SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

CIVIL APPEAL NO.1191 of 2014
(Against the judgment dated 22.11.2013 passed by the Peshawar High Court, Abbottabad Bench, in CR No.379-A/2011)

Muhammad Farooq and others

...Appellants

Versus

Javed Khan and others

...Respondents

For the appellants:	Qari Abdul Rasheed, ASC
For the respondents No.1-8:	Haji Sabir Hussain Tanoli, ASC Syed Rifaqat Hussain Shah, AOR
For the respondents No.9-27:	(Proforma respondents)
Dates of hearing:	22 October and 15 December, 2021

JUDGMENT

Yahya Afridi, J.- Muhammad Farooq and others **("Appellants")** sought leave to appeal against the judgment dated 22.11.2013 passed by the Peshawar High Court, Abbottabad Bench, in Civil Revision No. 379-A/2019, whereby the revision petition filed by the Appellants was dismissed, and the judgments of the trial and appellate courts that had concurrently found in favour of Said Rasool Khan (predecessor of Respondents No. 1 to 7) and Sher Bahadar Khan (Respondent No. 8) **("Respondents")** were maintained. Leave was granted to the Appellants vide order dated 19.08.2014 to consider the following questions:

i. whether there was a mutual mistake of fact on the basis of which the parties based their transactions and if so its effect;

ii. whether the report of the Local Commission justified the grant of a money decree;

iii. whether the money decree could have been passed when in fact there was no prayer to this effect made in the plaint filed by the respondents/plaintiffs; and

iv. whether in the circumstances of the case and considering that both parties had transacted the sale as far back as 1971, the suit which was filed on 07.04.2000, was barred by limitation.

2. Before we consider the above leave granting questions, it would be appropriate to chronologically encapsulate the essential facts leading to the present appeal:

i. **24.03.1971:** Bibi Sakina, the predecessor of the Appellants, sold out land measuring 3-Kanals 9-Marlas in *Khasra* No. 4012 situated in Tehsil & District Mansehra, to the Respondents *vide* Sale Mutations No. 14632 and 14633, both dated 24.03.1971.

ii. **23.01.1997**: The Appellants sold 5-Marla land in the disputed *Khasra vide* Sale Mutation No.43434 dated 23.01.1997.

iii. **15.06.1998:** The Respondents, apprehending the possibility that their purchased property may have been alienated *vide* the Sale Mutation No.43434 dated 23.01.1997, moved an application for demarcation of the land purchased by them, whereupon the Revenue Officials conducted demarcation on 15.06.1998. In the said demarcation, the Appellants, were found to have encroached upon land measuring 1-Kanal **("suit property")** of the Respondents.

iv. **25.09.1998**: On the basis of the demarcation of 15.06.1998, the Respondents instituted a suit, on 25.09.1998, for possession of the deficient land, against the Appellants and their mother, Bibi Sakina.

v. **15.04.1999:** The Appellants sold 4-Marla land vide Sale Mutation No. 47462 dated 15.04.1999.

vi. **07.04.2000:** The Respondents withdrew their suit on 05.04.2000 with permission to institute a fresh suit for challenging the subsequent sale made by the Appellants. Accordingly, a fresh suit was instituted on 07.04.2000, with an additional prayer of declaration as to their ownership of the suit property, and ineffectiveness on their rights, of the Sale Mutations No. 47462 and 43434 dated 23.01.1997 and 15.04.1999 respectively. They also prayed for permanent injunction for restraining the Appellants from raising construction on the suit property and from alienating it further. They also impleaded the beneficiaries of Sale Mutations No. 47462 and 43434.

vii. **20.06.2009:** During pendency of this suit, land measuring 4-Marlas out of the suit property, was further alienated twice vide Sale Mutations No. 53378 and 54436 dated 28.09.2002 and 26.09.2003, respectively. The Respondents filed the amended plaint, on 20.06.2009, which included the challenge to those Sale Mutations and impleaded the beneficiaries of the Sale Mutations.

Stance of the Appellants/defendants and subsequent purchasers

3. The Appellants took the stance that the demarcation proceedings were illegally conducted in their absence, and that too, in connivance

with the Revenue Officials. They also raised the objection that the suit was barred by the law of limitation. The subsequent transferees, on the other hand, claimed that they were *bona fide* purchasers and were protected under section 41 of the Transfer of Property Act, 1882.

Trial court proceedings

4. The trial court ordered fresh demarcation of the suit property, given that the earlier demarcation dated 16.06.1998 was disputed by the Appellants, to be conducted by the concerned *Naib Tehsildar* and *Saddar Qanungo*, as the local commissioners. They found that the total land in *Khasra* No.4012 was actually 12-Kanals 1-Marlas, not 13-Kanals, and that the mistake had occurred in calculating the measurements of that *Khasra* at the time of preparing Settlement Record in the year 1946-47. This, as per their report dated 19.02.2010, was the reason for the deficiency of 19-Marlas in the land purchased by the Respondents.

5. None of the parties filed any objection to the said report of the local commissioners. The trial court, therefore, based its decision upon that report. The trial court decided that the Respondents had admittedly purchased land measuring 3-Kanals 9-Marlas from Bibi Sakina and paid the price for the said land, but they had a deficiency of 19-Marlas in their possession of the purchased land. The trial court further held that the rights of the subsequent transferees of the land in *Khasra* No. 4012, were protected under section 41 of the Transfer of Property Act, 1882. On the issue of limitation, the trial court held that as the Respondents had come to know about the deficiency of land in their possession after demarcation of the suit property in the year 1998; therefore, their suit having been instituted in the year 2000 was well within time period.

6. In view of these findings, the trial court did not grant the Respondents the possession of the deficient 19-Marlas land, instead held that the Respondents were entitled to recover the price amount of the deficient 19-Marla land from the Appellants, at the rate of its current market value.

Appellate court proceedings

7. Both the contesting parties preferred appeals against the judgment and decree of the trial court, but the appellate court dismissed both appeals and maintained the judgment of the trial court with a modification in the terms that the decree was held to be a “preliminary

decree", and the trial court was directed to proceed further and fix the price amount of the deficient 19-Marlas land at the rate of its current market value.

Revisional court proceedings

8. Only the Appellants challenged the judgment of the appellate court before the revisional court by filing a revision petition, which was dismissed by the revisional court maintaining the judgment of the appellate court.

Leave granting questions

9. We have heard the arguments of the learned counsel for the parties, perused the record of the case with their able assistance and read the case law cited by them. We shall, now, take up and decide the leave granting questions *in seriatim*.

Question (i): Whether there was a mutual mistake of fact on the basis of which the parties based their transactions, and if so, its effect.

10. According to section 20 of the Contract Act 1872, a mistake of fact takes effect when the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, thus, rendering the agreement void. The judicial consensus that has developed on this common mistake of fact rendering an agreement void, is to discourage frequent intrusions by the court on the smallest of mistakes and to encourage positive exercise of jurisdiction on fundamentally apparent mistake of facts, so as to uphold freedom of contracts and certainty of terms of contracts.

11. Given that the Contract Act 1872 is based on the principles of English Common Law, it would be useful to observe how the English courts have dealt with a common mistake of fact. In the case of **Great Peace Shipping Ltd v. Tsaviliris Salvage Ltd**,[1] the court set out the elements of common mistake, or known as common mistake of fact, which must be present to avoid a contract:

> "(i) [T]here must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render contractual performance impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to

[1] Great Peace Shipping Ltd v Tsaviliris Salvage Ltd [2002] EWCA Civ 1407.

> be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.".[2]

As to the nature of what would render the state of affairs a vital attribute or fact, it was held that, the "mistake" must be fundamental or essential to the agreement, such that:

> "...it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject matter of the contract or was an inevitable inference from the nature of the contract that all parties so regarded it."[3]

The effect thereof would thus be that the buyer would not have proceeded to pay the amount had the mistake been known at the time of execution of the contract. In **Kleinwort Benson Ltd v. Lincoln CC**,[4] the House of Lords enunciated this principle in the terms that the buyer "would not have made the payment had he known of his mistake at the time when it was made", and that the function of mistake is to show that the benefit, which had been received was an unintended benefit. It is important to satisfy this element to ensure that freedom of contract is protected and that parties cannot avail this provision on minor mistakes to try get out of a bad bargain.

12. In order to render an agreement, void under section 20 of the Contract Act 1872, both the parties must be labouring under the same mistake of fact. Where one party knows the facts but refrains from communicating the same to the other party, section 20 of the Contract Act, 1872 is not attracted. Therefore, it is important to note that a unilateral mistake does not enable a party to avoid the contract. The mistake must be a bilateral one, where both parties are mistaken about the same vital fact.[5] A similar view has been expressed by the Supreme Court of India, in **Tarsem Singh v. Sukhminder Singh**,[6] where the price for the land agreed to be sold was to be calculated at a specified rate per unit of area. On the seller's refusal to convey, the plaintiff filed a suit for specific performance, and in the alternative, for refund of earnest money. The Supreme Court held that, the parties suffered from a mutual mistake as to the area of land, which was essential to the agreement; as the price was to be calculated on the basis of the area, therefore, earnest money ought to be refunded under section 65 of the Contract Act 1872.

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[2] Ibid, para 76; Brennan v Bold Burder [2005] 1 QB 303.
[3] Bell v Lever Bros Ltd [1031] All ER Rep 1 at 37 per Lord Thakerton.
[4] Kleinwort Benson Ltd v Lincoln CC [1992] 2 A.C. 349, 408 per Lord Hope.
[5] Pollock & Mulla, The Indian Contract Act 1872 (15th edn).
[6] Tarsem Singh v. Sukhminder Singh, AIR 1998 SC 1400.

Similarly, in **Henry Earnest Meaney v. EC Eyre Walker**,[7] the municipal byelaws enjoined that a building site could not be less than five "*bighas"*. A sale of a building site less than that area was affected, but both the parties were under a mistaken impression that the land was five "*bighas*", the agreement was declared to be void. It is, thus, apparent to observe a judicial consensus across jurisdictions that, a mistake of fact relating to the area of land being sold has been recognised as essentially fundamental for the purposes of attracting section 20 of the Contract Act, 1872.

13. Therefore, once a common mistake of fact between the contracting parties is established, the legal consequence to ensue is that the agreement entered between the parties is to be declared void under section 20 of the Contract Act 1872. This vitiation of the agreement would then lead the aggrieved party to be able to seek restitution under section 65 of the Contract Act 1872.

14. In essence, the underlying principle for grant of restitution to a claimant is the "unjust enrichment" of the opposing party. In order to positively avail restitution, the claimant is to fulfil the four condition precedents: firstly, that the opposing party has been enriched by the receipt of a benefit; secondly, that this enrichment is at the expense of the claimant; thirdly, that the retention of the enrichment is unjust; and finally, there is no defence or bar to the claim.[8]

15. In the present case, it is admitted that the price of the deficient 19-Marlas of land was paid, therefore, section 65 of the Contract Act 1872, as discussed above, addresses such a situation. Thus, requiring the recipient of the money, the Appellants, to return the sum received. To the similar effect are the provisions of sections 14, 40 and 41 of the Specific Relief Act 1877: as per section 14, where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract, as can be performed, and award compensation in money for the deficiency; likewise, section 40 provides that where an instrument is evidence of different rights or different obligations, the Court may, in a proper case,

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[7] Henry Earnest Meaney v. EC Eyre Walker AIR 1947 All 332.
[8] Banque Financiere de la Cite v Parc (Battersea) Ltd [1999] 1 A.C. 221, 234 per Lord Hoffman.

cancel it in part and allow it to stand for the residue; whereas, section 41 authorises that on adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other, which justice may require.

16. To recapitulate the above settled principles of "common mistake of fact", and the consequential remedy of "restitution", we may summarise the same, as follows:

> (i) Both parties must mutually be mistaken as to a fact stipulated in the contract.
>
> (ii) The mistaken fact must be fundamental, going to the root of the contract, which would render execution of the contract wholly or partially unenforceable, and must not be a minor mistake of fact.
>
> (iii) The effect of this fundamental mistake of fact must be such that the vendee would not have made payment for the object being sold, had the mistake been known to the vendee at its inception.
>
> (iv) The consequence of it being established that there is a fundamental mistake of fact between the contracting parties, rendering the recipient of the payment having been unjustly enriched, and where restitution is not possible, the recipient of the money must return the sum so received.

17. Now, when we apply the above settled principles to the present case, we note that all three lower *fora* had in consonance held that the mistake of fact was a bilateral common mistake, where it was neither the fault of the seller nor that of the buyer. Thus, both parties were mutually unaware of the deficient 19-Marla land in *Khasra* No. 4012. The next element to consider is, whether the very fact of the deficient 19-Marla land in the said *khasra*, which the buyer assumed to have bought, was essential to the contract. The answer to this crucial issue is in the positive, as the very nature of the contract was for the sale and purchase of land. Surely, had the buyer known at the time of entering into the agreement that the land being purchased was deficient of 19 Marlas, it would be unreasonable for such a buyer to have paid the consideration in respect to that extent of the land. The transaction of sale between the parties, to that extent, was thus void under section 20 of the Contract Act 1872.

18. All three courts below have, in unison, accepted that there was a common mistake of fact going to the root of the contract entered between the parties, rendering the same to be void to the extent of the deficient 19-Marla land within the contemplation of section 20 of the Contract Act, and which entitled the aggrieved party to be compensated in terms of section 65 of the Contract Act. Thus, the Appellants were rightly directed to pay back to the respondents, the price of the deficient 19-Marla land received by their predecessor, at the rate of current market value thereof.

Question (ii): Whether the money decree could have been passed when in fact there was no prayer to this effect made in the plaint filed by the respondents/plaintiffs.

19. The question as to the power of the courts to grant relief not expressly prayed for has earlier been agitated and decided by this Court in several cases. In the recent case of **Akhtar Sultana v. Muzaffar Khan,**[9] it was held that in appropriate cases, the courts can mould the relief within the scope of the provisions of Order VII, Rule 7 of the Code of Civil Procedure Code 1908 **("CPC")**, and are empowered to grant such relief as the justice may demand, in the facts and circumstances of the case.

20. In the present case, it was the undisputed demarcation report dated 19.02.2010 that, for the first time, brought to light the mistake regarding the wrong measurements of total land *in Khasra* No.4012 being actually 12-Kanals and 1-Marla, not 13-Kanals as was wrongly recorded at the time of preparing the Settlement Record in the year 1946-47. This, as per the report, was the reason for the deficiency of 19-Marlas in the land purchased by the Respondents. In fact, this very finding of the report led the lower *fora* to establish the entitlement of the Respondents to the extent of the deficient land of 19-Marlas. Therefore, in such circumstances, where the relief for possession of the deficient land prayed for was not possible, in the facts and circumstances of the case, we see no legal fault in passing the money decree in favour of the Respondents by the three courts below, despite there being no prayer to this effect in the plaint filed by the Respondents.

Question (iii): whether the report of the Local Commission justified the grant of a money decree.

21. We find that the report dated 19.02.2010 of the local commissioners **("Report")** as to the demarcation of the disputed *Khasra* No. 4012, its actual measurements, and pinpointing the mistake that

[9] Akhtar Sultana v. Muzaffar Khan (PLD 2021 SC 715).

had occurred in the Field Book at the time of preparing the Settlement Record in the year 1947-48, was not objected to by any one of the parties. Therefore, the Report has been relied upon by all three courts below. It may, however, be pointed out that the Report provided the basis for ascertaining the factual position only, and not the legal entitlement of the Respondents, which was determined under the law, that is, sections 20 and 65 of the Contract Act 1872.

Question (iv): Whether in the circumstances of the case and considering that both parties had transacted the sale as far back as 1971, the suit which was filed on 07.04.2000, was barred by limitation.

22. The Respondents have not pursued their original prayer for possession of the deficient 19-Marla land, and instead, stood satisfied with the money decree passed for payment of compensation at the rate of the current market value thereof. Therefore, the crucial question now would be, whether the claim for return of the money paid for the deficient 19-Marla land, if it had been made by the Respondents in the plaint, was within time, and not, whether the suit for possession filed was within time. Because, the power of the court to mould the relief under Order VII, Rule 7 of the CPC, does not enable it to override any applicable statutory provisions, including the provisions of the Limitation Act 1908.[10]

23. The applicable provision to a claim for return of the money paid upon a consideration which later fails, is Article 97 of First Schedule to the Limitation Act 1908 **("Act")**, which reads as under:

Description of suit	**Period of limitation**	**Time from which period begins to run**
97. For money paid upon an existing consideration which afterwards fails.	Three years	The date of the failure.

The above provision covers, *inter alia*, a claim by a party who has paid money pursuant to the terms of an agreement, where the other party fails to fulfil the terms of the agreement for which the money was paid, for any reason, including a common mistake of fact. The three-year period prescribed for filing such a suit to recover the money paid is to commence from the date of failure of the consideration upon which the money was paid.

[10] Thakamma Mathew v. M. Azamathullah (1993 SCMR 2397).

24. In the present case, we are to determine the date when the three-year period of limitation provided under Article 97 of the Act commenced. We have three dates to consider: the first date, as contended by the learned counsel for the Appellants, is 24.03.1971, when the sale of the deficient 19-Marlas land took place; the second date is 23.01.1997, when the Appellants sold out 5-Marlas land out of the land which the Appellant thought to be part of their purchased land; and the third date is 19.02.2010, when the undisputed demarcation report of the local commissioners pointed to the mistake in measurements that had occurred in the Field Book at the time of preparing the Settlement Record and deficiency of 19-Marlas land in *Khasra* No. 4012.

25. So far as the contention of the learned counsel for the Appellants that, the limitation period of three years provided in Article 97 of the Act was to start from 24.03.1971, the date of sale of the disputed property, when the Appellants failed to fulfil their obligation to transfer the possession of the entire sold land to the Respondents, is concerned, it may have prevailed in a simple case of failed consideration, where the parties are not in a mistake of fact, about the very area of the subject matter of the agreement. However, in the peculiar circumstances of the present case, when admittedly both the parties were under a common mistake of fact about the area of the land being sold, we are afraid this contention of the learned counsel does not hold any logical or legal basis. In this regard, we note that on the said date, both parties were unaware as to the actual area of land in the relevant *khasra* and deficiency of 19-Marla land. In such circumstances, it would be safe to hold that on the said date, the Respondents did not have the knowledge of the deficiency of the 19-Marla land in the purchased property, and thus, could not have had any cause of action to move the court for return of the money paid for the said deficient land.

26. Similarly, it would not legally suffice to take 23.01.1997 as the commencing date for the period of limitation under Article 97 of the Act, since the common mistake of fact relating to the deficiency of 19-Marla land was not in the knowledge of any party, particularly the Respondents, even on that date. And thus, they did not have the cause of action to move the court seeking return of the money paid for that 19-Marla land, on the said date.

27. This would take us to consider the third date, that is, 19.02.2010, when the undisputed demarcation report for the first time revealed the deficiency of 19-Marla land in the total recorded area of *Khasra* No. 4012. This is the date, when the common mistake of fact was first brought to the notice of the parties. In fact, it was this report that led the trial court to mould the relief from possession into that of a money decree, and thus, attracting Article 97 of the Act. Thus, it would be safe to hold that "the date of the failure" of the consideration within the contemplation of Article 97 of the Act would be the date of the report, that is, 19.02.2010, when the failure was made known to the parties, and the parties, particularly the Respondents, did not dispute the correctness of that report, thereby, a cause of action accrued to the Respondents to claim return of the money paid for the failed consideration.

28. Thus, when the starting date for computing the three-year limitation period provided under Article 97 of the Act was 19.02.2010, the decree passed by the trial court on 24.03.2010 for return of the price paid for the failed consideration, that is, the deficient 19-Marla land, at the rate of the current market value thereof, was well within time.

29. For all what has been discussed and decided above, we find that the concurrent findings recorded by the three courts below do not call for any interference by this Court, and the present appeal is bereft of factual and legal merit. The appeal is, therefore, dismissed.

Judge

Judge

Announced in open Court
at Karachi on 06.01.2022.

Judge

Approved for reporting.

Arif