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THE SPECIFIC RELIEF ACT, 1963 FROM EQUITABLE DISCRETION TO ENFORCEABLE RIGHT

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INTRODUCTION

The law relating to specific relief in India is a unique area of law that straddles the contract law and equity. Unlike other civil remedies, specific relief orders are directed at obliging a party to perform a particular obligation or restrain him, on the other hand, from committing a breach of contract. The relevant legislation, which governs this equity-based remedy, is the Specific Relief Act, 1963¹ ("the Act"), which substantially replaced the Specific Relief Act, 1877. The Specific Relief (Amendment) Act, 2018², which amended several sections of the 1963 Act, was a watershed in terms of doctrinal change: specific performance, which until now was seen as a discretionary and merely equitable remedy, has transformed into a kind of the enforceable right. This article will discuss this transformation and place it in the context of equity's doctrinal development as well as its impact on the Indian contract law.

THE ORIGINAL FRAMEWORK: SPECIFIC PERFORMANCE AS DISCRETIONARY EQUITY

The 1963 Act, being in essence a development of the equitable jurisprudence of the English Chancery courts, initially did not provide for specific performance as a matter of right. Thus, according to section 10 of the unamended act, the court could only order specific performance of a contract if “there is no standard for ascertaining actual

¹ The Specific Relief Act, No. 47 of 1963, India Code (1963).

² The Specific Relief (Amendment) Act, No. 18 of 2018, India Code (2018).

damage” resulting from its breach or if money would not be an adequate remedy. By linking specific performance to instances where damages would not be an adequate remedy, the provision in effect placed specific performance in the category of remedies that were discretionary in nature. In other words, the law laid down the principle that damages for breach of contract were the rule, and specific performance the exception. The contracting parties were at liberty to tailor their agreement in such a way as to allow for specific performance upon breach, but the courts were not empowered to grant it automatically. The exceptions to the rule were contracts for the sale of land or of unique goods.

The Supreme Court has repeatedly affirmed the discretionary nature of this jurisdiction. In *K. Narendra v. Riviera Apartments (P) Ltd.*, it found the power to decree specific performance, though discretionary, to be “sound and reasonable” rather than “arbitrary,” recognizing the “doctrine of comparative hardship” — that the court could decline relief where performance would impose an unforeseen hardship on the defendant which non-performance would not impose on the plaintiff.³

According to the unamended sections 20 and 21, the court’s discretion to order specific performance of a contract was further narrowed by the instruction that the order for its performance should be made cautiously and advisedly. The factors to which the courts were directed to have regard in deciding whether to order specific performance include whether the contract was such as to give an unconscionable advantage to the plaintiff, whether specific performance would be inequitable to the defendant in comparison to the rights of the plaintiff, and whether there had been any unconscionable dealings on the part of either party. In essence, this meant that even if the plaintiff demonstrated that there existed a valid and enforceable contract, and that its terms had suffered breach, the plaintiff could not automatically be entitled to specific performance. Instead, whether the remedy would be awarded or not would depend on the assessment of additional factors by the court, which were not directly related to the contractual obligation itself.

An illustration of this balancing approach is *Nirmala Anand v. Advent Corporation (P) Ltd.*, where the Court held that a mere rise in the price of property while litigation was

³ *K. Narendra v. Riviera Apartments (P) Ltd.*, (1999) 5 S.C.C. 77, ¶ 28 (India) (holding that the discretion to decree specific performance, while not arbitrary, remains “sound and reasonable[,] guided by judicial principles” and recognizing the doctrine of comparative hardship).

pending could not, on its own, defeat a plaintiff's claim for specific performance, but conditioned the decree on the payment of an additional sum so that the defendant was not left worse off by factors beyond either party's control — a demonstration of discretion being exercised "on sound principles" rather than withheld or granted wholesale.⁴

CRITICISM OF THE DISCRETIONARY MODEL

The discretionary model faced severe criticism due to the inappropriateness for the contractual and commercial relations in India. There were three main reasons for this, the first one being the inconsistent application of the adequacy of damages test. Such a situation when the court had to determine whether damages were adequate or not created uncertainty as different courts implemented various approaches when ruling such cases. The second reason was connected to the idea of specific performance as a discretionary remedy. It led to protracted litigation as the courts had to consider equitable issues before ruling on the performance of a contract. Finally, the third and most compelling reason for condemning the discretionary model was related to the fact that damages served as a convenient alternative to specific performance. In other words, one party to a contract could simply decide to pay the other damages as a way to mitigate losses suffered due to the other party's violation of the contract terms. This became particularly evident in the case of long-term infrastructure contracts where specific performance was required to ensure that the contracting parties would deliver on time and on budget.

Such a situation became unacceptable for the liberalised economy of post-reform India that required a stable and reliable legal framework for concluding long-term infrastructure, energy, and public-private partnership contracts. As a result, there was a need to make specific performance a matter of right rather than a discretion of the court.

⁴ *Nirmala Anand v. Advent Corp. (P) Ltd.*, (2002) 8 S.C.C. 146, ¶¶ 9–12 (India) (holding that mere escalation in the price of property during the pendency of litigation is not, by itself, a ground to refuse specific performance, though the decree may be conditioned to offset resulting hardship to the defendant).

THE 2018 AMENDMENT: A DOCTRINAL SHIFT

The Specific Relief (Amendment) Act, 2018 addressed these criticisms through a structural reform of the Act, most significantly by amending Section 10 to require the specific performance of a contract unless one of the exceptions set out in Sections 11(2), 14 and 16 applies. The word "shall" replaces the earlier formulation which allowed specific performance to be granted only at the discretion of the court, and the criterion of damages' inadequacy has been entirely removed from the provision. Hence, specific performance no longer stands based on being an exception to the rule of damage-based remedies, but rather the specific enforcement is the general rule, with exceptions carved out in the Act.

The Supreme Court specifically described this textual change in *B. Santoshamma v. D. Sarala*, in contrast to unamended Section 10, under which performance “may, in the discretion of the court, be enforced” in favor of the amended provision, under which the court is “now obliged to enforce” performance subject only to Sections 11(2), 14 and 16, holding in terms that the relief “is no longer discretionary” after the amendment.⁵

Further adjustments to the law of specific performance were also made through several additional amendments to the Act. First, as per the revised wording of Section 14, a narrower range of contracts are excluded from specific enforcement, including contracts which require continuous performance to be placed under the supervision of the court. Second, a new Section 14A empowers courts to obtain the assistance of independent experts in relation to specific performance disputes, particularly in the case of technically complex contracts. Third, Section 20A and several other provisions disapply injunctions in respect of infrastructure project contracts specified in the statute's Schedule, as the government sought to take a proactive role in ensuring the uninterrupted implementation of critical public infrastructure projects. Fourth, Section 20 was substantially reworded to allow for "substituted performance" (Section 20 read with the new wording as inserted by the 2018 Act), whereby an aggrieved party may, upon giving notice to the defaulting party, perform the contract through another person, including his or her own agency, and recover the costs of such

⁵ *B. Santoshamma v. D. Sarala*, (2020) 19 S.C.C. 80, ¶¶ 68–71 (India) (contrasting unamended Section 10, under which specific performance “may, in the discretion of the court, be enforced,” with amended Section 10, under which the court is “now obliged to enforce the specific performance of a contract” subject to Sections 11(2), 14 and 16).

performance from the party in breach without first having to approach the court. Finally, special courts have also been appointed

FROM EQUITY TO THE RIGHT: CONCEPTUAL CHANGE

The doctrinal significance of the 2018 amendment derives from the shift that it creates in the nature of the remedy. The pre-amendment Act kept specific performance linked to its origin in Chancery equity: it was a discretionary remedy, available only where the common law remedy of damages was inadequate, and subject to the court's evaluation of whether such performance would be unconscionable, oppressive or involve a hardship.

The amended Act implies a rule of specific performance as a matter of course in a contract, not a mere indulgence of the court: the remedy, which used to be in equity a discretionary power, has become a statutory right. By removing the inadequacy of damages threshold, the new amendment makes performance in specie the default option in a contract dispute, and leaves damages as the fallback. The change reflects a more general trend in a number of common law jurisdictions towards viewing promises as creating a right to performance rather than a mere option to choose between performance and compensation. Some writers have connected this development to the efficient-performance theory in contract law: a more robust performance-oriented remedy is preferable to the purely compensatory approach embodied in the common law because it better preserves the value of the bargain for both sides (whereas damages for breach would merely constitute an alternative market value).

The Supreme Court upheld this doctrinal shift in *Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd.*, finding that post-amendment specific performance is “founded on satisfaction of the requisite ingredients” prescribed by the Act rather than on judge-fashioned equitable principles.⁶ The Court, however, also found that the amended Section 10 applies only prospectively, governing transactions entered into on or after October 1, 2018, and leaving the older discretionary regime intact on

⁶ *Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd.*, (2023) 1 S.C.C. 355, ¶¶ 46, 70 : 2022 SCC OnLine SC 1079 (India) (holding that post-amendment specific performance is “founded on satisfaction of the requisite ingredients” of the Act rather than on judge-made equitable principles, and that the amended Section 10 applies prospectively to transactions entered into on or after October 1, 2018).

earlier contracts —a finding that survived, on the point of prospective effect, when the Court reviewed the decision on other grounds in *Siddamsetty Infra Projects (P) Ltd. v. Katta Sujatha Reddy*.⁷

It should be noted that discretion is not completely eliminated by the amendment: section 20 of the Act still permits the court to refuse specific performance in a given case (for example, when the terms of the contract are vitiated by fraud or mistake).⁸

IMPLICATIONS AND CONTINUING CONCERNS

The implications for commerce are considerable. In practice, this means that parties can negotiate and perform commercial contracts with greater confidence than before in the knowledge that the court will enforce the bargain as made and not allow the other side to "buy out" of performance by payment of damages. This is likely to have positive implications for high-value commercial or infrastructure transactions and bring Indian law into closer conformity with international commercial norms.

At the same time, commentators have pointed to potential negative implications for commercial contracting in India in certain inherently inequitable contexts where one contracting party is in a significantly stronger position than the other. By virtue of an entitlement-based approach to specific performance, the amendment in principle allows a contracting party to compel performance where equity would previously have refused such specific performance on the grounds of hardship. A similar concern has been raised in relation to the bar on injunctions for scheduled infrastructure contracts, which has been seen by some as limiting potential judicial oversight in disputes involving the state or large developers in such cases. The full jurisprudential implications of the amendment remain to be worked out by the judiciary, which must balance the residual scope of discretion preserved by virtue of the amended Section 20 in tandem with the new statutory presumption in favour of performance.

⁷ *Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd.*, (2023) 1 S.C.C. 355, ¶¶ 46, 70 : 2022 SCC OnLine SC 1079 (India) (holding that post-amendment specific performance is "founded on satisfaction of the requisite ingredients" of the Act rather than on judge-made equitable principles, and that the amended Section 10 applies prospectively to transactions entered into on or after October 1, 2018).

⁸ See Specific Relief Act § 20, as amended by The Specific Relief (Amendment) Act, No. 18 of 2018, India Code (2018) (preserving limited residual discretion to refuse specific performance, e.g., where a contract is vitiated by fraud or mistake).

The prospective-only basis upon which the Katta Sujatha Reddy judgment is confirmed means that a significant number of disputes deriving from pre-2018 agreements will continue to be determined at least initially in accordance with the old discretionary standard for the time being, and thus the twin regimes – equity-based discretion and entitlement-based enforcement – will have to co-exist in Indian courts for some time to come.

CONCLUSION

The development of the law from the Specific Relief Act, 1963, through to the 2018 amendment, reflects a shift in the approach to specific performance in India from a discretionary, equitable remedy to a default, rights-based remedy. Not only has the scope of specific performance been expanded, but its theoretical basis has been adjusted to reflect a more commercially practical view of enforceability. What was once an extraordinary remedy granted only in cases where money would prove to be an inadequate substitute for actual performance has now been transformed into the ordinary and indeed expected result of a valid breach of contract. This is an adaptation of a more commercial. This is an adaptation of a more commercial and entrepreneurial outlook on contract law and also raises fascinating questions on the role of equity in individual cases.