



IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2483 OF 2014

CANARA BANK

.....APPELLANT(S)

VERSUS

K.L. RAJGARHIA (D) THRU LRS.

....RESPONDENT(S)

J U D G M E N T

Aravind Kumar, J.

1. The Appellant before this Court is the unsuccessful Plaintiff in a suit<sup>1</sup> for Specific Performance, and the Respondent is the Defendant in the suit. *(The parties hereinafter are referred to by their respective ranks in the suit.)* The Single Judge<sup>2</sup> of the Delhi High Court<sup>3</sup> had decreed the suit filed by the Plaintiff against the Defendant, directing the Defendant to execute a Registered Sale Deed in favor of the Plaintiff, based on the Agreement to Sell<sup>4</sup> dated 27.12.1984. This judgment and decree of the Trial Court was challenged in RFA (OS) No. 47 of 2009 by the Defendant before the Division Bench of the High Court which came to be allowed by the impugned order dated 08.05.2012 and dismissed the Plaintiff's suit with respect to specific performance. However, directed the refund of the

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Suit No. 1669 of 1989, hereinafter referred to as the Suit.

<sup>2</sup> Hereinafter referred to as the Trial Court.

<sup>3</sup> Hereinafter referred to as the High Court.

<sup>4</sup> Hereinafter referred to as the Agreement.

consideration already paid by the Plaintiff. This order of the Division Bench of the High Court is now assailed before this Court in the present appeal by the plaintiff.

**BRIEF FACTS:**

2. The plaintiff and defendant entered into an agreement to sell dated: 27.12.1984, wherein the defendant agreed that he would sell the property bearing Plot No. 9, Block B, East of Kailash<sup>5</sup> for a sum of Rs. 32,07,500. According to the Agreement the Defendant was responsible for construction of 8 (eight) flats on the schedule property in following terms:

**SCHEDULE - I:**

- (A) 2(Two) Flats of approximately 1000 sq.ft. in Ground floor.  
1 (one) flat of approximately 1000 sq.ft. in Mezzanine floor.  
2 (Two) Flats of approximately 1000 sq.ft. in first floor.  
2 (Two) Flats of approximately 1000 sq.ft. in Second floor.  
1 (One) Flat of approximately 1000 sq.ft. in Third / Barsati floor.  
(B) Basement of approximately 1950 sq.ft. The actual covered area will be determined after the construction is completed in all respects and the flats are ready for occupation legally".

3. Disputes arose between the parties regarding the Registration of the agreement and therefore the Plaintiff filed a Suit for Specific Performance, contending the following:

- 3.1. In December 1984, the plaintiff entered into an agreement with the defendant for purchase of residential flats to be constructed on a plot in East of Kailash, Delhi, at a total consideration of ₹32,07,500/-, of which about 90% (₹28,86,750/-) was paid by the plaintiff. The defendant was obligated to complete construction within 18 months, with an additional six-month grace period, obtain all necessary statutory approvals, and hand over possession of the flats. The agreement also provided for

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<sup>5</sup> Hereinafter referred to as the Schedule Property.

payment of damages at Rs. 1,000/- per day for delays and allowed the plaintiff to complete unfinished work at the defendant's cost if necessary.

3.2. The defendant failed to complete the construction or hand over possession despite repeated requests, allegedly abandoning the project. The plaintiff contends that the defendant's claimed difficulties with their contractor are irrelevant, as construction and delivery were solely the defendant's responsibility. The Plaintiff contends that the mere monetary compensation is inadequate given the purpose of the flats for officers and public interest.

4. On service of summons, the Defendant appeared before the Court and filed his Written Statement contending the following:

4.1. The Agreement to Sell (27.12.1984) was not a genuine sale but a cover for a loan transaction executed under the assurance of the plaintiff bank's officers, with an understanding that advances would be repaid with 18% interest. The defendant contended the agreement was obtained under undue influence and coercion, as he was in urgent need of funds, indebted to the bank, and had no real freedom to negotiate terms.

4.2. The agreement imposed unfair conditions such as low consideration rates below market value, liability for all levies/charges on defendant, cancellation rights and penalties favouring the bank and exclusive rights over future construction. Specific performance would cause disproportionate hardship to the defendant who needed the premises for his family and sons, whereas the plaintiff (a bank) would suffer no real loss and could be adequately compensated by repayment amount paid with interest.

5. The Trial Court framed nine issues for its consideration, and evidence was recorded in relation to these issues. The matter was then posted for final arguments. At that stage, the Defendant submitted that he was abandoning all his claims, including those relating to the agreement being a loan transaction and the aspects of undue influence and coercion, and thereafter contended as follows:

5.1. That no sanctioned building plan was actually annexed to the agreement despite being referred to therein, and only a photocopy of a sanctioned plan was later handed over without being duly filed or proved by either party. The agreement was not for the sale of land but for the construction of residential flats, as shown in Schedule I, which mentioned eight proposed units to be built on the 300 sq. yard plot. Under the applicable master plan, only 2.5 residential units were permissible on a 300 sq. yard plot at the time, and even under the current plan, a maximum of five dwelling units would be allowed, whereas the sanctioned plan permitted only 2.5 units.

5.2. The agreement, however, envisaged construction of far more units i.e. two flats on each of the ground, first, and second floors, one on the mezzanine, and one on the terrace, totalling 8 to 10 flats which contrary to the sanctioned plan and building bye-laws, which made the proposed construction non-compoundable. It was therefore argued that the contract was illegal, being contrary to the master plan, sanctioned plan, and building regulations, and hence void and not specifically enforceable and furthermore, even refund of the advance consideration could not be claimed, as the agreement was void ab initio and not merely discovered to be void later under Section 65 of the Contract Act.

6. After noting the new plea raised by the Defendant, the Plaintiff filed an application contending that, in the event the Trial Court accepts the

Defendant's new plea, the Plaintiff is willing to take the property "as is," in accordance with Section 12 of the Specific Relief Act.<sup>6</sup>

7. The Trial Court after considering the evidence available on record decreed the suit filed by the Plaintiff and directed the Defendant to execute a registered sale deed in favour of the Plaintiff. The trial court while decreeing the Suit held that:

- 7.1. Just because there is a clause which says that the Plaintiff is entitled to refund in case if the defendant breaches the agreement, it cannot be a ground to delete his right to file suit for specific performance. The defendant's plea that the plaintiff obstructed completion of the agreement cannot be accepted, as the plaintiff's architect was only supervising construction, not hindering it. Since the plaintiff had paid 90% of the consideration and even offered to finish the remaining 10% work under Clause 10, its readiness and willingness to perform were conclusively proved.
- 7.2. Regarding the new plea the Trial Court held that the new plea raised by the defendant for the first time during arguments was *malafide* and an attempt to take advantage of their own wrong. It further held that even if the agreement for sale of eight flats was void for being contrary to building regulations or the master plan, the agreement could still be enforced to the extent permitted under Section 12, with respect to a lesser number of flats. The Court clarified that neither the object nor the purpose of the agreement was illegal, since the defendant had never raised the defence of inability to perform until the final hearing, the plaintiff's prompt election under Section 12(3) was valid. A meaningful reading of the agreement revealed that it merely referred to a proposal

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<sup>6</sup> Hereinafter referred to as 'the Act'

for eight flats, while the operative terms indicated that the consideration was to be paid based on the covered area constructed, with no specific reference to eight flats, showing that the transaction was essentially for property and land rights rather than a fixed number of flats.

8. The defendant filed a Regular First Appeal (OS) No. 47 of 2009 challenging the judgment and decree of the Trial Court before the Division Bench of the High Court. The Division Bench by the impugned judgment allowed the Regular First Appeal filed by the Defendant, and dismissed the suit filed by the Plaintiff with respect to the seeking relief of specific performance, however ordered for the refund of the consideration which the plaintiff had filed to the Defendant i.e. Rs. 28,86,750 with interest at the rate of 18% per annum, compounded quarterly, for the period from April 8, 1986, to August 31, 1988. Thereafter, from September 1, 1988, until the date of actual payment, the said sum shall carry interest at the rate of 12% per annum, simple interest. Setting aside the judgment and decree of the Trial Court the Division Bench held that:

- 8.1. At the time the agreement was executed, it was inherently incapable of performance because only two residential units (one each on the ground and first floors) with a small barsati of 300 sq. ft. were permissible on the plot, and construction of eight flats as agreed was legally impermissible. Additionally, the basement could be used only for storage, not for residential purposes. Whether the arrangement was to be treated as a loan or as a failed sale transaction, any recompense to the plaintiff would have to be governed strictly by Clause 5 of the agreement, which provided that in the event the defendant was unable to transfer title, the amounts paid would be treated as a loan repayable with interest and this interpretation also clarified that the only issue given up earlier was the plea of undue influence or coercion.

8.2. The Court emphasized that the plaintiff being a public sector bank was expected to act lawfully and transparently, and should not have entered into an agreement whose object was in contravention of building laws or was designed to circumvent legal restrictions. The agreement clearly referred to the construction of eight dwelling units, which constituted the object of the contract and was patently in violation of the governing master plan and building bye-laws, making the agreement unlawful on its face. Since the bank was aware of the legal prohibitions and the agreement itself contained a clause treating the advance payment as a loan in case of breach, the application of Section 12 of the Specific Relief Act was held to be erroneous, as the plaintiff could not compel the defendant to perform an act expressly prohibited by law.

8.3. It is this judgment that the Plaintiff is challenging in this Appeal.

9. Ms. Raakhi Sahijwal, Learned Counsel appearing on behalf of the Appellant-Plaintiff has vehemently contended:

9.1. That Division Bench erred in law by setting aside the judgment of the Single Judge without examining the reasoning of the trial court in proper perspective. The Single Judge, had carefully considered the agreement for construction of two flats per floor, which allegedly violated the Building Bye-Laws, and, relying on judicial precedents and Section 12 of the Specific Relief Act, and yet had granted specific performance in favor of the plaintiff. The Division Bench, without addressing these findings or establishing any perversity or legal error, substituted its own conclusions, disregarding the detailed analysis of the Single Judge, and incorrectly assumed that the trial court ignored the legality of the agreement;

- 9.2. She further contends that agreement dated 27.12.1984 cannot be deemed void-ab-initio merely because it proposed construction exceeding the permissible number of dwelling units under the Building Bye-Laws. The Single Judge correctly recognized that the construction could be modified to comply with the law, including merging of flats or making other adjustments, and that the enforceable portion of the contract could be executed using the Blue Pencil Rule. The plaintiff had also expressly waived claims to performance of the non-compliant portions of the contract and had agreed to accept the property as-is, undertaking to ensure compliance with the law, thus rendering the claim of illegality untenable;
- 9.3. It is further argued that, the Division Bench had erroneously entertained a plea of illegality which was never raised in the written statement, nor framed as an issue, nor supported by evidence, but raised only at the time of oral arguments. The Defendant, who initially proposed construction exceeding legal limits, cannot now claim the agreement as void to avoid his obligations. The Division Bench's decision overlooked the substance of the contract and gave undue weight to the respondent's inconsistent conduct, which included prolonging the litigation, raising false pleas, and taking contradictory positions regarding the legality of construction;
- 9.4. The judgment of Division Bench is inequitable, unjust, and prejudicial, causing significant hardship to plaintiff. The petitioner, a public institution that fulfilled its contractual obligations in good faith, has been denied the relief of specific performance despite compliance with Section 12 of the Specific Relief Act and willingness to accept modifications necessary to conform to law. In sum, the judgment of Division Bench disregards established legal principles, the detailed



findings of the Single Judge, and the equitable rights vested with the appellant-plaintiff, leading to an outcome of a finding which is both legally and factually unsustainable.

10. On the other hand, Sri. T.K. Ganju, Learned Counsel appearing for the Defendant contends:

10.1. That defendant is the lawful owner of the property No. B-9, East of Kailash, New Delhi, under a perpetual lease deed dated 19.08.1974. Due to financial constraints, the defendant could not complete construction within the stipulated time prescribed under the lease and had sought extensions from the Delhi Development Authority. To finance the construction, the defendant approached the Plaintiff, a regular banker, for advances secured through equitable mortgage, with the understanding that if the construction or sale could not be completed, the amounts received would be treated as a loan repayable with interest.

10.2. The agreement dated 27.12.1984 contemplated construction of eight dwelling units and a basement totalling 9,950 sq. ft., which exceeded permissible limits under the Building Bye-Laws, 1983, and the sanctioned plan which was well within the knowledge of plaintiff. All amounts received from the Plaintiff were invested in construction, leaving the defendant with no profit and when it became apparent that the construction could not comply with legal requirements, the defendant repeatedly offered to refund the amounts borrowed from plaintiff with interest, but Plaintiff refused and instead filed a suit for specific performance. The terms of the agreement were contrary to the Master Plan, sanctioned plan, and Building Bye-Laws, making the agreement void-ab-initio and incapable of specific performance;

- 10.3. The defendant further submits that neither Section 12 of the Specific Relief Act nor the Blue Pencil Rule applies, as the agreement was illegal, void from inception and could not be partially enforced. The agreement linked both the land and the flats inseparably, making any attempt to enforce it equivalent to rewriting the contract, which the court cannot do. Enforcing the agreement would contravene public policy and settled principles of law under the Indian Contract Act, 1872, as a contract with an unlawful object is void. The defendant emphasizes that the Plaintiff's suit for specific performance is therefore untenable, and the Division Bench was correct in observing that the Single Judge had ignored the illegality of the agreement;
- 10.4. The property has remained vacant and in a dilapidated condition since 1989, and the defendant has not earned any profit from it. The agreement, being in violation of building regulations and statutory plans, could not be enforced, and the only lawful course was to treat the amounts advanced as repayable loans as agreed between the parties. It is further contended that granting specific performance under these circumstances would be contrary to law, equity, and public policy, and the Plaintiff's claims are thus entirely without merit.
11. We have heard the learned counsels appearing on behalf of the parties and perused the material on record. The scrutiny of the same, gives rise to the following points for our consideration:
- i. *Whether the construction and delivery of the eight flats specified in Schedule-I formed an essential condition of the agreement, the absence of which would render the agreement incapable of subsistence?*
  - ii. *Whether the agreement in its current form unenforceable as it is in violation of the Building laws?*

- iii. *Whether the course adopted by the Trial Court in modifying or interpreting the agreement to render it workable in its present form was legally justified?*
- iv. *Whether the Division Bench of the High Court erred in setting aside the judgment and decree of the Single Judge/Trial Court?*

**RE: POINT NO.1**

12. Before proceeding to answer the above point, it is vital to consider the terms of the agreement to determine whether it is enforceable without the construction of the eight flats, and whether such construction constitutes an essential element of the agreement. This question must be considered first, as the Plaintiff, by filing an application under Section 12 of the Act, has taken the plea that in the event the Court accepts the Defendant's new contention i.e. the agreement is unenforceable and invalid, they are willing to take the property "as is."
13. Before proceeding to answer the issue regarding construction of flats being the essential element of the agreement, it is important for us to reproduce few recitals of the agreement, which are relevant and have bearing on the point to be determined:

**"1. The purchaser will pay a total sum of Rs.32,07,500/- (Thirty two lakhs seven thousand five hundred only) to the vendor as consideration for the flat set out in Schedule-I together with the lease hold rights over the said land at the rate of Rs.340/- per sq.ft. of covered area of the flat and Rs.250/- per sq.ft. of the covered area in basement which is more specifically described in Schedule II and in the instalments set out in Schedule III hereto. The said total consideration has been arrived at by taking into consideration the approximate area of each flat mentioned in Schedule I. This consideration is however subject to variation which will finally be determined after the completion of the construction in all respects and the actual area is measured. The total consideration payable is on the actual covered area ascertain on actual measurement. The vendor acknowledges that he has already received a sum of Rs. 10 lakhs (Rs. Ten lakhs only) as part of the above consideration. The purchaser, however, is at liberty to stop further payments in accordance with the**

Schedule III, if the vendor has committed any breach of his undertakings.

1. It is agreed that according to the present plan, the ground floor, first floor and second floor will each contain two flats of approximate covered area of 1000 sq.ft. and mezzanine floor and the third floor of Barsati floor will each contain one flat of 1000 sq.ft. In addition, there will be a basement of an approximately covered area of 1950 sq.ft. If, however, the vendor constructs additional two flats, the vendor shall sell the same only to the purchaser at the same rates and subject to the same conditions and specifications as applicable to the other flats as set out in this agreement, provided however, the Vendor shall not construct even if it is permissible to do so in excess of flats and basement. The agreed broad specifications of the building and flats are set out in Schedule IV hereto.
2. It is agreed that on the plot of land in question, no other structure or building will be erected, the intention being that no one else other than the purchaser will have any right, title or interest to any part of the plot or any structure thereon.
- .....
5. It shall be the duty of the vendor to obtain all the necessary permissions from the Delhi Development Authority or other government authorities for transferring and conveying all the rights, title and interest in respect of the land and the flats to the purchaser. If for whatever reason, the vendor is not able to convey and transfer the right, title and interest as mentioned herein above to the purchaser, the entire amount paid by the purchaser to the vendor shall be treated as a loan advanced by the purchaser to the Vendor and will be repayable on demand with interest at 18% per annum compounded quarterly from the date on which the flats are to be handed over under this agreement. It is specifically agreed that all expenses, charges in connection with transfer including the payment of any statutory dues or amount by way of unearned increase in the value of the plot to the Delhi Development Authority or any other authority shall be borne by the vendor.
6. It is specifically understood that the purchaser is interested in purchasing the flats to be constructed thereon along with the rights concerning the plot of land and not the rights over the land alone and therefore the construction of the flat within the period and subject to the specification set out herein is the essential term of this agreement. The Vendor therefore shall not sell or lease or otherwise transfer the flats to any other person.
7. It is agreed that the vendor will construct the flats and complete the same in all respects and hand over possession of the same within a period of 18 months from the date of this agreement. PROVIDED however, the vendor is given a grace period of six months by the purchaser in writing from the above stipulated date of completion and handing over possession and subject to this, the time is the essence of this contract.

PROVIDED further that if it becomes impossible for the Vendor to complete the construction within the period mentioned above, on account of or by reason of war, act of State, natural calamities and such

*other events which the vendor could not prevent or which were not within the control of the vendor, the time for completion of the construction shall be extended by a period equivalent approximately to the duration of the event specified above.*

.....  
**11. Immediately after the construction of the flats are complete to its satisfaction, the purchaser may at its discretion occupy the flats without any specific permission by the Vendor to so occupy the flats.”**  
*(emphasis supplied)*

On perusal of the above clauses, particularly the highlighted portions, it becomes evident that the construction of eight flats, as mentioned in Schedule–I, along with two additional flats (making a total of ten flats), was not merely an essential part of the agreement but its very object and intent with which parties entered the contract. Without the construction of these number flats, the agreement to sell does not, and cannot, subsist. This position becomes clear from Clause 6 of the agreement, which states: *“It is specifically understood that the purchaser is interested in purchasing the flats to be constructed thereon along with the rights concerning the plot of land and not the rights over the land alone, and therefore, **the construction of the flats within the period and subject to the specifications set out herein is an essential term of this agreement.**”*. This clause explicitly stipulates that the construction and handing over of the number of flats constitute an essential term of the agreement and it was so agreed. In conclusion, the construction and delivery of the eight flats formed the core and essential terms of the agreement, without which the agreement itself could not subsist.

### **RE-POINT– II:**

14. Having concluded that the agreement cannot subsist without the construction and delivery of the eight flats, we shall now proceed to examine point-II.

15. The position of law regarding the “enforceability of the agreement which is against the law” is well settled. Section 23 of the Contract Act specially says **“The consideration or object of an agreement is lawful unless it is forbidden by law, or is fraudulent, or involves injury to a person or property, or is opposed to public policy.”**

16. This Court in the case of *Narayanamma and Anr v. Govindappa and Ors*<sup>7</sup> addressed the issue whether an agreement to sell land executed during a non-alienation period under the Karnataka Land Reforms Act was enforceable wherein the plaintiff had sought for specific performance of the agreement, but the trial court had dismissed the suit as void in the teeth of statutory prohibitions, a decision reversed by the appellate court. **However, this Court upheld the trial court’s judgment of dismissal, holding that agreements contravening law cannot be enforced, as enforcing them would be in conflict with public interest. The Court emphasized the doctrine of illegality and the principles ex turpi causa non oritur actio and ex dolo malo non oritur actio, reinforcing that courts will not assist in enforcing illegal agreements even if both parties are ad idem on illegality. The case highlights that adherence to statutory provisions and public interest being paramount in suits for specific performance.** While dismissing the Suit, this Court concluded as follows:

*“26. However, the ticklish question that arises in such a situation is “the decision of this Court would weigh in side of which party”? As held by Hidayatullah. J. in Kedar Nath Motant<sup>3</sup>, the question that would arise for consideration is as to whether the plaintiff can rest his claim without relying upon the illegal transaction or as to whether the plaintiff can rest his claim on something else without relying on the illegal transaction. **Undisputedly, in the present case, the claim of the plaintiff is entirely based upon the agreement to sell dated 15-5-1990, which is clearly hit by Section 61 of the Reforms Act. There is no other foundation for the claim of the plaintiff except the one based on the agreement to sell, which is hit by Section 61 of the Act. In such a case, as observed by Taylor, in his “Law of Evidence” which has been approved by***

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<sup>7</sup> (2019) 19 SCC 42.

*Gajendragadkar, J. in Immani Appa Rao, although illegality is not pleaded by the defendant nor sought to be relied upon him by way of defence, yet the Court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action ex turpi causa non oritur actio le. no polluted hand shall touch the pure fountain of justice. Equally, as observed in Story's Equity Jurisprudence, which again is approved in Immani Appa Rao, where the parties are concerned with illegal agreements or other transactions, courts of equity following the rule of law as to participators in a common crime will not interpose to grant any relief, acting upon the maxim in pari delicto potior est conditio defendentis et possidentis.*

*27. It could thus be seen that, the trial Judge upon finding that the agreement of sale was hit by Section 61 of the Reforms Act, had rightly dismissed the suit of the plaintiff"*

*(emphasis supplied)*

17. Now turning our attention to the facts of the instant case, it can be noticed that both the Trial Court and the Division Bench have unequivocally concluded that the agreement, in its present form, is unenforceable as it contravenes the applicable building laws. The Division Bench observed as follows:

*"9. In the year 1984, the Master Plan for Delhi then in force, along with the applicable Building Bye-Laws, 1983, permitted construction on a plot admeasuring 300 sq. yds. of a basement equal in area to the ground floor; a ground floor and a first floor of the same area, and a barsati floor with one-fourth of the covered area of the ground floor. Thus, when the agreement was entered into, it was incapable of being performed, inasmuch as only two residential units—one on the ground floor and one on the first floor—could be constructed, with a barsati floor of 309 sq. ft."*

The Trial Court also reached a similar finding, holding that the agreement, in its present form, was unenforceable as the construction of eight flats was impermissible under the building regulations but yet decreed the suit.

18. Accordingly, this answer's point II in the affirmative, that the agreement in its current form is unenforceable.



**RE – POINT III**

19. Having held that the agreement, in its present form, is unenforceable and that the construction of eight flats is an essential part thereof, we now proceed to examine the third point by raising two sub-points. The first is *whether, in a suit for specific performance, the Court can sever the invalid portion of an agreement from its valid portion?* If first issue is answered affirmatively, the second is *whether, in exercising such severance, the Court can render the agreement workable by removing an essential part.* These questions arise in the present case as the appellants have contended that the Trial Court's judgment and decree was valid. The Trial Court applied Section 12 of the Specific Relief Act, directing transfer of the 'rights over the land' to the Plaintiff, subject to compliance with the Building Regulations limiting construction to three flats.

20. **Sub-point No.III(1):** It is a well-settled principle of law that while adjudicating suits, or when examining the validity of agreements or contracts, the Courts generally have the power to sever the invalid portion of an agreement from its valid portion and give effect to the latter. There is no bar on the application of the doctrine of severability in suits for specific performance. However, this power must be exercised with great caution and only in exceptional cases.

21. **Sub-point No.III(2):** After the Trial Court concludes that it must resort to the exercise of severing the invalid portion of an agreement, the second sub-issue that arises—*whether the Court can render the agreement workable by removing an essential part of it.* The answer to this question is obvious, the Court cannot remove the essential part of an agreement or the very object for which it was executed. We further caution that, while exercising such power, the Courts must refrain from re-writing or re-constructing the agreement between the parties to make it work, which is the law laid down



by this Court in the case of *Mayawanti v. Kaushalya Devi*<sup>8</sup> which held as follows:

“8. In a case of specific performance, it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation.”

22.It is trite law that the power of the Court to sever the invalid portion of an agreement from its valid portion must be exercised sparingly and only in exceptional circumstances. While doing so, the Court cannot, under the guise of severance, redraft or reconstitute the fine tunes of the contract by removing its essential terms or altering its fundamental object which the parties had arrived at by way of their *consensus ad idem*, as such the exercise would amount to creating a new agreement between the parties, which is impermissible in law.

23.Having discussed the settled proposition of law, it is apposite to apply the same to the facts of the present case. The Trial Court in the present case, after taking the effort for separation of the invalid part from the valid part of the agreement held as follows:

*“66. The next question which arises is as to the relief to be granted to the plaintiff. The agreement in the present case expressly provided for the plaintiff entering in possession and completing the works. The plaintiff has also claimed the specific*

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<sup>8</sup> (1990) 3 SCC 1.

*performance of that clause of the agreement. The specific performance of that clause cannot be' denied to the plaintiff. **The plaintiff, of course, by stepping into the shoes of the defendant in the matter of raising construction shall not be entitled to raise any illegal / unauthorized construction even if that was the agreement. The plaintiff can raise only construction in accordance with law.** The plaintiff has given its assent therefore. The, defendant who has been found in default can be directed to perform specifically so much of his part of the contract as he can perform, i.e. by putting the plaintiff into possession of the property and by transferring / selling / conveying the property to the plaintiff as agreed. The defendant would, of course, have a choice whether to first have the leasehold rights in the property converted into freehold in his own name or to pay the unearned increase and transfer the leasehold rights in the land to the plaintiff."*

24. We have already held, while deciding the first point for consideration, that the construction and handing over of eight flats constituted an essential part of the agreement, without which the agreement could not have subsisted and while deciding the second point, we have concluded that the agreement for construction of eight flats was contrary to law and therefore unenforceable. Taking clue from the conclusion arrived at by us under the first and second sub-issues, it follows that the Trial Court was not justified in reworking the agreement to make it enforceable by removing its essential object—namely, the construction of eight flats on the subject land. In effect, the Trial Court re-wrote the agreement by reducing the number of flats to be constructed from eight to three, in conformity with the Building Regulations, which it could not have done since the very essence of the agreement was the construction of eight flats.

25. Thus, we conclude that *the course adopted by the Trial Court in modifying or interpreting the agreement to render it workable in its present form was not legally justified and as such the appellate court has rightly reversed the findings of trial court and rejected the prayer for specific performance.*

**RE- POINT – IV**

26. Having decided the foregoing issues, we hold that the Division Bench rightly allowed the appeal filed by the Defendant and rightly dismissed the suit instituted by the Plaintiff.

27. Before parting with the matter, we consider it appropriate to reiterate the observations made by the Division Bench, which are reproduced below:

*“27. Suffice would it be to state that the respondent is a public sector bank and it is not expected from the State or its instrumentalities to enter into camouflage agreements and especially where the object of the agreement would result in law being violated.”*

28. In the light of aforesaid discussion, we are of the considered view that the appeal must fail and accordingly, the appeal is dismissed. The Judgement and decree passed by the High Court of Delhi, in RFA (OS) No. 47 of 2009 dated 08.05.2012 stands affirmed. Parties to bear their respective costs. Pending Application(s), if any, shall stand disposed of.

....., J.  
[ARAVIND KUMAR]

....., J.  
[VIPUL M. PANCHOLI]

**New Delhi;  
October 9, 2025.**