering the present review petition, it needs to be noted that Section 13 (1-A) of the Hindu Marriage Act, 1955, makes it clear that if there has been no resumption of cohabitation between the parties to the marriage, for a period of one year or above, since after granting of the decree for *judicial separation*,

in a proceeding to which both, the husband as well as the wife, were parties, a decree for dissolution of marriage of the parties can be passed if either of the party to the decree for *judicial separation* applies for divorce.

41. It is, therefore, clear that if, upon filing of an appeal, seeking to get the decree for *judicial separation* set aside, no order of stay against the decree for *judicial separation* is made, the decree for *judicial separation* remains operative and, continues to run and if, in such a circumstance, a party to the decree for *judicial separation* applies to the Family Court and establishes before the Court that since the date of granting of decree for *judicial separation*, no resumption of cohabitation has taken place between the parties concerned, there is no legal impediment in granting the decree of divorce.

42. If a decree of divorce is granted, it is the decree of divorce, which needs to be interfered with, if appealed against, inasmuch as the appeal against the decree for *judicial separation*, in the absence of an order of stay, would become infructuous so long the decree for dissolution of marriage remains in force. In such a case, the decree for *judicial separation* cannot be interfered with in appeal inasmuch as such interference would render the decree for dissolution of marriage invalid, illegal, infructuous and ineffective. A Court cannot pass a decree, which would not or cannot make the parties concerned stand on the same position as they stood on

the date of institution of the appeal against the decree for *judicial separation*.

43. When the appeal against the decree for *judicial separation* came up for hearing before this Court, this Court, inadvertently, did not take care to bear in mind that since after the dissolution of marriage, in the present case, the petitioner-husband was already married and he had fathered two children and that these facts had become irreversible. In substance, the parties to the decree for *judicial separation* could not have been placed on the same footing, or in the same position, as they stood at the time, when the appeal, against the decree for *judicial separation*, had been filed.

44. The problem can be looked at from another angle. After the dissolution of marriage by a decree of divorce, the petitioner-husband had married and fathered two children and, hence, third party right had been created in the whole dispute. Therefore, interest of such a third party, who are innocent, minor and legitimate children, could not have been ignored. If, for any reason, interference with the decree for *judicial separation*, in appeal, is actually made, it would render the appeal of the petitioner-husband, against the order setting aside the *ex parte* decree for dissolution of marriage, almost redundant, infructuous and ineffective.

45. The above aspects were not considered by us at the time, when the decree for *judicial separation* was

interfered with in appeal.

46. Though considerations for a review application are very limited and exceptional, it is important to note that the infringement of fundamental rights of a citizen or statutory rights of a citizen may be a ground for reviewing an order.

47. The above principle leads us to take into account the rights of the second wife as well her children fathered by the review petitioner before us. It is noticeable that any judgment disturbing the decree for *judicial separation* has an adverse impact on the enjoyment of statutory rights, if not the fundamental rights, by the second wife, who entered the marital ties only after passing of a decree of divorce. Every wife and child of such a marriage enjoys certain rights under different statutes, such as, under Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956, etc.

48. This Court, while exercising the power of review and keeping in mind the possible infringement of statutory rights of those, who are not before this Court, needs to act by reviewing the order passed earlier. The infringement of statutory rights of wife and children from the second marriage and the hardships that would follow from reversal of the decree for *judicial separation*, had not been considered by us. We are reminded of an old maxim, *ACTUS CURIAE*

NEMINEM GRAVABIT: which means “an act of the court shall prejudice no man”. As soon as the decree for *judicial separation* was set at naught, the act of the Court caused prejudice to the second wife and her children.

49. Let us consider the above aspects from another angle. We are to see as to what will be the fate of a marriage, which is solemnized after passing of a decree of divorce. When a decree of divorce is based on a decree for *judicial separation* and the decree for *judicial separation* is reversed, the question is whether, in such a situation, the decree of divorce, too, automatically goes and the marriage becomes a nullity. It is to be borne in mind that with the passing of a decree of divorce, the marital ties between the parties come to an end. The parties are no longer treated as husband and wife and they are no longer successors of each other under the law of succession. Their respective rights and obligations, under different statutes, as husband and wife, end. Unless the decree of divorce is modified/reversed by a superior court, it remains. After the period of appeal is over or if an appeal is preferred, but is dismissed, the parties are free to go for a second marriage. It takes us to Section 15 of the Hindu Marriage Act, 1955, which reads:

Sec 15. Divorced persons when may marry again.

When a marriage has been dissolved by a decree of divorce and either there is no right

of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has dismissed, it shall be lawful for either party to-the marriage to marry again.

50. A decree for *judicial separation* merely lays down the foundation for making an application for grant of a decree of divorce. A decree for *judicial separation* does not give entitlement to a decree of divorce unless and until the grounds of divorce, as mentioned in Section 13 of Hindu Marriage Act, 1955, are in existence and proved by the party seeking such decree. Once a decree of divorce is passed and unless there is an appeal challenging the same, the decree subsists. Once there is no appeal or the period, for preferring appeal, expires or an appeal, having been preferred, is dismissed, the party can go for second marriage without any legal obstacle. Such a second marriage is always valid.

51. In the present case, the husband, having married after the decree of divorce, his second marriage is always legal. The decision of the Supreme Court, in the case of ***Lila Gupta Vs Laxmi Narain***, reported in AIR 1978 SC 1351, is worth taking note of in this regard. The Supreme Court has held, in ***Lila Gupta*** (supra), that even if the second marriage is solemnized before the expiry the period of 1 (one) year (as it then stood prior to amendment to Hindu Marriage Act in 1976),

its not a nullity. The second marriage will remain valid. The decree of divorce once granted, correctly or incorrectly, puts an end to the martial tie between the parties. That is why, subsequent second marriage is not a nullity. The decree of divorce, in the absence of any challenge to it or even when there is an appeal but without an order of stay, the relationship between the parties is not that of husband or wife. The relevant observations appearing in **Lila Gupta** (supra), read as follows:

"8. Did the framers of law intend that a marriage contracted in violation of provision contained in the proviso to S. 15 to be void? While enacting the legislation, the framers had in mind the question of treating certain marriages void and provided for the same. It would, therefore, be fair to infer as legislative exposition that a marriage in breach of other conditions the legislature did not intend to treat as void. While prescribing conditions for valid marriage in S. 5 each of the six condition was not considered so sacrosanct as to render marriage in breach of each of it void. This becomes manifest from a combined reading of Ss. 5 and 11 of the Act. If the provision in the proviso is interpreted to mean personal incapacity for marriage for a certain period and, therefore, the marriage during that period was by a person who had not the requisite capacity to contract the marriage and hence void, the same consequence must follow where there is breach of condition (iii) of S. 5 which also provides for personal incapacity to contract marriage for a certain period. When minimum age of the bride and the bridegroom for a



valid marriage is prescribed in condition (iii) of S. 5 it would only mean personal incapacity for a period because every day the person grows and would acquire the necessary capacity on reaching the minimum age. Now, before attaining the minimum age if a marriage is contracted S. 11 does not render it void even though S.18 makes it punishable. Therefore, even where a marriage in breach of a certain condition is made punishable yet the law does not treat it as void. The marriage in breach of the proviso is neither punishable nor does S. 11 treat it void. Would it then be fair to attribute an intention to the legislature that by necessary implication in casting the proviso in the negative expression, the prohibition was absolute and the breach of it would render the marriage void? If void marriages were specifically provided for it is not proper to infer that in some cases express provision is made and in some other cases voidness had to be inferred by necessary implication. It would be all the more hazardous in the case of marriage laws to treat a marriage in breach of a certain condition void even though the law does not expressly provided for it. Craies on Statute Law, 6th Edn. pages 263 and 264 may be referred to with advantage;

"The words in this section are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself is void is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in



vain for any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it (emphasis supplied) From this examination of these Acts I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create a nullity".

9. In the Act under discussion there is a specific provision for treating certain marriages contracted in breach of certain conditions prescribed for valid marriage in the same Act as void and simultaneously no specific provision having been made for treating certain other marriages in breach of certain conditions as void. In this background even though the proviso is couched in prohibitory and negative language, in the absence of an express provision it is not possible to infer nullity in respect of a marriage contracted by a person under incapacity prescribed by the proviso.

10. Undoubtedly, the proviso opens with a prohibition that : It shall not be lawful etc. Is it an absolute prohibition violation of which would render the act a nullity? A person whose marriage is dissolved by a decree of divorce suffers an incapacity for a period of one year for contracting second marriage. For such a person it shall not be



lawful to contract a second marriage within a period of one year from the date of the decree of the court of first instance. While granting a decree of divorce, the law interdicts and prohibits a marriage for a period of one year from the date of the decree of divorce. Does the inhibition for a period indicate that such marriage would be void? While there is a disability for a time suffered by a party from contracting marriage, every such disability does not render the marriage void. A submission that the proviso is directory or at any rate not mandatory and decision bearing on the point need not detain us because the interdict of law is that it shall not be lawful for a certain party to do a certain thing which would mean that if that act is done it would be unlawful. But whenever a statute prohibits a certain thing being done thereby making it unlawful without providing for consequence of the breach, it is not legitimate to say that such a thing when done is void because that would be tantamount to saying that every unlawful act is void. As pointed out earlier, it would be all the more inadvisable in the field of marriage laws. Consequences of treating a marriage void are so serious and far reaching and are likely to affect innocent persons such as children born during the period anterior to the date of the decree annulling the marriage that it has always been considered not safe to treat a marriage void unless the law so enacts or the inference of the marriage being treated void is either inescapable or irresistible. Therefore, even though the proviso is couched in a language prohibiting a certain thing being done,

that by itself is not sufficient to treat the marriage contracted in contravention of it as void."



52. In the case at hand, the petitioner-husband solemnized his second marriage only after obtaining a decree of divorce. When he solemnized his second marriage after the decree of divorce, the second marriage, notwithstanding the fact that the ex parte decree of divorce has, now, been set aside, cannot be treated as a nullity. In fact, even when a person solemnizes his second marriage, before the expiry of the statutory period of appeal, his second marriage is still not a nullity inasmuch as Section 5 of the Hindu Marriage, Act, 1955, permits solemnization of marriage between two Hindus if neither party has 'spouse' living at the time of marriage. In order to, therefore, treat the subsequent marriage a nullity, it will have to be presumed that the parties to the divorce are still spouses even when their marriage has been dissolved by a decree of divorce. This is legally not permissible inasmuch as a decree of divorce, unless stayed by an order of superior court, snaps the relationship between the parties and, hence, they are not treated as spouse or else, such second marriage, prior to expiry of appeal period, would have rendered the subsequent marriage void under Section 11 of the Hindu Marriage Act, 1955.

53. In the light of what has been discussed above, as a whole, we arrive at the conclusion that this Court, having

not taken into account the impact of interference with the decree for *judicial separation* while making the order under review, has committed an error on the face of the record and, for the reasons that we have assigned above, we are clearly of the view that in the face of the fact that the review petitioner had already married for the second time and had two children from his second marriage, the appeal against the decree for *judicial separation*, in the absence of any order of stay against the decree for *judicial separation*, had become infructuous and could not have been interfered with.

54. In the result and for the reasons discussed above, we allow this review petition and set aside the order, dated 23.07.2015, passed in Misc. Appeal No. 513 of 2009.

55. However, there shall be no order as to costs.

(I. A. Ansari, CJ)

Nilu Agrawal, J: I agree.

(Nilu Agrawal, J)

Pawan/-

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