# II – WORKSHOP – 2018-19

## KRISHNA DISTRICT

### IDENTIFIED OFFICERS

<table>
<thead>
<tr>
<th>S.No</th>
<th>Name of the Officer</th>
<th>Topic</th>
<th>Page Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Smt. K.Radha Ratnam, XII Additional District Judge, Vijayawada</td>
<td>Contours of Relief of Specific Performance of Contract</td>
<td>1-18</td>
</tr>
<tr>
<td>2.</td>
<td>Smt. M.Anuradha, Senior Civil Judge, Kaikaluru</td>
<td>Scope of exercising discretion to grant relief of specific performance.</td>
<td>19-34</td>
</tr>
</tbody>
</table>
CONTOURS OF RELIEF OF SPECIFIC PERFORMANCE OF CONTRACTS
(as amended by the Specific Relief (Amendment) Act, 2018, (Act No.19/2018 dated 01.08.2018 with effect from 01.10.2018))

The law of specific relief in India was originally codified by specific relief act 1987. The provisions of the enactment was considered by the law commission in its 9th report which was later replaced by the present Act of 1963. Under the Act, the remedy of specific performance was not available to a party as a matter of right, but its grant was based on the discretion of the Court.

On a construction of the provisions of the Principal Act and by exercising the discretion vested, the Courts in a large number of cases have awarded damages as a general rule, while specific performance is granted as an exception.

The Amendment Act 2018 has brought about a substantive charge. As per the Amendment Act, the Courts are bound to enforce the specific performance of a contract as a rule, subject to limited exceptions.

The Act provides the following kinds of Specific Relief

- Recovery of possession of property
- Specific performance of contracts
- Rectification of instruments
- Rescission of contracts
- Cancellation of instruments
- Declaratory decrees
- Injunction

In this paper we are concerning with relief of Specific Performance of Contracts.

Specific performance means enforcement of exact terms of the contract.

A contract as defined under section 2 (h) of the Indian Contract Act is ‘an agreement to do or not to do a particular act which is legally enforceable by law entered for a particular purpose by two or more
parties where each party assumes legal obligation that must be fulfilled’.

Obligations :-

When there is a contract there would be contractual obligations to perform as defined under Section 2 (a) of the Act. The obligation includes every duty enforceable by law. The burden on whom such obligations are cast under contract must discharge the same, failure to discharge such obligation, gives a right to other party to sue for the relief of enforcement of such breach obligation through Court of Law. This is called specific performance of contract. So, ‘specific performance means performance of ones obligation under a contract’

When a party defaults in performing any such obligation the Court may issue an order directing the defaulting party to perform such obligation. So, the relief of specific performance is a directive order by Court wherein a party to contract must perform a specific action and the remedy developed by principle of equity.

**Essential requirements of Obligation :**

I. **Obligagor :-**

A person who is bound to discharge the obligation is obligagor

II. **Obligagor :-**

A person who is entitled to demand the fulfillment of the obligation is obligagee.

III. The subject matter of the obligation.

IV. Source of obligation i.e., the efficient cause which binds or connect the parties to the obligation.

Some of the obligations on the part of the vendor are as follows :

V. To clear debts, if any

VI. To deliver possession

VII. To measure, survey and fix boundary stones

VIII. To obtain income tax clearance certificate

IX. To transfer ownership

X. To reveal encumbrances on the property
The aggrieved plaintiff to initiate any legal action for performance of a contract the following **conditions** must be in existence.

1. There must be specifically enforceable type of contract sufficiently certain in its terms;
2. Adequate consideration;
3. Plaintiff’s performance tender or excuse for non performance of the contract
4. The defendant’s breach of the contract.

In one word it is to say the plaintiff must have performed the agreement and the defendant must have breached the agreement. If those conditions are fulfilled, the plaintiff can obtain decree for specific performance against the defaulting party.

Now, let us have overall idea about **Sections 9 to 24** of the Act which are specifically concern with specific performance of contracts.

- **Section 9** of the Act deals with the defences that are available to the person against whom the relief is claimed. He may plead any ground which is available under any Law relating to Contracts.

**Some of the defences available are :**

- That the plaintiff did not enter into the agreement
- The plaintiff has not performed the obligations imposed upon him under the agreement

- **Absence of concluded contract :**

  A contract is concluded by means of an offer by one party to the other and the acceptance of the offer by the party to whom it is made. The onus to prove that the contract is concluded one is on the plaintiff.

  In a case an agreement to transfer immovable property was subject to fulfillment of certain conditions there was no concluded contract between the parties unless and until such conditions are fulfilled.

  A contract for sale is complete when the parties to it ie., the buyer and the seller are ascertained, the property to be sold is identified by description, the price is fixed and there is mutual consent of the parties to the terms, if any, concerning the transactions.

  An agreement to enter into an agreement upon terms to be afterward settled between the parties creates no enforceable obligation until those terms are settled and the party who entered into such agreement is perfectly at liberty to retire from the party.
• **Void Contract :-**
  A contract which is void is not enforceable and no specific performance of the contract is permissible.

• **Voidable nature of contract :-**
  If the consent to a contract is obtained by coercion or undue influence or fraud or misrepresentation or mistake etc., the defendant can opt to avoid the contract being voidable contracts.

• **Unlawful Agreements :-**
  A contract which is legally invalid due to unlawful consideration, unlawful object, marriage brokage contract, agreement in restraint of trade, agreement in restraint of legal proceedings, agreement in respect of past illicit cohabitation, contract offending public policy and wagering contracts cannot be sought to be specifically enforced.

• **Incomplete or inchoate contract :-**
  Incomplete contract is no contract in the eye of law. Thus, where agreement of sale provides for sale after obtaining the sanction of certain authority within a certain time the agreement remains incomplete unless and until the sanction is obtained.

• **If the plaintiff terminates the contract**
  Example : In respect of a contract, a building, a house complex when the plaintiff wrote to defendant to the effect “since you committed breach of agreement by not executing a deed or conveyance I am left with no alternative other than to terminate the contract”. A suit for specific performance of contract thereafter is not tenable.

• When the plaintiff **repu diated** the contract and elected to sue for damages he cannot thereafter claims specific performance of contract.

• Absence of consideration, unlawful consideration, renders a contract void

• **Undue hardship on the defendant : -** (Section 20 of the Act)
  Section 20 (2) (a) of the Act provides that when the granting decree of specific performance entails giving to the plaintiff an undue advantage over the defendant the relief may be refused.

• **Doctrine of frustration :-**
  In certain circumstances the parties to a contract are discharged from performance of the obligations when there is a supervening impossibility. The contract is then said to be frustrated. Even where performance may not have become physically impossible when there is a fundamental change in the situation the doctrine of frustration may be invoked.
**Example:**
1. A contract for transfer of shares in a company is not specifically enforceable after winding up order is made.
2. If suit property is acquired by the Government in land acquisition proceeding pending in a suit for specific performance of agreement to sell it to the plaintiff the contract is frustrated and the suit is accordingly is liable to dismissal.

   Thus to a suit for specific performance or to a suit for damages for breach of contract frustration of the contract is a valid defence.

- **Contingent contract :-**

  A suit for specific performance is premature if it is instituted before the conditions are fulfilled on the fulfillment of which alone the contract is to become absolute. No specific performance can be decreed of a contingent contract until the contingency happens.

- **Material alteration in agreement :-**

  If there is a material alteration no rights can be enforced on the basis of document. *(Loonkaran Sethia vs Ivan E John (AIR 1977 SC 336))*

  The defective title of the vendor in the property is a valid defence.

**Defence of nonest factum** when a person who has executed a written document was mistaken not merely as regards the contents but as to the essential nature of the contract he can plead nonest factum i.e., ‘it is not my deed’ and the writing is not my deed.

**Example :-** An illiterate man signed his name under a document on the assurance that it was a release only of arrears of rent. In fact it was a release of all kinds to the property. Then, that man can defend as that document is void on the plea of nonest factum and the document is void.

**Substituted Performance of Contract Under Section 20 :-**

In case a non-defaulting party exercise the option of substituted performance then such party can no longer seek any specific performance of contract.
Section 15 : - Who may obtain specific performance

Section 15 of the Specific Relief Act provides for those persons who can obtain specific performance of contracts those are as follows :-

A suit for specific performance can be filed by any party in a Court of competent jurisdiction who has suffered loss due to non performance of contract on part of the other party to the contract.

The specific performance of a contract cannot be decreed in the absence of the parties to the contract. So, the specific performance of a contract may be obtained by

(a) any party thereto,
(b) the representative in interest or the principal, excepting where the learning skill, solvency or any personal quality of such party is a material ingredient in the contract.

if personal skill of one party is essential element of the contract, specific performance is frustrated with death of that party, the legal representative of the party cannot demand specific performance of the contract.

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the reminder-man;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.
Section 19 :- Against whom the contracts may be specifically enforced

a) Either party to the contract;
b) Subsequent transferee with notice of prior sale agreement;
   (necessary party)
Illustration:
   ‘A’ contracts certain land sells to ‘B’ for Rs.5,000/-, ‘A’ afterwards conveys the land for Rs.6,000/- to ‘C’, who has notice of the original contract. ‘B’ may enforce specific performance of the contract as against ‘C’.

c) Heirs and legal representatives of the parties to it.
Illustration:
   ‘A’ contracts to convey certain land to ‘B’ by particular day. ‘A’ dies intestate before that day without having conveyed the land. ‘B’ may compel A’s heir or other representative in interest to perform the contract specifically.

d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
e) when the promoters of company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company;

Section 10 :- Contracts which can be specifically enforced.
This section is to be read along with section 11 (2) 14 and 16 and section 20.

Previously, specific performance of a contract was a remedy that the Courts had the discretion to grant only when (i) the actual damage caused due to non performance of the action could not be ascertained;
(ii) when monetary compensation would not be adequate relief for the non performance of the contract.

Section 10 of the Act has been entirely substituted to now read that the ‘performance of contract shall be enforced by the Court subject to the provisions contained in sub-section 2 section 11, section 14 and section 16’.
Until now while specific performance was granted as per the discretion of the Courts, under the amended Act specific performance will be granted mandatorily, subject to certain exceptions which are elaborated in the sections below referred.

**Section 11** of the Act deals with cases in which specific performance of contracts connected with trusts enforceable.

**Section 14** of the Act deals with contracts which cannot be specifically enforced and

**Section 16** of the Act speaks about the personal bars to relief i.e., persons in favour of whom specific performance cannot be enforced.

**Section 11 (2)**

By the amended Act the discretionary power of the Court was done away in the cases connected with trusts and the specific performance of the contract **shall** be enforced by the Court subject to provisions contained in sub-section 2 of section 11 that a contract made by a trustee in excess of his powers or in breach of trust shall not be specifically enforced.

The amended Act has mandated specific performance of contract which is in relation to trusts except as provided in the Act.

◆ **Section 14** of the Act has been entirely substituted.

Grounds that compensation is an adequate relief in sub-section (a) and that a contract runs into such minute or numerous details that the Court cannot enforce specific performance of its material terms in sub-section (b) of section 14 of the Act have been deleted by the amended Act. The amended Act now prescribes certain contracts which mandatorily cannot be specifically enforced.

The amended Act provides for following four contracts which cannot be specifically enforced.

- where an aggrieved party has obtained substituted performance of contract;
- where the contract involves performance of a continuous duty which cannot be supervised by the Court;
- where the contract is dependent on personal qualifications of an individual, such that enforcement of the material terms is not possible and
➢ the contract is determinable by its nature.

The new ground introduced to refuse specific performance when a party to the contract has obtained substituted performance under section 20 of the amended Act (discussed below)

◆ Section 20 of the amended Act :- Substituted performance of contracts (the old section is substituted with the new provisions)

- In cases of breach of contract by the promisor, the promisee can have the contract performed to a third party or his own agency and recover the expenses and costs actually incurred from the promissor.
- Mandatory 30 days notice to be given by the promisee to the promisor for rectifying the breach. If the promisor fails to do so the promisee may proceed to obtain substituted performance.
- Substituted performance must actually be obtained prior to promise recovering expenses or substituted performance from the promisor.
- Newly substituted section 14 and 16 of the amended Act, in the place of old section bars grant of specific performance of a person by whom or for a contract in respect of which substituted performance has been obtained.
- A party who suffered the breach can in addition to substituted performance claim compensation.

◆ Section 16 of the Act has been amended to provide that specific performance cannot be enforced in favour of the person -

(a) who has obtained substituted performance of contract under Section 20;
(b) who has become in capable of performing or violates any essential term of contract or acts in fraud of the contract or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
(c) who fails to ‘prove’ that he has performed or has always be ready and willing to perform the essential terms of the contract.

The amended Act done away with the requirement for a party seeking specific performance to aver readiness and willingness to perform his part of the contract. Several cases have got dismissed solely because of the failure to make such plea in the plaint. Now, the courts
can still grant specific relief even if the pleadings do not contain an averment such effect.

From the provisions above mentioned, it is to say that except in the cases of the contracts specified in section 11 (2), section 14 and except in favour of the persons specified in section 16 of the Act, the Court shall grant relief of specific performance mandatorily.

**Section 12 : - Specific Performance of part of Contract**

Except under certain exceptional cases (discussed below) specific performance of part of a contract shall not be granted.

- **Exceptions :- (Sections 12 (2) to 12 (4))**

  Where the party to the contract is unable to perform part of the contract which is small portion in value and admits compensation in money, in such cases the Court can direct specific performance of contract which can be performed and can award compensation for the part unperformed.

  In ‘**Baikunthi Devi And Ors. vs Mahendra Nath And Anr**’ (AIR 1977 SC 1514) The Apex Court held the Section 12 (2) enables party in default to claim specific performance provided left unperformed contract is small in value and admits compensation.

**Section 12 (3) :-**

If defaulting party to the contract is unable to perform considerable part of the contract, though he admits to pay compensation in money or did not admit to pay compensation in money, he is not entitled for decree for specific performance.

But in the case suit filed by other party (non-defaulting party) Court can order or direct the defaulting party to perform as much as he can.

**Section 12 (4) :-**

- When part of the contract stands on a separate and independent footing from another part which cannot be performed, the Court may direct specific performance of former part of the contract.

**◆ Section 17 :- Contract by one who has no title**

As per Section 17 (1) (a) a person who knows that he has no title to the property and yet enters into a contract in regard to it cannot have the remedy of specific performance.

Illustration : ‘X’ property belong to ‘C’. ‘A’ without ‘C’s authority contract to sell to ‘B’ an estate ‘X’ which ‘A’ knows to belongs to ‘C’. ‘A’
cannot enforce specific performance of this contract even though ‘C’ is willing to confirm it.

_Illustration_: ‘A’ is a heir of ‘B’ who left the country several years before but there is no sufficient proof of his death. ‘A’ is in possession of certain land and he contract to sell it to ‘Z’. ‘A’ cannot compel ‘Z’ specifically to perform the contract.

Under section 17 (1) (b) if a person entered into contract believing that he had a good title to the property cannot have remedy of specific performance except in the case where his title was perfected within the the time fixed by the agreement of the parties or by the order of the Court.

Thus, section 17 draws a distinction between a person who at the time of the contract knows that he has no title and one who thought that he has no good title, believes that he has. In the first case which is covered under clause (a) specific performance cannot be enforced at the instance of the vendor. In the second case covered by clause (b) specific performance can be decreed provided the vendor perfects his title within the time fixed by the agreement of the parties or by the order of the Court.

◆ _Section 18 :- Non-enforcement with variation_

Section 18 of the Act can have application only to written contracts that are complete in nature. The plaintiff can obtain the performance only in accordance with the variation set up by the defendant. This section refers to fraud, mistake of fact and the like on the specific enforceability of contracts.

_Illustration_: ‘A’ entered into a contract in writing with ‘B’ in respect of a dwelling house. ‘B’ is under the impression that the contract included the adjoining yard and the contract was so framed as to leave it doubtful whether the yard was so included or not. ‘A’ sues ‘B’ to compel specific performance of a contract to buy that house. ‘B’ proves that he assumed that the contract included an adjoining yard. In such case the Court will refuse to enforce the contract except with the variation set up by ‘B’.
Section 21: Power to award compensation under

- For breach of contract by one party, the another party is entitled to claim damages when the specific performance of the contract was not possible. But the plaintiff was not entitled for such damages when by his own act specific performance is rendered impossible.

- The plaintiff can claim damages at any stage of the suit by amendment (section 21 (5))

- If the amendment relates to the relief of compensation in lieu or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the Court will allow the amendment at any stage of the proceedings as under Section 21.

- If the amendment of conversion of a suit for specific performance into one for damages for breach of contract in which case section 73 of Contract Act is invoked.

- When the contract is incapable of performance refund of earnest money making grant.

Section 22: Power to grant relief for possession, partition, refund of earnest money etc.,

Section 22 enumerates the powers of the Court to grant possession, partition and for return of earnest money or deposit made by him in case the claim for specific performance is refused.

Babugaru vs Hajarilal AIR 1982 SC 818 at 824

*When the seller (defendant is in possession), the plaintiff (buyer) need not specifically pray for delivery of possession. Right to possession is inherent in the right to specific performance.*

*The party in possession may be a tenant or subsequent purchaser, a trespasser or a person claiming by an independent title. If such person is made a party to the action, a prayer for delivery of possession should be included that would be on ‘appropriate’ to include such a prayer.*

Sarverunnisa Begum vs Syed Rafiq 2015 (3) ALT 762

Held that *A decree for mere specific performance implies a decree for possession – Judgment Debtor cannot contend the Decree*
**Holder did not seek for possession as there is no decree for possession.**

◆ **Section 24 :-**

Dismissal of suit for specific performance of a contract shall bar the plaintiff to file separate suit for compensation but it shall not bar to file separate suit for any other relief like return of the deposit etc.,

While discussing about provisions of Specific Relief Act I have covered the amendments brought to it relevant points of the provisions. The other amendments which are not discussed earlier are as follows.

◆ The other important amendments introduced by amendment Act 18 of 2018 are that section 14-A, sections 20-A, 20-B and 20-C are newly introduced.

◆ The newly inserted **Section 14-A** in the Act entitles Court to engage experts to assist on any particular issue in a suit where it is necessary to get expert opinion.

- Further, the Court may direct parties to provide the expert with all information or access to the relevant documents, goods, property etc.,

- The opinion or report given by the expert is to form part of the suits record.
- The parties to the suit may examine the expert in the open Court on any of the matters referred to him.

- The expert is entitled to fee, costs or expenses fixed by the Court.

◆ The amendment Act has introduced a new category of projects which are ‘infrastructure projects’ which are listed in the schedule of the Act.

- The newly inserted section **20-A** in the Act, bars Courts from granting injunction in a suit where the contract involved is related to the infrastructure projects specified in the schedule, if granting injunction cause impediment or delay in the progress or completion of such infrastructure project.

- The newly inserted section **20-B** introduced a provision for designation of Special Courts for trying suits in respect of contracts relating to infrastructure projects by State Government in consultation with Chief Justice of High Court.
Section 20-C as introduced by the amendment Act provides that suits filed under the Act must be disposed within twelve months from the date of service of summons to the defendant and such period is extendable by further six months for recording reasons in writing.

In section 21 an amendment was brought to the effect that in a suit for specific performance of contract the plaintiff may also claim compensation. The plaintiff also claimed compensation in addition to specific performance.

Some important features of the relief of Specific Performance along with Judgments.

Unregistered agreement of sale from 01.04.1999 all the agreements are must be under a registered document but for relief of specific performance there is an exemption was provided under section 49 (c) of Registration Act for suits filed for specific performance.

In S. Kaladevi vs. V. R. Somasundaram AIR 2010 SC 1654

Apex Court held unregistered agreement of sale is admissible in evidence in a suit for specific performance.

Readiness and Willingness:

As per Section 16 (c) of old Act the plaintiff must aver and prove his readiness and willingness to perform his part of contract. As per amended Act, it is sufficient the plaintiff has to prove the readiness and willingness on his part and there is no need to aver the same in the plaint.


The Apex Court explained the distinction between ‘readiness’ and ‘willingness’ as the readiness refers to financial capacity and willingness to the conduct of the plaintiff wanting performance.

In Balakrishna vs Bhagwandas AIR 2008 SC 786.

The Apex Court held that the plaintiffs readiness and willingness is a condition precedent and it must be in accordance with the terms of the agreement.


In Man Kaur (dead) by L.Rs., vs Hartar Singh Sanga – (2010) 10 SCC 512
The Apex Court held that right from the date of the execution till date of decree the plaintiff must prove that he is ready and has always been willing to perform his part of contract.

- **In Jayashree vs Bhagwandas AIR 2009 SC 1749**
  The Apex Court held in a suit for specific performance the plaintiff is to approach the Court with clean hands.

- **Whether time is essence of contract :-**
  In the decision of *Chand Rani vs Kamal Rani – 1993 (1) SCC 519*.
  The Constitution Bench of Honourable Apex Court held that it is well accepted principle that in the case of sale of immovable property, time is never regarded as essence of the contract.

- **Subsequent transferee :-**
  - A transferee for value who has paid his money in good faith and without notice of an earlier contract is not bound by it and specific performance cannot be enforced against him.
  - If the subsequent transfer is based upon an earlier contract there can be no specific performance of an intermediate contract.

**Illustration :**
The plaintiff brought a suit for specific performance of a contract for sale of a property dated 25.10.2010 as against ‘D’ who had obtained a conveyance of the property on 28.10.2010. D’s conveyance was in pursuance of a contract dated 22.10.2010. The plaintiff is not entitled for specific performance as against ‘D’.

- Priority as between two registered sale deeds.

**Illustration :**
‘A’ entered into a contract for sale with ‘B’ on 10.02.2007 then he executes a sale deed in favour of ‘C’ on 10.06.2008. Later, a sale deed is executed of the same property in favour of ‘D’ on 18.06.2008. C’s sale deed is registered on 25.06.2008 when he paid full consideration before the Registrar. ‘C’ awares the agreement of sale dated 10.02.2007 at the time when he paid consideration, B’s sale deed of 18.06.2008 is entitled to priority because the earlier agreement of 10.02.2007 would be enforceable against ‘C’ in such a case. If the agreement of 10.02.2007 is proved to be not genuine, then C’s sale deed though registered on 25.06.2008 relates back to the date of its execution i.e., 10.06.2008 so entitled to priority.
Subsequent purchaser whether necessary property

Dwaraka Prasad Singh vs. Harikanth Prasad Singh AIR 1973 SC 655 Apex Court held

“in a suit instituted by a purchaser against the vendor and a subsequent purchaser for the specific performance of contract of sale the proper form of the decree is to direct specific performance of the contract between the vendor and the plaintiff and further direct the subsequent transferee to join in the conveyance so as to pass on the title which resides him to the plaintiff, both the original vendor and the subsequent transferee are necessary parties”.

- Where the transfer is prior to the suit but subsequent to the suit contract such subsequent transferee is a necessary party to the suit on the earlier contract.

- A transferee of the property pendente lite is a proper party and may be added as party to the suit for specific performance.

- In a suit for specific performance of a contract by a member of an Undivided Hindu Family to sell his share, the other members of the family are not necessary parties unless those members are subsequent transferees of the property agreed to be sold to the plaintiff.

- If one of the co-vendor has not joined in the suit for specific performance cannot be decreed.

- A contract for sale can be enforced against the subsequent donee.

- A pre-emptor who has notice of the contract for conveyance entered into simultaneously with the sale which formed the basis for pre-emption is bound by the contract and the title obtained by him by pre-emption proceedings is subject to that contract.

- A sale of property to the pre-emptor pending to suit for specific performance is effected by lis pendency.

- The subsequent transferee can put forward any defence which was open to the original contracting party in whose shoes he stands.

◆ Alternative Relief of Refund of Earnest Money : -

Where the vendee suing for specific performance of contract or sale in the same suit asked in the alternative for the relief of refund of earnest money or advance money, paid under the contract of sale can as an
aggrieved person prefer appeal against the Judgment and Decree of the first Court which granted him only the relief of return of the earnest money or advance money while denying him the relief of specific performance (AIR 1991 Madras 163 – Ramani Ammal vs Suselammal).

◆ Amendment regarding to Compensation :-

Where an amendment relates to relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the Court will allow the amendment at any stage of proceeding. AIR 1992 SC 1604 – Jagadesh Singh vs Nathu Singh.

◆ Relief of specific performance and injunction :-

Sucha Singh Sodhi vs Baldev Raj Walia - Civil Appeal No.3777 OF 2018

Held that specific performance and permanent/temporary injunction cannot be claimed in one suit as they are independent to each other and the cause of action are different.

◆ Stamp Duty :-

When the agreement of sale is coupled with delivery of possession the same is liable for stamp duty as if it is a Sale Deed under schedule I Article 47-A of Stamp Act (AP). Stamp duty is attracted if delivery of possession was concurrent or contemporaneous with the agreement. 2015 (1) Civil Court Cases (AP ) 322

◆ Limitation :-

The period of limitation for a suit specific performance of a contract is three years and the time of limitation starts to run from the date fixed for performance or if no such date is fixed, when the plaintiff has noticed that performance is refused.

◆ Retrospective and Prospective :-

There is no express provision in the Amendment Act stating if the Amended Act will apply retrospectively or will have only prospective application.

Substitution of an existing provision by a new provision can be construed as it substituted expressions were included from the date of introduction of the original law.

In my opinion, the new Act is retrospective and is applicable to pending suits.
CONCLUSION :-

From the above all provision, it can sum up that the relief of specific performance is an equitable relief so the plaintiff seeking performance of a contract must come to Court with clean hands and the party must be in a position to establish and to prove that he is ready and has always been willing to perform his part of contract and in view of 2018 amendments except in the cases falling under section 11 (2), 14 & 16 (as amended) it is mandate on the part of Courts to grant relief of specific performance and the Court should come to conclusion by taking into consideration, the conduct of the plaintiff prior to and subsequent to filing of the suit.
SCOPE OF EXERCISING DISCRETION TO GRANT RELIEF OF
SPECIFIC PERFORMANCE

Introduction:

Specific performance of contract is an extraordinary equitable remedy that compels a party to execute the contract according to the precise terms agreed upon or to execute it substantially so that under the circumstances, justice will be done between the parties. It grants the plaintiff what he actually bargain for in the contract rather than the damages for not receiving it. Thus, it is an equitable rather than a legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by avoiding damages for breach of contract. In England, the relief of specific performance pertains to the domain of equity, but in India the exercise of discretion is governed by the statutory provisions.

1. Section 20 of “Specific Relief Act” 1963 provides that

Discretion as to decreeing specific performance:- (1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by Judicial principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise discretion not to decree specific performance:

(a) Where the terms of the contract or the conduct of the parties at the time entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or,

(b) Where the performance of the contract would involve some hardship on the defendant which he did not foresee,
(c) Where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

**Explanation 1:** Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause(b).

**Explanation 2:** The question whether the performance of a contract would involved hardship on the defendant within the meaning of clause(b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

2. Thus, before of granting decree for specific performance the Court must be satisfied that
   
i The contract is certain and unambitious in its terms.
   ii A valuable consideration is passed,
   iii The contract is fair,
   iv The contract is not vitiated by fraud mistake and misrepresentation,
   v The contract does not offend third party
   vi The contract does not impose a harm and unconscionable bargain,
   ix The plaintiff is not guilty of unreasonable delay and latches

3. After considering the provision of Sec. 20 of the Act, it appears that merely because of contract is lawful, the specific performance should not be granted. Further, while using the discretion the court has to consider some of the factors in between the parties. The discretion of the court is not arbitrary but should be sound and reasonable, guided by judicial principles and capable of correction by court of appeal. Further while
using discretion the court has to consider hardship to the parties. If the greater hardship would be caused to the defendant which he did not foresee and due to non-performance of contract no such hardship would be caused to the purchaser then discretion it is not necessary to grant decree for specific performance at the instance of the other property.

4. It was observed in Nallam Seeta Mahalakshmi and Ors. Vs. Talari Vijayalakshmi, 2005(4) ALD 130, “The jurisdiction to decree specific relief is discretionary and the Court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the Court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the Court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.”

5. In the case of Surya Narain Upadhyaya vs. Ram Roop Pandey and others, 1995 Supp (4) SCC 542, the Hon’ble Apex Court while considering the scope of Section 20 of the Specific Relief Act held as under:

“Though the decree for specific performance is a discretionary power, yet the court is not bound to grant such a relief merely because it is lawful to do so; but the discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles of law and capable of correction by a court of appeal. Therefore, the discretion should be properly exercised keeping in view the settled principles of law as envisaged in Section 20 of the Act.

6. In the case of Mayawanti vs. Kaushalya Devi, (1990) 3 SCC 1, the Hon’ble Apex Court observed as under:

“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 idea 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.”

7. In the case of K. Prakash vs. B.R. Sampath Kumar, (2015) 1 SCC 597, the Hon’ble Apex Court held:
“Indisputably, remedy for specific performance is an equitable remedy. The court while granting relief for specific performance exercises discretionary jurisdiction. Section 20 of the Act specifically provides that the court’s jurisdiction to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with the sound and reasonable judicial principles.

8. The King’s Bench in Rooke’s case said:
“Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others, allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by the Constitution entrusted with.”

9. The Court of Chancery in Attorney General v. Wheate followed Rooke’s case and observed: (ER p. 666)
“... the law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be secundum discretionem boni viri, yet, when it is asked, vir bonus est quis? The answer is, qui consulta patrum, qui leges
juraque servat. This description is full and judicious, and what ought to be imprinted on the mind of every Judge.”

10. The principle which can be enunciated is that where the plaintiff brings a suit for specific performance of contract for sale, the law insists upon a condition precedent to the grant of decree for specific performance: that the plaintiff must show his continued readiness and willingness to perform his part of the contract in accordance with its terms from the date of contract to the date of hearing. Normally, when the trial court exercises its discretion in one way or the other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under Section 20 of the Specific Relief Act, that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree are established then the court has to exercise its discretion in favour of granting relief for specific performance.

11. Reference may also be made by their lordships in the case of Zarina Siddiqui vs. A. Ramalingam, 2015 (1) SCC 705, as under:-

“The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance.” The grant of decree for specific performance is a matter of discretion under Section 20 of the Specific Relief Act, 1963. The Court is not bound to grant such relief merely because it is lawful to do so but the discretion is not required to be exercised arbitrarily. It is to be exercised on sound and settled judicial principles. One of the grounds on which the Court may decline to decree specific performance is where it would be inequitable to enforce specific performance.
In Sen Kukherjee and Co., Vs. Smt Chhaya Banerji and AIR 1998 Calcutta 252

The Hon’ble Supreme Court has held that the relief of specific performance having its roots in equity, the Specific Relief Act, 1963 has preserved the discretion of the Court not to grant the relief even though the agreement is specifically performable in law. The only letters imposed by the statue on the exercise of the discretion are that the discretion must not be exercised arbitrarily but soundly and reasonably and guided by judicial principles. The phrase “capable of correction by Court of/appeal” has been inserted possibly to indicate the necessity for the trial Court to state the reasons for exercising its discretion in a particular way. The circumstances mentioned in the clauses (a), (b) and (c) of sub sec. (2) of S.20 are not expressly exhaustive. They indicate the situations in which the Court may properly exercise discretion not to decree specific performance. However, certain considerations have been excluded as relevant factors. These are contained in Explns 1 & 2 to the Section as well as in S.20(4). It is to be notices that each of these exclusions are preceded by the word ‘mere’. The word ‘mere’ in the context means ‘sole’. In other words, any one of those factors by itself would not justify the exercise of discretion against granting specific performance. The factors cumulatively or with other factors may from the basis of a decision not to grant specific performance.

13. The conduct of the plaintiff:

The relief of Specific Performance of contract is based upon the principles of Equity that “He who seeks Equity must do Equity” and the plaintiff has to plead that he has always been ready and willing to perform his part of the essential terms of the contract and he has to prove the same. Thus, it do not suffice on the part of the plaintiff that he is ready and willing to perform his part of the contract but he has to prove the same. The readiness and willingness on the part of the plaintiff can be inferred from the surrounding circumstances and the conduct of the plaintiff, not only prior to filing of the suit but during the course of the trial. His conduct must be such that he shall not be blamed in any way for the failure of the contract and the said responsibility exclusively lies upon the defendant. Thus, the conduct of the plaintiff plays a vital role in adjudicating, whether he is entitled for the equitable relief of

14. Clause(a) of sub sec.2 of Sec. 20 of Specific Relief Act mention about “conduct of parties” but such conduct is referable to point of time of entering into contract. Conduct of defendant in taking up on sustainable or untrue defence does not come under this clause. Words” at time of entering into contract” in clause (a) would indicate this. Scope of enquiry under clause(a) is to find where any of three ingredients mentioned therein would give plaintiff an unfair advantage over defendant. Bonafide of party who approached to court for relief and his conduct are important factors to be taken into account. P. Prabhakarrao -Vs-P. (AIR 2007 (Andhra Pradesh)163.

15. FALSE REPRESENTATION:
Mere plea of false representation is not enough. It has to be further shown by defendant that this false misrepresentation resulted in adversely affecting their interest, or it altered the position of the parties in such a way that it would be inequitable to grant relief to the plaintiff and held by their lordships in Vuppalapati Butchiraj and another – Vs- Rajah Sri Ranga Satyanarayana Ramchandra Venkata Narasmha Bhupala Bhalavayubim Varu and others, A.I.R. 1967AP 69.

16. READY AND WILLING OF PLAINTIFF:
Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of agreement and if there was non-performance was that on account of any obstacle put by the vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. Court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale.

To succeed in the suit, plaintiff has to prove his readiness and willingness. The readiness involves proof of capacity to perform, which in turn requires proof of financial ability at the relevant point of time. The willingness to perform the contract is not mere desire; it should be a genuine willingness, to be proved lie any other fact; circumstances may justify an interference that the assertion of the plaintiff as to his willingness is a mere verbal assertion and as a fact, his conduct may disclose that he was really interested in procrastination, because delay
was to his advantage; in many cases, a person who agreed to purchase a property of which he is already in possession may not be anxious at all to complete the contract, either because, he has no ready case with him, or any consider it expedient not to part with the money, so that he can have the continued benefit of the money as well as the enjoyment of the property. The respective position of the parties to the agreement, the circumstances under which the agreement was entered into, the relative advantage or disadvantages to the parties by the performance or non-performance of the contract during the relevant period, are some of the relevant circumstances to be considered by the Court, while scrutinizing the evidence adduced before it.

The main thrust of the analysis of the facts & circumstances, would be to scrutinize the plaintiff’s conduct in relation to the property and the term of the agreement. However, even if the plaintiff makes out his case for Specific Performance, Court has to still consider as to whether the discretionary relief should be granted in favour of the plaintiff or it should be denied in the light of Section 20 of the Specific Relief Act; no doubt, it is a judicial discretion exercise of which depends upon several factors. Section 16 (c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance.

17. In the Judgment in Ram Awadh(Dead) by L.Rs. And other V/S Achhaibar Dubey and another, AIR 2000SC 860”, it is held that a court may not, therefore grant relief to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance where of he seeks.

18. In India Financial Assn. Seventh Day Adventists V. MN.A. Unneerikutty 2007(1) Civil L.J. 599 (c) Shaligram Vs. Ramesh 2014(3) Mh.L.J. 704, their lordships observed that where evidence clearly established that the plaintiff has capacity to pay and was also ready and willing to pay the balance amount, so in absence of any, material to show that the defendant was not acting in an unauthorized
manner, it was held that the judgment of the High Court granting decree for specific performance cannot be faulted.

19. Where vendor sold the suit property to third party during pendency of suit for specific performance of agreement to sell, and the third party purchaser was aware of the previous agreement and pendency of the suit, so the purchaser third party would be bound by the decree in the instant suit and the fact that he has invested huge amount on suit property would be no ground to refuse relief of specific performance of agreement as held in **Raghunath V. Rajendra, AIR 2007(NOC) 1089 (Bom)**.

20. In **The Judgment In Umabai and Anr. v. Nilkanth Dhondiba Chavan (Dead) by LRs reported (2005) 6 SCC 243**, it was observed as follows.

“It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the Plaintiff-Respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the Plaintiff-Respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.


“5...Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he
has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract.”

22. **Lord Campbell in Cort V. Ambergate, etc. railway Co. (1851) 117 ER 1229 observed as follows:**

   “In common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it has not been renounced by the defendant”.

23. **In Amarjeet Vs. Sushiladevi, 2002(2)B.C.R.694 “ The words “ready” and willing used in Sec. 16(c) are very significant and in my opinion, where the performance on the part of plaintiff contemplates payment of certain money. The word “willing” in the same context means the plaintiff’s desire to pay the money to the defendant. The term refers to both physical and mental elements, the combination of which answers the requirement of the term. A plaintiff may have the money ready and with him or he may be capable of raising the requisite money, yet he may not have desire to pay the same. Conversely a plaintiff may have an earnest and sincere desire to pay the money, but he may not have the same ready with him or he may not be in a position to raise the same. In either case, the result is the same. Such a plaintiff cannot perform his obligation to pay the consideration amount to his vendor and therefore, he cannot be regarded to be a person “ready and willing” to perform the essential obligation regarding making payment”.

   The plaintiff in a suit for specific performance has to allege and if the fact is traversed must prove his continuous readiness and willingness from date of contract to the time of hearing, to perform the contract on his part. Failure to make good that averment brings with it the inevitable dismissal of his suit.

   Where the conduct of the plaintiff from the beginning to the end i.e. till the institution of the suit and even thereafter clearly indicated his readiness and willingness to perform his part of contract he would be
entitled of decree for specific performance are held in Popatlal Maneshankar Pande Vs. nanalal Nagardas Vhora 1987 Mah. L.J. 1055(1064).

24. In The Judgment in Ardeshir H.Mama Vs. Flora Sassoon, reported in AIR 1928 PC 208 their lordships observed as follows: “Where the injured party sued at law for a breath, going to the root of the contract, he thereby elected to treat the contract as at an end himself and as discharged from the obligations. No further performance by him was either contemplated or has to be tendered. In suit for specific performance on the other hand, he treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of contract to the time of hearing, to perform the contract on his part. Failure to make good that averment bring with it and leads to inevitable dismissal of the suit”.

25. In the Judgment in Fakir Chand V/s Sudehskumari reported in 2006 (4) Mah. L.R. 553(SC) their lordships observed as follows: “ The language under Section 16(c) of the Act in our view, does not require any specific phraseology but not only that the plaintiff must aver that he has performed or has always been ready and willing to perform his part of contract. Therefore, the compliance with the readiness and willingness has to be in spirit and substance and not in letter and form”.

26. Compliance of the requirement of Forms 47 and 48 of Appendix-A of the C.P.C. Whether necessary:-

The language of Rule 3 of Order VI of the Code of Civil Procedure is mandatory and any plaint in a suit for specific performance of contract has to be strictly in conformity with form No. 47 or 48 of Appendix A of the Code of Civil Procedure. It shows that in a suit for specific performance there must be averments to the effect that plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

27. DELAY AND LACHES:TIME–ESSENCE OF CONTRACT

The doctrine of laches in Courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as an equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy put the other
party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. Laches cannot be equated with limitation. It is not a question of time. It is a question whether it shall be inequitable to permit the claim to be enforced. Court has to see whether there has been some change in the condition or relation of the property and the parties. Mere lapse of time therefore short of limitation cannot operate as laches. Delay, short of statutory period of limitation will be fatal in cases of change in circumstances, accrual of right of third party or where there is inordinate delay etc.

28. Section 55 of the Contract Act provides that if a party to a contract fails to do a certain thing agreed upon within the stipulated period the contract becomes voidable at the option of other party for purpose of the part not performed if the parties intended that time would be of the essence of the contract. The Court has to look at the substance of contract and not at the letter to determine whether the parties intended completion of the obligation under the contract within the stipulated period notwithstanding fixation of a date for performance. If time is of essence of contract, delay operates as bar to a decree for specific performance.

The dictionary meaning of the ‘reasonable time’ is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words, it means as soon as circumstances permit. In Law Lexicon it is defined to mean “A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstance will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done,- some more protracted space than ‘directly’; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.

29. In the Judgment reported AIR2011 SC3234 between Mrs. Saradamani Kandappan’s case, it was observed that the legal position is clear from the decision of a Constitution Bench of the Hon’ble Apex Court in Chand Rani 1993 (1) SCC 519, wherein their lordships outlined the principle as under:
“It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.”

30. In the case of Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs, 1993 (1) SCC 519, it was held that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

1. from the express terms of the contract;
2. from the nature of the property; and
3. from the surrounding circumstances, for example: the object of making the contract.

However, mere inadequacy of consideration or the mere fact that the contract is onerous to the Defendant or improvident in its nature, shall not constitute an unfair advantage to the Plaintiff over the Defendant or unforeseeable hardship on the Defendant.[ See AIR2012SC2035, Narinderjit Singh Vs. North Star Estate Promoters Ltd.]

31. It is not possible or desirable to lay down the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice, or such as to bring about a situation when it would be inequitable to give him such a relief.

32. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should
take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.

33. In a recent Judgment on Exercise of discretion for the grant of relief of specific performance between Kamal Kumar vs Premlata Joshi reported in 2019 (1) ALT SC 30 (D.B) It is held in Para 10 that “It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are

First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property;

Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract;

Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract;

Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and

lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds”

34. The Specific Relief (Amendment) Act 2018:

There have been some changes in the civil dispute resolution practice area through the Specific Relief (Amendment) Act, 2018 which has made some important amendments to the Specific Relief Act, 1963 (hereinafter referred to as "the Act"). The Specific Relief (Amendment) Bill, 2017 was introduced in the Parliament on December 22, 2017. It was passed by the Lok Sabha on March 15, 2018 and the Rajya Sabha on July 23, 2018. It received the assent of the President on August 1, 2018. The ninth amendment is in Section 20 of the Act whereby the concept of substituted performance of contracts has been introduced. The
whole unamended Section 20 which provided for discretion to decree specific performance has been substituted by a new section.

By a new section 20 of the principal Act, the following sections shall be substituted, namely:—

“20. (1) Without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872, and, except as otherwise agreed upon by the parties, where the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and, recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

(2) No substituted performance of contract under sub-section (1) shall be undertaken unless the party who suffers such breach has given a notice in writing, of not less than thirty days, to the party in breach calling upon him to perform the contract within such time as specified in the notice, and on his refusal or failure to do so, he may get the same performed by a third party or by his own agency:

Provided that the party who suffers such breach shall not be entitled to recover the expenses and costs under sub-section (1) unless he has got the contract performed through a third party or by his own agency.

(3) Where the party suffering breach of contract has got the contract performed through a third party or by his own agency after giving notice under sub-section (1), he shall not be entitled to claim relief of specific performance against the party in breach.

(4) Nothing in this section shall prevent the party who has suffered breach of contract from claiming compensation from the party in breach.

The Amendment Act of 2018 has further introduced Sections 20A, 20B and 20C to the Act. Section 20A has made special provisions for contracts relating to infrastructure projects which have been specified in the Schedule inserted in the Act by the Amendment Act of 2018. It prohibits a civil court to grant an injunction in relation to such infrastructure projects where grant of such injunction would cause
impediment or delay in progress or completion of such projects. Section 20B provides for designation of Special Courts to try a suit under the Act in respect of contracts relating to infrastructure projects. Section 20C provides for expeditious disposal of suits filed under the provisions of the Act to be disposed of within 12 months from the date of service of summons to the defendant, which may be extended for a further period not exceeding six months in aggregate.

There is a small amendment in Section 21 (which deals with power to award compensation) wherein sub-section(1), the words "in addition to" have been substituted for the words "either in addition to, or in substitution of". This amendment is manifestation of the intention of the Legislature to promote specific performance of contracts rather than claiming compensation in substitution of specific performance.

**CONCLUSION:-**

Seeking to improve India’s track record on the enforceability of contracts and accelerate the time taken to dispose of pending cases, the Amendment Act aims at protecting contractual expectations and wiping out uncertainties. Although several of the provisions introduced by the Amendment Act, such as the appointment of experts and substituted performance are common contractual terms, they are nevertheless, a welcome statutory addition. However, compelling specific performance in certain circumstances might be impractical, in particular, where the defaulting party to a contract is on the brink of financial distress or potential insolvency proceedings under the Insolvency & Bankruptcy Code.

Likewise, the alternative of monetary compensation may be meaningless in such circumstances, unless a third-party guarantor underwrites the obligations of the defaulting party. While the intention to compress the court proceedings to a period of 18 months is a laudable aim, it begs the question as to what would happen at the end of that time period.
ALTERNATIVE RELIEFS FOR SPECIFIC PERFORMANCE OF CONTRACT

INTRODUCTION

Specific performance of contracts

- **Specific performance** is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such to complete performance of the contract. It is typically available in the sale of land, but otherwise is not generally available if damages are an appropriate alternative. As with all equitable remedies, orders of specific performance are discretionary, so their availability depends on its appropriateness in the circumstances. Such order are granted when damages are not an adequate remedy.

- The specific reliefs Act 1963 was enacted to define and amend the law relating to certain kinds of specific relief. It contains provisions, *inter alia*, specific performance of contract, contracts not specifically enforceable, parties who may obtain and against whom specific performance may be obtained etc. It also conferred Wide discretionary powers upon the Courts to decree specific performance. As a result of Wide discretionary powers, the courts in majority of cases awards damages as a general rule and specific performance as an exception.

- The Specific Relief Act, 1963 deals with the remedies granted at the discretion of the court for the enforcement of individual civil rights. In case of breach of contract, the general remedy available to the aggrieved party is compensation or damages of loss suffered.
For this, a civil suit is filed against the guilty party who had made the default in performance of its duty or obligation as per the terms of contract under the statutory provision of Section 73-75 of Indian Contract Act 1872. However, sometimes pecuniary compensation does not satisfy the plaintiff so he may ask for specific relief.

**Scope of alternative reliefs of adequate compensation and damages**

Till the amendment of specific relief act 1963, the relief of specific relief is purely discretionary in nature as provided under sec 10 of the Act 1963. But with the advent of amendment by Act 18 of 2018, the relief of granting specific performance of contract has became rule than exception subject to certain limited grounds.

Some of the major amendments made in the Specific Relief Act, 1963 are:

1. **Section 10.** The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16.”

2. **In Section 11(1)** which gives cases in which specific performance of contracts connected with trusts enforceable, for the words “contract may, in the discretion of the court”, the words “contract shall” shall be substituted.

3. **For Section 14** that states the contracts which cannot specifically be enforceable, the following sections shall be substituted:

“14. The following contracts cannot be specifically enforced, namely:—

(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;
(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;
(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; an
(d) a contract which is in its nature determinable.”

(4) **In section 16** of the principal Act,— (i) for clause (a), the following clause shall be substituted, namely:—“(a) who has obtained substituted performance of contract under section 20;

(5) **For Section 20**: Discretion as to decreeing specific performance, the following sections shall be substituted and inserted:

- Section 20. Substituted performance of contract
- 20A. Special provisions for contract relating to infrastructure project.
- 20B. Special Courts.
- 20C. Expeditious disposal of suits.

- In view of the said amendment the scope of alternative remedies as a general rule under section 10 (prior to amendment) has been reduced to limited extent in order to give effect to the valid contracts by making the relief of specific performance as a general rule. The alternative reliefs of adequate compensation and damages as a rule which are alternative to specific performance of contract has vanished their significance as a general rule and the specific performance was done away from the discretion of the court and making it as a enforceable right.
Alternative reliefs in specific Performance of Part of Contract:

- Sec. 12 (2): 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 be only a small portion to the whole in value and admits 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.

- The above provision provides for claiming compensation as an alternative to the part of unperformed contract. Sub Section (3) of Section 12 provides the limitations for Sub Section (2) of Section 12 under which the compensation can be sought as an alternative remedy for the part of unperformed contract.

- Section 12 (4): Where a part of a contract which, taken by itself, can and odd to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed the court may direct specific performance of the formal contract.

- The above provision provides for severance of a contract from the part which cannot be performed from the part of the contract which ought to be performed and providing the alternative relief to the part of the contract which cannot be performed or the performance becomes impossible.

Alternative reliefs as rights of purchaser or lessee against the person with no title or imperfect title:

- Section 13 (1) (d): Where the vendor or lessor sues for the Specific Performance of Contract and the suit is dismissed on a ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of
the suit, and to a lean for such deposit, interest and costs on the
interest, if any, of the vendor or lessor in the property which is the
subject matter of the contract.

➢ The above provision provides that in the event if the Plaintiff fails to succeed the suit filed for Specific Performance of the Contract, he reserves alternative remedy to get back the return of his earnest money paid towards the contract.

**Alternative remedy in substituted performance of contract**

Section 20: Substituted Performance of a Contract

➢ “20. (1) Without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872, and, except as otherwise agreed upon by the parties, where the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and, recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

➢ (2) No substituted performance of contract under sub-section (1) shall be undertaken unless the party who suffers such breach has given a notice in writing, of not less than thirty days, to the party in breach calling upon him to perform the contract within such time as specified in the notice, and on his refusal or failure to do so, he may get the same performed by a third party or by his own agency: Provided that the party who suffers such breach shall not be entitled to recover the expenses and costs under sub-section (1) unless he has got the contract performed through a third party or by his own agency.
(3) Where the party suffering breach of contract has got the contract performed through a third party or by his own agency after giving notice under sub-section (1), he shall not be entitled to claim relief of specific performance against the party in breach.

(4) Nothing in this section shall prevent the party who has suffered breach of contract from claiming compensation from the party in breach.

With the introduction of the above provision, which appears to be ancillary in nature to the relief of Specific Performance of a Contract, it can also be termed as alternative relief of Specific Performance of Contract.

The sufferer of breach of contract can obtain the substituted performance through a 3rd party or by his own agency and shall recover the expenses and costs incurred by him. However such a relief can be sought only after issuing a prior notice of 30 days period to the defaulter and after his refusal or failure to comply the notice. Sub Section (3) is an exception to Section 10, where, by availing the option of substituted performance the sufferer of breach of contract cannot claim the relief of specific performance and Sub Section (4) provides that the sufferer is also entitled for seeking compensation from the defaulter even after availing the option of substituted performance.

Section 24: Bar of suit for compensation for breach after dismissal of suit for specific performance:

The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar
his right to sue for any other relief to which he may be entitled, by reason of such breach.

- The above provision provides for any other relief as an alternative remedy which is permitted by law, arise by reason of breach of contract, though the sufferer has failed to obtain the specific performance of contract.

**Alternative relief after rescission of contract**

- **Section 27** deals with rescission of contracts in cases where such contract is voidable or terminable by the Plaintiff and such a contract is unlawful for causes not apparent on his face and the defendant is more to blame than Plaintiff. The provision also provides for the grounds to refuse to rescind the contract under the circumstances defined under Sub Section (2) of Section 27.

- **Section 28** deals with rescission of contracts at the instance of defendants after the specific performance has been decreed.

- **Section 29**: Alternative prayer for rescission in suit for specific performance:-

  - A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

- Section 29 deals with the relief of rescission as an alternative remedy in a suit for specific performance in cases where the court refuses to enforce the contract specifically. Such a relief of rescission of contract in alternative for specific performance is an exceptional relief where the Plaintiff can avail the option of election after he fails to succeed to enforcement of the specific performance of contract.
Conclusion:-

The alternative remedies once a general rule has became exception by virtue of latest amendment, however such alternative reliefs are also subject to the rule of equity. This kind of alternative reliefs protects the interests of the innocent party to the contract to claim the monetary relief against the defaulting party and also ensures the option of electing the relief in case they fail to enforce the contract without their fault.
1. **Introduction:** The Specific Relief Act, 1963 is a procedural law, yet it is based on rules of justice, equity and good conscience. This Act provides various kinds of specific relief or equitable remedy against violation of legal rights. Cancellation of instruments is one of these kinds of specific relief or equitable remedy.

2. **What is Cancellation of instruments?** Cancellation of instruments is about nullifying a document. If there is a document which is void or voidable due to some reason and any person having reasonable apprehension that the said document is against him and may cause serious injury to him may sue against such document. He can sue to cancel the document. This is called cancellation and is dealt with in Sections 31 to 33 of the Specific Relief Act, 1963 of India. So if a document is void *ab initio* there is no need to set aside the document. Cancellation is the relief. He may sue to the court to have the document adjudged void.

3. **Definition of Cancellation of Instruments:** According to Specific Relief Act, if a written document is void or voidable due to some reason and any person, who has reasonable apprehension that this document is against him and can cause serious injury to him especially if such document is left outstanding, this person can sue for cancellation of such document. This is called cancellation of Instruments.

4. **This is a discretionary relief:** As per Section 32 of the Specific Relief Act, 1963 the court may allow cancellation of a part of the document which injures the plaintiff. The good part may be allowed to stand. Hence it is upon the plaintiff to prove that the document or any part of it injures his rights and therefore it should be cancelled. If the document has been registered under the Indian Registration Act, the Court shall send the copy of decree to the office of registration.

5. **There are the two kinds:**
   (a) Complete Cancellation of Instruments

Under specific Relief Act, court has discretion to adjudge an instrument, to order it to be delivered up and cancelled. It reveals that complete cancellation of instruments has been provided in law.
44

(b) Partial Cancellation of Instruments
According to specific Relief Act, court can cancel an instrument in part and can allow performance of its remaining part. It reveals that partial cancellation of instruments has also been provided in law.

6. **What are the essential conditions for claiming cancellation?**

   The plaintiff in a suit for cancellation of a document must satisfy the following conditions:
   1. The instrument is void against the plaintiff.
   2. The instrument is voidable against him.
   3. The instrument can cause injury to him.
   4. The plaintiff is under reasonable apprehension of injury.
   5. The injury is serious to the plaintiff.

7. **Grounds for Cancellation of Instruments or under what circumstance instruments can be cancelled**:

   Followings are considered grounds for cancellation of instruments or following circumstance under which instruments can be cancelled.

   (a) Void or Voidable Instrument
   A ground for cancellation of instruments is that a written instrument should be void or voidable against any person.

   (b) Causing of Injury
   Another ground for cancellation of instruments is that if an instrument is left outstanding, it can cause injury to that person against whom instrument is void or voidable.

   (c) Reasonable apprehension of serious Injury
   Among grounds for cancellation of instruments, a ground is that there should be apprehension of serious injury due to a written instrument.

**What instruments can be cancelled?**

Following instruments can be cancelled:

(a) Written Instrument
   When an instrument is written and the same is void or voidable against any person and can cause serious injury to such person, this written instrument can be cancelled.

(b) Registered Instrument
   A registered instrument can be cancelled. However, it is necessary for court to send a copy of its decree regarding cancellation of registered instrument to that officer, in whose office the instrument has been registered and such officer should note fact of cancellation on that copy of the instrument, which is present in his books.

(c) Unregistered Instrument
   An unregistered instrument can also be cancelled. However, it is necessary for court to send a copy of its decree regarding cancellation of unregistered instrument to that officer, in whose office the instruments are registered.
(d) Void Instrument
An instrument, which is void against any person and can cause apprehension of serious injury to the person, can be cancelled.

(e) Voidable Instrument
An instrument, which is voidable against any person and can cause apprehension of serious injury to the person, can be cancelled.

(f) Unconstitutional Instrument
An instrument, which is unconstitutional, can also be cancelled.

9. **What Instruments can be partially cancelled?**
   When instrument is evidence of different rights or different obligations, court can cancel it in part and can allow performance of its remaining part. In *Yanala Malleshwari v. Ananthula Sayamma* the division bench of High Court of Andhra Pradesh considered the following questions;

1. Whether a person who suffers injury by reason of such void instrument has to necessarily seek cancellation of such instrument?

2. Is it necessary that a person who suffers injury by reason of transfer of immovable property (contract), which is between two persons in respect of his own property and which is void on the face of it for the reason that the vendor of the said transaction has no authority to transfer the property to the vendee, to file a suit?

3. Can he not execute and register a deed cancelling the offending sale deed?

The above queries need consideration of two aspects. When a suit for cancellation of an instrument/deed or document is maintainable? When such a suit at the instance of original owner is not maintainable and what are the other remedies to such a person? Section 31 and 34 the Specific Relief Act, 1963 are relevant and read as under.

10. **Section 31 of the Specific Relief Act, 1963. When cancellation may be ordered:**
   (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

   (2) If the instrument has been registered under the Indian Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall

---

note on the copy of the instrument contained in his books the fact of its cancellation.

11. **Section 34 of the Specific Relief Act, 1963**: Discretion of Court as to declaration of status or right:— Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation:— A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and whom, if in existence, he would be a trustee.

12. **Misconception about the person who has to sue**: It is a misconception that in every situation, a person who suffers injury by reason of a document can file a suit for cancellation of such written statement. Two conditions must exist before one invokes Section 31 of the SR Act 1963. These are: the written instrument is void or voidable against such person; and such person must have reasonable apprehension that such instrument if left outstanding may cause him serious injury. Insofar as Section 34 of the 31 of the Specific Relief Act, 1963 is concerned, it is no doubt true that a person entitled to any right as to any property can seek declaration that he is so entitled to such right. Here again, the person who claims the right to property can institute a declaration suit only when the defendant denies or interested to deny the title of the plaintiff. The difference between the two situations is glaring. In one case, cancellation of deed can be sought in a Court only by a person who executed document and who perceives that such document is void or voidable. In the other case, even if a person is not a party to the document, he can maintain a suit for declaration.

In **Kotrabassappaya v. Chenvirappaya**² dealing with Section 39 of Specific Relief Act, 1877 (which is now Section 31 of the 1963 Act), a Division Bench of Bombay High Court interpreted the provision as

---

enabling only the person who parted with the property under an instrument maintain an action for cancellation of the deed. It was held:

Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it cancelled. The test is "reasonable apprehension of serious injury". Whether that exists or not, depends upon the circumstances of each case. It cannot be laid down, as a rule of law, that in no case can a man, who has parted with the property in respect of which avoid or voidable instrument exists, sue to have such instrument cancelled.

In lyyappa v. Ramalakshamma the Madras Division Bench laid down that a suit for cancellation of an instrument will be maintainable only by the person who executed the document. In that case, the suit was brought alleging that the defendant forged the sale deed in the name of the plaintiff as executants and alternatively if it was in fact executed by the plaintiff the execution had been obtained by fraud and no consideration had passed upon him. The Court held that if the plaintiff did not execute the document and it was forgery, the suit for cancellation is not maintainable and if the sale consideration was not paid, the action should be for payment of money and not for cancellation of the document. The relevant observations are as under.

Seeing that the suit is, for reasons already mentioned, not maintainable, we do not desire to express any opinion on these questions of fact. But assuming that the Judge's findings are right, we must observe that the suit ought to have been dismissed. The gist of the plaintiff's charge against the defendant was that she never had executed a sale deed in his favour, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that, if she did execute the document, no consideration was received by her, or that fraud was practiced upon her. See Mahomed Buksh Khan v. Hosseini Bibi L.R., 15 I.A., 86. For this reason the second issue was, we think, as improper one, and it is further open to the objection that, assuming that the document was executed, but that the consideration did not pass, the relief prayed for in this suit could not have been granted. It is obvious that in case of default in

---
3 lyyappa v. Ramalakshamma 13 ILR 549 (Madras) (D.B.).
payment of consideration the vendor’s right is not to have the sale deed cancelled and delivered up, but to have the money paid to him by the purchaser.

A Full Bench of Madras High Court in *Muppudathi v. Krishnaswami*\(^4\) considered the scope of Section 39 and 41 of Specific Relief Act, 1877 (which are now Section 31 and 33 of 1963 Act). The principle entrenched in Section 39 was explained thus:

The provisions of Section 39 make it clear that three conditions are requisite for the exercise of the jurisdiction to cancel an instrument:

1. the instrument is void or voidable against the plaintiff;
2. plaintiff may reasonably apprehend serious injury by the instrument being left outstanding;
3. in the circumstances of the case, the Court considers it proper to grant this relief of preventive justice.

On the third aspect of the question the English and American authorities hold that where the document is void on its face the court would not exercise its jurisdiction while it would if it were not so apparent. In India it is a matter entirely for the discretion of the court.

The question that has to be considered depends on the first and second conditions set out above. As the principle is one of potential mischief, by the document remaining outstanding, it stands to reason the executant of the document should be either the plaintiff or a person who can in certain circumstances bind him. It is only then it could be said that the instrument is voidable by or void against him. The second aspect of the matter emphasizes that principle. For there can be no apprehension if a mere third party, asserting a hostile title creates a document. Thus relief under Section 39 would be granted only in respect of an instrument likely to affect the title of the plaintiff and not of an instrument executed by a stranger to that title.

The Full Bench of Madras High Court noticed that when the instrument/document is not executed by the plaintiff, the same does not create a cloud upon the title of the true owner nor does it create apprehension that it may be a source of danger. Accordingly, a suit for cancellation of instrument by a person who did not execute the document would not lie. However, there could be cases where

---

instruments are executed or purported to be executed by a party or by any person who can bind him in certain circumstances. As pointed out by the Madras High Court, these are: a party executing the document or principal in respect of a document executed by his agent, or a minor in respect of document executed by his guardian de jure or de facto, the reversioner in respect of a document executed by the holder of the anterior limited estate, a real owner in respect of a document executed by a benamidar. In these cases, though the party may not have executed document, if those are allowed to stand, it may become a potential source of mischief and danger to the title and a suit would, therefore, be maintainable for cancellation of such document. When the document itself is not executed by the plaintiff, there is no necessity to have the document cancelled by a Court decree, for it has no effect on the title of true owner.

In *Debi Prasad v. Maika* a learned single Judge of Allahabad High Court placing reliance on Full Bench decision of Madras High Court in Muppudathi (22 supra), observed asunder.

In all these cases there is no question of a document by a stranger to the title as in the present case and it can further be found that in all such cases a reasonable apprehension can be entertained that if such an instrument is left outstanding the same may cause the plaintiff serious injury. In the present case, it cannot be successfully maintained that a reasonable apprehension can be entertained by the plaintiffs that if the sale-deed is left outstanding it may cast a cloud upon their title or cause them serious injury because the cloud upon their title will not be removed merely by a decree for cancellation of the instrument. The cloud will continue to hang over the plaintiffs by the hostile assertion of title by the executant of the sale-deed and those who claim a title to it. Therefore, the proper relief for the plaintiffs to seek in a case of this kind is a declaration of their own title or a declaration that the executant of the sale-deed in dispute has no title to the property.

The law, therefore, may be taken as well settled that in all cases of void or voidable transactions, a suit for cancellation of a deed is not maintainable. In a case where immovable property is transferred by a person without authority to a third person, it is no answer to say that the

---

5 *Debi Prasad v. Maika*, AIR2008AP60; 2008(3)ALD326; 2008(4)ALT530,
true owner who has authority and entitlement to transfer can file a suit under Section 31 of the Specific Relief Act for the simple reason that such a suit is not maintainable. Further, in case of an instrument, which is void or voidable against executant, a suit would be maintainable for cancellation of such instrument and can be decreed only when it is adjudicated by the competent Court that such instrument is void or voidable and that if such instrument is left to exist, it would cause serious injury to the true owner.

13. **What is Rectification of instruments?**
Literally the word rectification means to rectify or to correct. It is an equitable remedy which is being granted (when facts of the instrument are not according to intention of parties) when parties come to a genuine agreement and instrument fails to record it.

14. **Section 26 of Specific Relief Act, 1963. When instrument may be rectified:**
(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the articles of association of a company to which the Companies Act, 1956, applies) does not express their real intention, then
(a) either party or his representative in interest may institute a suit to have the instrument rectified; or
(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or
(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defense open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.
(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

PROVIDED that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

First sentence in the Section shows that in order to get an instrument rectified, the foremost thing to be established is that through fraud or mutual mistake of the parties a contract or other instrument in writing does not express the real intention of the parties. Pleading and proof of fraud or a mutual mistake of the parties are mandatory requirements for obtaining a relief of rectification of an instrument.⁶

15. **Essentials for claiming rectification of an instrument, as revealed by the precedents, can be summarized.**

1. Firstly, the relief will not be granted unless a completed agreement is reached prior to the written agreement, which is sought to be executed. In other words, if the negotiations leading up to the execution of the document were vague and inconclusive or if it is impossible to ascertain what was the intention of the parties and what they really meant, then the challenged instrument can only be said to represent the agreement that has been concluded. If there is no antecedent agreement proved, upon which a rectification can be based, the relief cannot be granted.

2. Secondly, both the parties must have intended that the exact term of the prior agreement should be reduced to writing and this intention should remain unchanged up to the moment of the actual execution of the instrument. That is, if it is proved that the parties subsequently changed their original intention and that the instrument finally represents the true intention of the parties, it becomes fatal to a suit for rectification.

3. Thirdly, the evidence relating to mistake common to both the parties must be clear and the burden of proving this lies on the party praying for rectification. It is also settled that the mistake should be obvious and not a mere probability.

4. Fourthly, a party should seek rectification of literal mistakes, so as to enable the parties to act according to their intentions already revealed

---

⁶ Aliyar v Raju. v. Vayalat, 2016 (2) KLT 656.
clearly and unequivocally, so as to prevent them from nullifying their prior agreement.  

16. **Meaning of contract** : Word contract in section 26 includes executory contract for example agreement to sell, agreement to lease and agreement to mortgage as well as executed contract like sale deed lease deed and mortgage deed.

In *Joseph John Peter Sandy v. Veronica Thomas Rajkumar* the Apex Court observed that Section 26 of the Act has a limited application, and is applicable only where it is pleaded and proved that through fraud or mutual mistake of the parties, the real intention of the parties was not expressed in relation to an instrument.

17. **Existence of a valid and complete contract is *sine qua non*** : It is well settled that the condition precedent for claiming rectification is the existence of a valid and complete contract. It is equally settled that there can be no rectification where there is no prior agreement with reference to which the rectification has to be done.

18. **Meaning of instrument** : Under section 2 (14) of Stamp Act the instrument includes document by which any right or liability is created transferred limited extended extinguished or recorded.

19. **Basis of his doctrine** : The doctrine of rectification of instrument is based on the maxim of equity which is equity looks to the intent rather than the form.

20. **Circumstances section 26** : When through fraud or mutual mistake of the parties a contract or other instrument in writing does not truly express their intention either party or his representative in interest may institute a suit to have the instrument rectified. Thus this section indicates 2 major grounds of rectification of instruments.

1. **Fraud** : It is well accepted rule that where the error in written instrument has been brought by the fraud of one party the equity of rectification is obvious

2. **Mistake** : If there is a mutual mistake of parties in writing an instrument that it does not express the true intention of parties then court can order the rectification of such instrument.

**Illustration** : A intending to sell to B his house and one of 3 godowns

---

7 Aliyar v Raju. v. Vayalat (2016 (2) KLT 656).
adjacent to it executes a conveyance prepared by B in which through B’s fraud all 3 godowns are included. Of the 2 godowns which were fraudulently included, B gives one to C and the other to D for a rent neither C nor D having any knowledge of fraud. The conveyance may as against B and C, B rectified so as to exclude from it the godown given to C but it can not be rectified so as to affect D’s lease.

21. **Essentials of rectification**: Followings are the essentials of rectification

1. Suit must relate to contract or instrument in writing.
2. The plaintiff must prove fraud or mutual mistake in framing of mistake.
3. The plaintiff must prove to the court that contract and instrument sought to be rectified is not in accordance with the intent of parties.
4. Plaintiff must file a suit within 3 years from discovery of fraud or mutual mistake in the contract or instrument.
5. Plaintiff must be party to the contract.
6. Plaintiff must prove to the court that he is entitled to grant a discretionary relief by way of rectification

22. **Who can sue for rectification?** Under section 26 following persons can bring a suit

1. Any party to the contract or his
2. His representative in interest can sue for rectification of instrument.

23. **Intention of parties section 26**: For the purpose rectifying a contract in writing the court must be satisfied that all the parties thereto intended to make an equitable agreement

24. **Principles of rectification Section 26**: In rectifying a written instrument the court may inquire what the instrument was intended to mean and what were intended to be its legal consequences and is not confined to inquiry what the language of instrument was intended to be.

25. **Specific enforcement of rectified contract Section 26**: A contract in writing may be first rectified and then if plaintiff has no prayed in his plaint and the court thinks fit specifically enforced.

**Illustration**

A contract in writing to pay his attorney, B a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of client
which if construed strictly would exclude B from all rights under it. B is entitled if the court thinks fit to have it rectified and to an order of payment of the sum as if at the time of its execution it had expressed the intention of parties.

26. **Documents which can be rectified**: Following documents can be rectified

1. Contracts
2. Deeds of transfer
3. Decree of court
4. Other instruments
5. Negotiable instruments
6. Insurance polices
7. Acknowledgement
8. and settlement

27. **Effect of rectification**: A deed rectified by the court so as to confirm to the true intent of the executing party at the moment of execution must be taken to his deed and have been his deed in the rectified form as from the date of execution.

In Halsbury’s Laws of England\(^9\) it has been stated that rectification, if granted, relates back to the time when the instrument was executed. After rectification the instrument has to be read as if it has been originally drawn in its rectified form.

In Snell’s Principles of Equity\(^10\) it has been observed that a rectification decree has retrospective force. The effect is not that the instrument continues to exist though with the parol variation but that it is to be read as if it had been originally drawn in its rectified forms. Thus, existing transactions, which only the rectified instrument would have authorized, become retrospectively valid.

In *Dagdu v. Bhana*\(^11\) Jenkins C.J. observed that if the mistake is established then the court can give relief by rectification, but what is rectified is not the agreement but the mistaken expression of it. It is thus settled that after the deed is rectified by a decree of the court, the deed as rectified will be deemed to be operative ever since its original

\(^10\) Snell’s Principles of Equity, 26th Edn., at p. 689.
execution. The portions that have been deleted by the rectification decree will have to be treated as non-existent from the very beginning of the life of the trust deed.

28. **Limitation Period**: There can be no set time limit for the discovery of mistake and fraud. At any time when the mistake is discovered or fraud comes to light, it is open to the parties affected to come to court and institute a suit for the rectification of mistake in the instrument.

29. **Conclusion**: Keeping in view the above discussion, it is clear that the doctrine of rectification of instrument is based on the maxim that equity looks to the intent rather than the form. The equity court tries to rectify the written contracts and instrument so that they could be confirmable with the true intent of the party on the basis of the aforesaid maxim. In *Aliyar v Raju v Vayalat*\(^\text{12}\) a Bench of this Court observed, "It is needless to restate that the courts exercising power under the SRAct 1963 have both legal and equitable jurisdictions. It is common knowledge that in our country we do not have Courts of Equity and Law Courts separately. The Act confers equitable jurisdiction on the Civil Courts for granting specific relief."

---

\(^{12}\) Aliyar v Raju. v Vayalat, 2016 (2) KLT 656.