PETITIONER:
SRI TARSEM SINGH

Vs.

RESPONDENT:
SRI SUKHMINDER SINGH

DATE OF JUDGMENT: 02/02/1998

BENCH:
S. SAGHIR AHMAD, M. JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S. SAGHIR AHMAD. J.

Delay condoned.

The defendant is the petitioner in this Special Leave Petition before us.

The petitioner, who owned 48 kanals 11 marlas of agricultural land in village Panjetha, Tehsil and District Patiala, entered into a contract for sale of that land with the respondent on 20.5.1988 @ Rs. 24,000/- per acre. At the time of the execution of the agreement, an amount of Rs. 77,000/- was paid to the petitioner as earnest money. Since the petitioner in terms of the agreement although the respondent was ready and willing to perform his part of the contract, the latter, namely, the respondent filed the suit for Specific Performance against the petitioner which was decreed by the trial court. The decree was modified in appeal by the Additional District Judge who was of the opinion that the parties to the agreement, namely, the petitioner and respondent both suffered from a mistake of fact as to the area of the land which was proposed to be sold as also the price (sale-consideration) whether it was to be paid at the rate of per "Bigha" or per "Kanal". The Lower Appellate Court also found that the respondent was not ready and willing to perform his part of the contract. Consequently, the decree for Specific Performance was not passed but a decree for refund of the earnest money of Rs. 77,000/- was passed against the petitioner. This was upheld by the High Court.

Learned counsel for the petitioner has contended that since the Lower Appellate Court was recorded a finding that the respondent was not ready and willing to perform his part of the contract inasmuch as the balance of the sale consideration was not offered by him to the petitioner, the Lower. Appellate Court as also the High Court, which upheld the judgment of the Lower Appellate Court, were in error in passing a decree for return of the amount of earnest money particularly as the parties had expressly stipulated in the agreement for sale that if the sale was not obtained by the respondent on payment of the balance amount of sale consideration, the amount of earnest money, advanced by the

respondent, shall stand forfeited.

In order to decide this question, we have to proceed on certain admitted facts which are to the effect that there was an agreement for sale between the parties concerning agricultural land measuring 48 kanals 11 marlas which was proposed to be sold at the rate of Rs. 24,000/- per bigha or kanal and that an amount of Rs. 77,000/- was paid as earnest money. The sale deed was to be obtained on or before 15.10.1988 by offering the balance of the sale consideration to the petitioner before the sub-Registrar, Patiala. There was a stipulation in the agreement that if the respondent failed to pay the balance amount of sale consideration, the earnest money shall stand forfeited.

During the pendency of the appeal before the Additional District Judge, respondent made certain amendments in the plaint which have been set out in the judgment of the Lower Appellate Court as under:-

> "(a) He corrected the area of the suit land as 48 bighas 11 biswas, instead of 48 kanals 11 biswas.
> (b) In para 3 of the plaint, he corrected the figure of Rs. 1,56,150/- to Rs. 2,35,750/-.
> (c) He also added following para 3A to the amended plaint:-
> "The land is mortgaged with Canara Bank by the defendent for Rs. 20,000/-. The defendant be directed to deposit the due amount to the Canara Ban or the plaintiff be authorised to retain the mortgage money."
> (d) He also added the following lines to para 9 of the plaint:-
> "The plaintiff met Tarsem Singh in the month of September, 1988 and offered him the money with request to get the sale deed registered in his favour but he refused to do so."
> (e) He also added the following lines to para 19 of the plaint:-
> "The value of the suit for the purpose of court fee and jurisdiction is Rs. 2,40,000/- on which a court fee stamps of Rs. 4,686/- is fixed."

The Lower Appellate Court also recorded additional evidence. Thereafter, the Lower Appellate Court proceeded to record the findings as under:-

> "24. It is rightly submitted by the learned counsel for the appellant that the case of the appellant is hoisted twice over with his patard. If the total price of as per amended plaint, them from the original plaint and evidence of the respondent in the trial court, it is clear that he was never of Rs. 2,35,750/- to the appellant for the land in contract, and that what he was ready and willing to pay at all material points of time before he filed application for amendment of the plaint in this court, was only

Rs. 1,56,150/-.

25. Of course, with the advantage of hind sight and as a clever but clumsy after though Sukhminder Singh respondent PW1 stated in this court on 30.4.1993 that when he attended the offence of the Sub Registrar for execution of the sale deed on 30.4.1993 he was having Rs. one lac in his possession. However performance because for the reasons already stated, it is abundantly clear that till before filing the application for amendment of the plaint, in this court, the respondent was only willing to pay the total sale price Rs. 1,56,150/- to the appellant, and not the full sale consideration of Rs. 2,35,750/-. Therefore in the peculiar facts and circumstances of the case, it would be difficult to hold that he had throughout been ready and willing to perform his part of the contract.

26. An other forensic cross which the respondent must bear is that even from his original pleadings, and the amended pleadings, it is clear that both the parties were under a mistake of fact in so far as the area of land agreed to be sold was concerned. As luck would have it, none of them was sure whether it was 48 kanals 11 marlas, or 48 bighas 11 biswas. Therefore, the contract Act. Besides this where the description, area and other particulars of the property are not absolutely definite, precise, certain and exact, no decree for specific performance of sale can be passed."

The Lower Appellate Court further proceeded to say as under:-

"On the analysis presented above it is absolutely clear that the parties were never ad-idem as to the exact area of the land agreed to be sold."

It was on account of the above findings that the decree for return of the earnest money of Rs. 77,000/- paid to the petitioner was passed particularly as the petitioner was found to be under a legal obligation to return that amount together with interest at the rate of 6% per annum from the date of contract till the date of acutal refund.

The findings that the parties were suffering from a mistake of fact as to the area and the rate at which the property was agreed to be sold has been upheld by the High Court which summarily dismissed the Second Appeal filed by the petitioner questioning the finding of the courts below.

What is the effect and impact of "Mistake of Fact" on the agreement in question may now be examined.

'Contract' is a bilateral transaction between two or more than two parties. Every contract has to pass through

several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter-proposals as also the consideration resulting finally in the acceptance of the proposal. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affix their signatures or thumb impression so as to be bound by the terms of the agreement set out in that document. Such an agreement has to be lawful as the definition of contract, as set out in Section 2(h) provides that "an agreement enforceable by law is a contract". Section 2(9) sets out that "an agreement not enforceable by law is said to be void".

Before we proceed to consider what are lawful agreements or what are voidable or void contracts, we may point out that it is not necessary under law that every contract must be in writing. There can be an equally binding contract between the parties on the basis of oral agreement unless there is a law which requires the agreement to be in writing.

Section 10 of the Contract Act provides as under:-

> "10. What agreements are contracts.- All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
> Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

The essentials of contract set out in Section 10 above are:-

(1) Free consent of the parties
(2) Competence of parties to contract
(3) Lawful consideration
(4) Lawful object

Competence to contract is set out in Section 11 which provides that every person is competent to contract who is of the age of majority and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Section 12 provides that a person will be treated to be of sound mind if, at the time when he makes the contract, he is capable of understanding it and forming a rational judgment as to its effect upon his interests.

"Consent" and "Free Consent", with which we are really concerned in this appeal, are defined in Section 13 and 14 of the Act as under:-

> "13. Two or more persons are said to consent when they agree upon the same thing in the same sense."
> "14. Consent is said to be free when it is not caused by-
> (1) coercion, as defined in section 15, or
> (2) undue influence, as defined in section 16, or
> (3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."

Section 15, 16, 17 and 18 define "Coercion", "undue Influence", "Fraud" and "Misrepresentation".

Section 19 provides that when consent to an agreement is caused by coercion, fraud or misrepresentation, such agreement is voidable at the option of the party whose consent was so caused. So also is the agreement to which consent of a party was obtained by undue influence.

Section 20 of the Act lays down as under:-

"20. Agreement void where both parties are under mistake as to matter of fact.- Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.- An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact."

This Section provides that an agreement would be void if both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement. The mistake has to be mutual and in order that the agreement be treated as void, both the parties must be shown to be suffering from mistake of fact. Unilateral mistake is outside the scope of this Section.

The other requirement is that the mistake, apart from being mutual, should be in respect of a matter which is essential to the agreement.

Learned counsel for the petitioner contended that a mistake of fact with regard to the "price" or the "area" would not be a matter essential to the agreement, at least in the instant case, as the only dispute between the parties was with regard to the price of the land, whether the price to be paid for the area calculated in terms of "bighas" or "canals".

"Bigha" and "Kanal" are different units of measurement. In the Northern part of the country, the land is measured in some states either in terms of "bighas" or in terms of "kanals". Both convey different impressions regarding area of the land. The finding of the Lower Appellate Court is to the effect that the parties were not ad-item with respect to the unit of measurement. While the defendant intended to sell it in terms of "kanals", the plaintiff intended to purchase it in terms of "bighas", the plaintiff intended to purchase it in terms of "bighas". Therefore, the dispute was not with regard to the unit of measurement only. Since these units relate to the area of the land. Since these units relate to the area of the land, it was really a dispute with regard to the area of the land which was the subject matter of agreement for sale, or, to put differently, how much area of the land was agreed to be sold, was in dispute between the parties and it was with regard to the area of the land

that the parties were suffering from a mutual mistake. The area of the land was as much essential to the agreement as the price which, incidentally, was to be calculated on the basis of the area. The contention of the learned counsel that the "mistake" with which the parties the suffering, did not relate to a matter essential to the agreement cannot be accepted.

Learned counsel for the petitioner has contended that Lower Appellate Court or the High Court were not justified in passing a decree for the refund of Rs. 77,000/- which was paid as earnest money to the petitioner as there was a specific stipulation in the agreement for sale that if the respondent did not perform his part of the contract and did not obtain the sale deed after paying the balance amount of sale consideration within the time specified in the agreement, the earnest money would stand forfeited. It is contended that since the respondent did not offer the balance amount of sale consideration and did not obtain the sale deed in terms of the agreement, the amount of earnest money was rightly forfeited and a decree for its refund could not have been legally passed.

Learned counsel for the petitioner has invited our attention to Section 73 and 74 of the Contract Act which, in our opinion, are of no aid to the petitioner.

Section 73 stipulated a valid and binding contract between the parties. It deals with one of the remedies available for the breach of contract. It is provided that where a party sustains a loss on account of breach of contract, he is entitled to receive, from the party who has broken the contract, compensation for such loss or damage.

Under Section 74 of the Act, however, the parties to the agreement stipulate either a particular amount which is to be paid in case of breach or an amount may be mentioned to be paid by way of penalty. The party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused, to receive from the party who has committed the breach of contract, compensation not exceeding the amount mentioned in the agreement or the penalty stipulated therein. But this Section also contemplates a valid and binding agreement between the parties. Since the stipulation for forfeiture of the earnest money is part of the contract, it is necessary for the enforcement of that stipulation, that the contract between the parties is valid. If the forfeiture clause is contained in an agreement which is void on account of the fact that the parties were not ad-idem and were suffering from mistake of fact in respect of a matter which was essential to the contract, it cannot be enforced as the agreement itself is void under Section 20 of the Contract Act. A void agreement cannot be split up. None of the parties to the agreement can be permitted to seek enforcement of a part only of the contract through a court of law. If the agreement is void, all its terms are void and none of the terms, except in certain known exceptions, specially where the clause is treated to constitute a separate and independent agreement, severable from the main agreement can be enforced separately and independently.

Since, in the instance case, it has been found as a fact by the below that the agreement in question was void from its inception as the parties suffered from mutual mistake with regard to the area and price of the plots of land agreed to be sold, the forfeiture clause would, for that reason, be also void and, therefore, the petitioner could not legally forfeit the amount and seek the enforcement of forfeiture clause, even by way of defence, in

a suit instituted for Specific Performance by the respondent.

We may also refer to Section 65 of the Contract Act with, mirus the illustrations, is as follows:-

> "65. Obligation of person who has received advantage under void agreement or contract that becomes void.- When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

This Section, which is based on equitable doctrine, provides for the restitution of any benefit received under a void agreement or contract and, therefore, mandates that any "person" which obviously would include a party to the agreement, who has received any advantage under an agreement which is discovered to be void or under a contract which becomes void, has to restore such advantage or to pay compensation for it, to the person from whom he received that advantage or benefit.

Learned counsel for the appellant has contended that Section 65 would apply to a situation where the agreement is "discovered to be void" or where the contract "becomes void" and not to an agreement which is void from its inception. This argument cannot be allowed to prevail.

Mutual consent, which should also be a free consent, as defined in Section 13 and 14 of the Act, is the sine qua non of a valid agreement. One of the essential elements which go to constitute a free consent is that a thing is understood in the same sense by a party as is understood by the other party. It may often be that the parties may realise, after having entered into the agreement or after having signed the contract, that one of the matters which was essential to the agreement, was not understood by them in the same sense and that both of them were carrying totally different impressions of that matter at the time of entering into the agreement or executing the document. Such realisation would have the effect of invalidating the agreement under Section 20 of the Act. On such realisation, it can be legitimately said that the agreement was "discovered to be void". The words "discovered to be void", therefore, comprehend a situation in which the parties were suffering from a mistake of fact from the very beginning but had not realised, at the time of entering into the agreement or signing of the document, that they were suffering from any such mistake and had, therefore, acted bona fide on such agreement. The agreement in such a case would be void from its inception, though discovered to be so at a much later stage.

The Privy Council in Thakurain Harnath Kuar vs. Thakur Indar Bahadur Singh, AIR 1922 PC 403 = ILR (1922) 45 All. 179 = 27 CWN 949 = 44 MLJ 489, while considering the provisions of Section 65 held that:-

> "The section deals with (a) agreements and (b) contracts. The dinstinction between them is apparent from section 2. By clause (e) every promise and every set of promises forming the consideration for each other is an agreement, law is a contract. Section 65, therefore, deals with (a)

agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void.

An agreement, therefore, discovered to br void is one discovered to be not enforceable by law, and, on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void."

This case before the Privy Council also related to sale of certain villages for which some money had been paid in advance. The sale was found to be inoperative as there was a misapprehension as to the rights of the transferor in the villages which he purported to sell and that the true nature of those rights was discovered much later. In this background, the Privy Council held the agreement to have been "discovered to be void". The Privy Council, therefore, passed a decree for compensation in favour of the vendee and in assessing that compensation, the sum of money, which was advanced, was included in the amount of compensation decreed with 6% interest payable from the date of suit.

To the same effect is an old decision of the Calcutta High Court in Ram Chandra Misra and others vs. Ganesh Chandra Gangopadhya and others. AIR 1917 Calcutta 786, in which it was held that an agreement entered into under a mistake and misapprehension as to the relative and respective rights of the parties thereto is liable to be set aside as having proceeded upon a common mistake. In this case, there was an agreement for lease of the mogoli brahmatter rights of the defendants in certain plots of land. Both the parties were under the impression that the brahmatter rights carried with them the mineral rights. It was subsequently discovered that brahmatter rights did not carry mineral rights. The High Court held that the agreement became void under Section 20 of the Contract Act as soon as the mistake was discovered and, therefore, the plaintiffs were entitled to refund of money advanced under a contract which was subsequently discovered to be void.

We may point out that there are many facets of this question, as for example (and there are many more examples), the agreement being void for any of the reasons set out in Section 23 and 24, in which case even the refund of the amount already paid under that agreement may not be ordered. But, as pointed out above, we are dealing only with a matter in which one party had received an advantage under an agreement which was "discovered to be void" on account of Section 20 of the Act. It is to this limited extent that we say that, on the principle contained in Section 65 of the Act, the petitioner having received Rs. 77,000/- as earnest money from the respondent in pursuance of that agreement, is bound to refund the said amount to the respondent. A decree for refund of this amount was, therefore, rightly passed by the Lower Appellate Court.

For the reasons stated above, we see no force in this Special Leave Petition which is dismissed.