Present :

Mr. Justice Syed Muhammad Dastagir Husain

And

Madam Justice Kashefa Hussain.

Civil Rule No. 392(Review)/(F)14.

Sheikh Mohmmad Zafor alias Abu Zafor and another.

--------- Defendant-Appellant-Petitioners.

-Versus-

Samela Bibi being dead his heirs :

Sheikh Md. Siddiqur Rahman and another.

--------- Plaintiff-Respondent-Opposite-Parties.

Mr. Abul Kalam Mainuddin with

Mr. M. Shamsul Haque, Advocates.

---------- For the petitioners.

Mr. M. Qumrul Haque Siddique with

Mr. Tushar Kanti Roy, Advocates.

---------- For the opposite Parties.

Heard on: 28.07.2015, 03.08.2015 and

Judgment on : 05.08.2015.

Kashefa Hussain, J :

This is an application by the Defendant-Appellant-Petitioners for review of judgment and decree dated 05.12.2010 passed by this Division in First Appeal No. 177 of 1998. Upon filing of the instant Review Application, Rule was issued calling upon the opposite-parties to show cause as to why the judgment and decree dated 05.12.2010 passed in First Appeal No.177 of 1998 by the High Court Division should not be reviewed and/or such other or further order or orders passed as to this Court may seem fit and proper.

The facts of the case in a nutshell, are that the appellants filed First Appeal No.177 of 1998 before the High Court Division being aggrieved by the judgment and decree dated 09.10.1997 passed by the learned Subordinate Judge, 1st Court, Khulna in Title Suit No.79 of 194 decreeing the suit. In the First Appeal, the appellant's contention inter alia was that the Respondent No.1as plaintiff instituted Title Suit No.79 of 1994 before the aforesaid Court seeking partition of the land and that it belonged to one Hossain Sheikh. The plaintiff stated inter alia, that Hossain Sheikh died leaving behind one son Akam Uddin and a daughter Samela Bibi who was plaintiff in the suit. Samela Bibi as per the plaint inherited 1/3rd share to the land under partition and the rest 2/3rd was inherited by Akam Uddin and Akam Uddin died leaving behind 2 sons Abdul Hakim Sheikh and Abu Zafor Sheikh one wife Chutu Bibi and a daughter Romesa Khatun. Akam Uddin created a registered deed of patta dated 29.11.1927 showing settlement of 5.27 acres of land in his favour measuring 14 annas share in the property of Hossain Sheikh and 2 annas were left out of settlement.

It is the plaintiff's case that the patta was a unilateral patta and was not registered by both the parties and since both Samela Bibi and her brother Akam Uddin were both minors at the time such patta was void. The plaintiff further stated that there were several previous litigations and the patta deed was cancelled. But the plaintiffs names in the suit property was not recorded as per her 1/3rd share and this compelled her to file the partition suit claiming 1/3rd share of the suit land.

The defendant Nos.1 and 2 contested the suit by filing written statement denying the allegations made in the plaint, contending inter alia, that Hosain Sheikh had lawfully settled the suit land in favour of Akam Uddin by a registered patta deed dated 29.11.1927 and that after the settlement there remaining only 2 annas share to be divided between the heirs accordingly to their proportionate shares, Akam Uddin started possessing 4.60 acres of land and died leaving behind 2 sons and his legal heirs inherited the suit land proportionately and in this manner the defendant No.2 inherited 1/5 share in the suit land. Abdul Hakim being in possession transferred 1.54 acres of land by registered kabalas deed dated 04.04.1984 in favour of defendant No.1. During possession the defendant Nos.1 and 2 also purchased lands by a number of kabala deeds and the defendant No.1 disclosed that they are in possession of the entire land except 20 decimals of such land.

During trial six issues were framed, the P.Ws and D.Ws were duly examined and exhibits were duly produced before the Court and after conclusion of the trial the learned Subordinate Jude, 1st Court, Khulna decreed the suit by his judgment and decree dated 09.10.1997 ascertaining the share of the plaintiff to the extent of 1.60 acres and ascertaining the share of Akam Uddin to the extent of 2/3rd shares.

Being aggrieved by the impugned judgment and decree dated 09.04.1997 passed by the learned Subordinate Judge, 1st Court, Khulna in Title Suit No.79 of 1994, the defendant Nos.1 and 2 preferred First Appeal being No.177 of

1998 before this division and after hearing both sides and upon scrutiny of materials on record, this division allowed the appeal mainly on the ground of defect of parties and the requirement of the suit land to be brought into the hotchpotch of the suit. Although the appeal was allowed yet the appellants preferred this review application before us arising out of First Appeal No.177 of 1998 on a specific ground of law. The petitioners in the review petition stated that due to unavoidable circumstances beyond their control they could not file an appeal against the judgment passed by the High Court Division and by the time they were ready to file an appeal, time for filing an appeal before the Appellate Division had already expired. They also stated in their review petition that the plaintiff-respondent in First Appeal No.177 of 1998 after dismissal of their suit filed a new suit afresh in the Court of Joint District Judge, 1st Court, Khulna and summons of such suit was received and only after obtaining the certified copy, of the judgment the engaged Advocate from the Khulna Bar for the first time pointed out that there was an adverse finding on law points in the judgment of the High Court Division. But due to circumstances beyond their control there was no time to file an appeal before the High Court Division and due to such unavoidable circumstances the review application was also filed with a delay of 445 days and such delay was wholly unintentional.

Mr. Abul Kalam Mainuddin with Mr. M Shamsul Haque, the learned Advocates appeared on behalf of the review petitioners while Mr. M. Qumrul

Haque Siddique with Mr. Tushar Kanti Roy, the learned Advocates appeared on behalf of the respondent-opposite-parties to resist the Rule.

Mr. Abul Kalam Mainuddin, the learned Advocate for the review petitioner while making his submissions mainly cast his thrust upon the issue of amendment of Section 107 of the Transfer Property Act particularly the date of the amendment. He takes us through the judgment passed in First Appeal No.177 of 1998 and points out that this Division in its judgment made an error in law in not taking into consideration the fact that the patta deed in question was executed on 29.11.1927 which was before the subsequent amendment of Section 107, which amendment came in 1929 only after the execution of the deed on 29.11.1927. He agitated before us that therefore the amended version of Section 107 requiring a patta deed to be executed by both the parties was not required before 1929 and consequently in the instant case shall not to be applicable to the patta deed dated 29.11.1927. He also argues before us that he had agitated the issue of amendment of 1929 and the date of the execution of the patta deed before this Division while making his submissions during the hearing in First Appeal No.177 of 1998 and further asserts that their submissions were also noted down in the judgment, but that this Division upon an error of law missed out on the legal bar of specific point not being able to give retrospective effect to a new provision of statute under the law. He further attracts our attention to a finding by this Division in its judgment that the land is agricultural land. The learned Advocate strenuously argued that inspite of express submissions made by them on the issue of the amendment of 1929 and

the non-applicability of such amendment relating to a deed executed at a prior date, yet the submissions of the appellant-petitioner remained unanswered, not addressed upon by the Court. He also persuades that having obtained knowledge of the adverse remark much later due to circumstances beyond their control, the petitioners finding no other alternative was compelled to file a review application praying before this Division for review of its own judgments.

Upon queries made by us as to the legality of filing a review application on the grounds taken by the parties, the learned Advocate for the review petitioners submits that a review application is allowable in this case since this Division in his judgment made an error apparent on the face of the record and therefore according to the learned Advocate. Review will lie in the instant case. Upon further queries the learned Advocate agitated before us that there is an error apparent on the face of the record in the judgment of this Division since this Division by not addressing itself upon an important of law rather remained 'silent' on the point and thus made a 'mistake' and due to which review petition lies.

On the other hand, Mr. M. Quamrul Haque Siddique, the learned Advocate for the respondent-opposite parties submits that this Division cannot sit on its own judgment save for few limited purposes. He points out that no new point of law was agitated and stresses upon the point that in a case where the issue was agitated before the Court but which not addressed by it, in such

cases review shall not lie. He reiterated the point that this Division can not review its own judgment on an issue which was already before it and such issue was expressly agitated before it but it was not addressed for some reason. He points out that in this event of an issue being raised even if it is then only it upon a specific point of law can be only subject of an appeal.

We have heard the learned Advocates from both sides, perused the application for review, judgments and materials on records. It transpires from the judgment passed in First Appeal No.177 of 1998 by this Division that it is true that the review petitioners had placed their submissions upon a specific point of law, but the Court had not addressed on that point.

The situation might have been different if the particular issue was not placed before the Court at all. But since in the judgment itself, their Lordships even noted the submissions made by the learned Advocate for the appellant-review-petitioners we do not have any scope to presume that the Court might inadvertently upon an error mistakenly or consciously overlooked the issue. It is obvious from the records that the issue was placed before the Court, but their Lordships decided not to address itself upon the same or did not feel it necessary to address the point same and now in remained passive and apathetic. Now , in a situation like this whether review petition shall lie against the Court's conscious passiveness and apathy or whether it is a subject of appeal, we must at first examine the provisions of a review application within the scope of order 47 of the Code of Civil Procedure which reads under :-

Upon a perusal of Order 47 and an analysis of the circumstances under which a review of a judgment may lie, as is quite obvious from the judgment itself, that no new and important matter of evidence was discovered in this case after the passing of the judgment and decree. As we discussed above, it was upon a specific point of law and such point was already submitted by the concerned counsels, as appears from the judgment itself. Hence, it does not prima-facie come within the ambit of any new and hereto before undiscovered or unraveled and important matter of evidence.

Another circumstance as provided for in Order 47 for a review to be maintainable is " on account of some mistake or error apparent on the face of the record". Here also we feel it necessary to reiterate that in this case it was not an inadvertent "mistake" or "error" by which the Court might have overlooked a specific issue. It if was, in fact an inadvertent mistake or error, review would lie. But as is obvious, the Court knowingly upon its conscious decision decided not to address the issue, whatever its reason of doing so. Under such circumstances we cannot treat a conscious decision of the Court to be 'mistake' or 'error' apparent on the face of the record. Therefore if any person feels himself aggrieved by such decision taken consciously by a Court, not to address itself upon a particular point, in those cases it should be a subject of appeal, and not review.

During course of the argument, the learned Advocates from both sides had cited a few decisions before us in support of their respective arguments and

had attracted our attention towards them and from which we are mentioning some. Learned Advocate for the petitioner had cited the principle in the case of Hosne Ara Begum –Vs- Anwara Begum reported in 5 BLC (2000) page 111 where the principle of maintainability of review in para 11 of the judgment is produced hereunder :-

> " A review is permissible only when it is seen that there was an error apparent on the face of the record in recording the judgment and order under review."

The petitioner also referred to the case of Rais Ali –Vs- Jabed Ali reported in 19 DLR (1967) page 511 where the principle cited is as follows :-

> " What is the face of the record ? The judgment which is pronounced by a Court is the face of the record of that Court. It is true that it is not every kind of error which would attract the provisions of Order 47 of the Code.
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> But there is no doubt that the judgment itself is the face of the record, whatever else may or may not be the face."

The principle in the case of Mathura Mohan –Vs- Hazara Khatun reported in 48 DLR (1996) page 190 was also placed before us in the following terms :-

Order XLVII rule I

> " When there is an omission on the part of a Court to take notice of a provision of law an application for review under Order 47 rule I CPC is competent."

In the case of Hosne Ara Begum –Vs- Anwara Khatun reported in 5 BLC page 111 the principle enumerates the circumstances under which a review may be permissible and maintains that to make a review application maintainable there has to be an error apparent on the face the record. But as we have discussed, in this case before us we do not find any error which is apparent of the record, rather it is a conscious decision of the Court by which it decided not to dwell upon a particular point raised by the party.

In the case of Rais Ali –Vs- Jabed Ali reported in 19 DLR (HC) 1967 page 511, we find an echo of the principle in the case referred to above and therefore our view on it also remains the same. But we would like to draw the attention of the learned Advocate for the petitioner and remind him that in the 19 DLR case, the Court also significantly made an observation, stating that "not every kind of error would attract the provisions of Order 47 the Code." Relying upon this observation made in the DLR case we may conclude that just because there is an error in the judgment itself, it shall not make it eligible for a review application under Order 47 of the Code.

While drawing our attention to the decision in the case of Mathura Mohan –Vs- Hazera Khatun reported in 48 DLR (1996) page 191, we find that the petitioner had relied upon the principle that in the event of an 'omission' by a Court to take 'notice' of a particular provision of law, Order 47 will come into play. But as we analyzed above, in the case before us and as it appears from the judgment in First Appeal No.177 of 1998, the fact remains that in this

particular case, there are no omissions by the Court to take 'notice' of a specific provision of law. In fact as is evident from the judgment itself, the Court did take notice of the particular provision of law by way of including the submissions of the learned Advocate on the particular point in the judgment itself. It is only that the Court unmistakably noted the particular assertion on a point of law, but knowingly decided not to address the issue and left it at that. It is certainly not an omission on the part of the Court, but a decision by the Court having full knowledge.

Therefore we find that the petitioner's reliance upon these judgments are misplaced and he has upon misinterpretation of particular circumstances and the provision of law wrongly relied upon these judgment.

Parallelly, the learned Advocate for the opposite parties relying upon a few judgments, placed those before us for our appreciation some among which we find necessary and significant to examine. The decision in the case of Ahmed Safa –Vs- Hamid Box reported in 42 DLR (1990) (HC) page 209 was cited in the context by the learned Advocate for the opposite parties where in the principle relied upon by him reads as under :-

> " Failure on the part of a judge to accept properly the submission of the learned Advocate resulting in an erroneous finding is no ground for review."

This judgment concluded that "failure" to accept properly submissions of the Advocate cannot be a ground for review. We feel that the principle enunciated may be applied to the case we are dealing with at present. Since in

the case before us also a similar circumstance exists as the one contemplated in the judgment in 42 DLR that we have referred to given that in this review application also the basic contention of the petitioners is that the High Court Division in First Appeal No.177 of 1998 "failed" to accept properly the submissions of the Advocate and which resulted in an erroneous finding. We are inclined to agree with this decision that failure to properly accept submissions cannot be a proper ground of review under Order 47 of the Code of Civil Procedure.

Besides, the learned Advocate for the opposite parties also took us to a decision of our Apex Court in the Case of Fazle Karim –Vs- Bangladesh reported in 48 DLR (AD) (1996) page 179 where the grounds in Order 47 Rule 1 of the Code of Civil Procedure was discussed and the Court placing its reliance upon Order 47 concluded in para 7 of the judgment :-

> " The Rules provide that review of a judgment or order in a civil proceeding may be made "on grounds similar to those mentioned in Order XLVII rule I of the Code of Civil Procedure" that is to say, on discovery of new and important matter or evidence which was not none or could not be produced before, (ii) on account of some mistake or error apparent on the face of the record, or (iii) for any other sufficient reason. Consistently with the principle that there is to be an end to litigation, it is now well-recognised that review is not an appeal nor a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision sought to be

> reviewed. Unless a prayer for review is based on the grounds mentioned above, the Court will not sit on the matter again for a rehearing or further hearing which is already concluded by decision even if that be erroneous."

In another Para of the judgment in the same case their Lordships finding was-

> " No mistake in a considered conclusion, what-ever the extent of that mistake, can be a ground for the exercise of review jurisdiction.
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> It is not because a conclusion is wrong but because something obvious has been overlooked, some important aspect of the matter has not been considered, that a review petition will lie. It is a remedy to be used only in exceptional circumstances."

While drawing upon its own conclusion and opinion our Apex Court in that case also placed its reliance in the case of Mohd Amir Khan –Vs- Controller of Estate Duty PLD 1962 (SC) page 335, part of which we feel significant to repeat hereunder :-

> "The indulgence by way of review may no doubt be granted to prevent irremediable injustice being done by a Court of last resort as where by some inadvertence and important statutory provision has escaped notice which, if it had been noticed, might materially have affected the judgment of the Court but in no case should a rehearing be allowed upon merits."

The main reason that we also feel that this principle in the case reported in PLD 1962 and which was relied upon by our Apex Court in the case of Fazle Karim –Vs- Bangladesh is significant and applicable in this case is that a ground for review to be maintainable applies to a situation where something obvious has escaped notice or 'overlooked through inadvertence or any other reason whatsoever. But the case in hand does not reveal any such inadvertence or error.

As we also discussed elsewhere in the judgment in this particular case there exists no such incident of having escaped notice of the 'overlooking' of any particular point or issue. Rather, the specific assertion and submissions on the point of law was duly noted down in the judgment itself. It is only that while doing so the High Court Division decided not to address it, for whatever its reasons.

While deciding discerning upon the question of maintainability of review when or not a review application may be entertained. We feel it necessary to distinguish and severe between two situations. A situation where a specific point of law was raised, but the Court failed to take due notice of it and a situation where the Court did take notice, but consciously decided to refrain from addressing itself on the point raised. The first situation falls within the category of an inadvertent error or mistake and which is also apparent on the face of the record and in such case a review application may be maintainable. But our case here for reasons we already discussed comes within the scope of

the second category and therefore in this case review application under Order 47 the provisions of Order 47 is not maintainable.

We might safely conclude that in the case before us no 'overlooking' by any error or otherwise took place. Lastly the learned Advocate for the opposite parties drew our attention to another decision of our Apex Court in the case of Zenith Packages Limited–Vs- Member Labour Appellate Tribunal Dhaka and others reported in 52 DLR (AD) (2000) page 161 where the principle applicable to the present case reads as follows :-

> "Therefore on the grounds urged for review of judgment by the petitioner it seems to us that we are asked to sit over our judgment by way of appeal in a circuitous was addressing a lengthy and repeated submissions which already received our due notice in the judgment sought to be reviewed."

From a close reading of the above and upon comparison of the circumstance in the case before us our considered finding is that, in this case submissions of the Counsel did duly receive notice of the Court and which is echoed in the judgment itself and therefore in respectful agreement with the principle set out by our Apex Court, we are of the opinion that we cannot sit upon our own judgment and embark upon a rehearing upon specific a point and therefore the only redress for the petitioner is such cases is the Appellate Forum and not Review.

Our finding is that in the case we are dealing with at present the primary aspect which ought to be appreciated in the case, the fact of noting the

submissions on a particular point of law in the judgment but yet making a conscious decision of restraining itself from addressing that point of law is discernible and thus distinguishable from a situation where a point was placed but was somehow overlooked or missed out by the Court by an inadvertent error. We therefore feel it necessary to reiterate that what is discernible here is that no such inadvertent "error" occurred in consequence of which Order 47 Rule 1 could have come into play. Hence in this case the fact of noting the submissions in the judgment itself but yet consciously deciding not to dwell on the point makes all the difference and leaves no scope for a Review under the provision of Order 47 of the Code.

> 1.(1) Any person considering himself aggrieved –
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
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> (b) by a decree or order from which no appeal is allowed, or
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> (c) by a decision on a reference from a Court of Small Causes,
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> 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by same other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

2. An application for review of a decree or order of a Court, not being the High Court Division, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical arithmctical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed; but any such application may, if the judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

Therefore upon hearing the learned Advocates from both sides and upon consideration of the decisions referred to and upon perusal of the judgment in First Appeal No.177 of 1998 against which the instant review application was filed and taking the other materials on record and taking the facts and circumstances into consideration, it is our view that none of the grounds, mentioned in Order 47 Rule 1 of the Code of Civil Procedure against which a review may be maintainable in this particular case. Therefore, the only forum

available to the petitioner could have been way by way of an Appeal before the appropriate forum. Hence we do find any substance in this Rule.

In the result, the Rule as to Review is discharged without any order as to costs.

Communicate the order at once.

Syed Muhammad Dastagir Husain, J;

I agree.

Sayed.B.O.

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