Contours of relief of Specific Performance of Contracts:

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“Change is the law of life. And those who look only to the past or the present are certain to miss the future.”

John F. Kennedy

The topic assigned is ‘contours of relief of specific performance of contracts’. It means a brief outlook with regard to the provisions which entails a party to the contract can seek specific performance of contract, defences to be taken by opposite party, the discretionary powers of the courts in decreeing the suits for specific performance and awarding of compensation if there is breach of contract. It is a settled law that the relief of specific performance of contract is an equitable relief. In equity all that required is to show the circumstances that will justify the intervention by a court of equity. The substantive rules which postulates the existence of a valid contract are laid down in the contract Act. Therefore it would be appropriate to refer the provisions of the Contract Act so far as convenient in respect of the matters relating to specific performance of contracts. Keeping the above broad principles in mind, now I intend to deal with provisions relating to specific performance of contracts with reference to the Specific Relief Act, 1963 (principal Act) and also with reference to the Specific Relief (Amendment) Act, 2018 under which amendments were brought to the Principal Act. The Principal Act came into operation on 1.3.1964 whereas the provisions of the Amendment Act came into force from 1.10.2018 vide notification no.SO 4888(E) dt.19.09.2018.
Chapter II of the Specific Relief Act, which covers Secs.9 to 24, deals with specific performance of contracts. Specific performance essentially belongs to the Law of procedure because Sec.9 of the Specific Relief Act specifically says that the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any Law relating to contracts. It means that the defendant may take any plea which is available to him by way of defence like the contract is vitiated by coercion, fraud, misrepresentation, mistake, illegality or the absence of the concluded contract or the want of authority or discharge of contract by reason of impossibility of performance.

The remedy of specific performance of contract was an equitable remedy and confers a discretion on the court either to decree or not to decree the specific performance depending upon facts and circumstances of the case. (Refer Sec.20). However such discretion can be exercised by the court not arbitrarily but on sound and reasonable grounds guided by Judicial principles. However in Sub section (2) of Sec.20 of the Principal Act made three provisions in which the court may properly exercise discretion not to decree the specific performance. They are (1) unfair advantage to the plaintiff over the defendant, (2) involve some hardship to the defendant which was not foreseen and non performance of the contract would involve no hardship to the plaintiff and (3) makes the contract inequitable to enforce specific performance though the contract is voidable. Sub-Sections (2) and (3) of Section 20 of the Specific Relief Act made it clear that the courts cannot exercise discretion where the plaintiff has done substantial acts and the court cannot refuse to decree the specific performance of contract on the ground that the contract is not enforceable at the instance of other party. Thus Sec.20 mandates that the discretion vested with the courts has to be exercised judiciously and that the illustrations given in Sec.20 of the Principal Act are not exhaustive but they are only
illustrative. In addition to Sec.20, sections 10 and 14 are significant provisions. Sec.10 refers to the circumstances in which specific performance of contract shall be enforced but subject to Section 11(2), 14 and 16 of the Specific Relief Act.

Section 10 (a) and (b) of the Principal Act says that Specific performance of contract could be granted if there is no standard for ascertaining the actual damage caused by non performance of the contract and compensation in terms of money would not afford adequate relief. On the other hand, Sec.14(1) of the Act lays down that some of the contracts cannot be specifically enforced like 1. for non performance of which compensation in money is an adequate relief, such relief cannot be enforced. (2) The court cannot specifically enforce the contracts where a contract which runs into such minute or numerous details or depending on personal qualifications or volition of the parties or otherwise is of such nature that the court cannot enforce specific performance of its material terms.(3) a contract which is in its nature determinable and (4) contract to execute works which the court cannot effectively supervise cannot be enforced under this clause. Contracts involving personal services cannot be specifically enforced under this clause. So also, no specific performance can be granted in respect of a contract to marry or to give in marriage. A contract the terms of which are vague and uncertain also comes within the purview of clause(b). However, the Section 14 of the Principal Act was substituted. The substituted provisions would be dealt with later.

Now coming to the most important propositions applicable to the contracts of immovable property is essence of the time for performance of the contract. The general and normal presumption is that time is not considered to be the essence of contract in relation to immovable property. However such presumption can be displaced by proving express stipulation to the contrary or the strong circumstances which clearly indicate
that the parties had intention to get the contract completed within a time limit. If there is no clause with regard to fixation of time for performance of contract, the intention of the parties have to be looked into so as to decide the factor as to whether time was essence of the contract or not. If time was not originally made as the essence of the contract, it could be made by either of the party by issuing notice to the other calling upon to complete the transaction within the notified time specified in the notice. It means that to make the time is the essence of the contract, even if the same was not specifically mentioned in the original contract, by issuing a notice by either party, the time could be made as the essence of the contract. If no notice is issued it is not open to the party unilaterally repudiate the contract on the ground that the stipulated time had expired. The above principles were considered by the Hon’ble Supreme Court in the case of Gomati Nayagan Pillai (AIR 1967 SC 868).

Whether specific performance can be granted against a transferee who purchased the property in good faith or not. The relevant provision is Sec.19 of the Specific Relief Act. Sec.19(1)(b) of the Act says that Specific performance cannot be granted against a transferee who purchased the property in good faith and without notice of the previous contract. The reason behind the above principle is that the agreement of sale does not by itself create any right or interest over by immovable property (Sec.54 of Transfer of property Act). However the burden lies on the subsequent transferee to prove that he is a bona fide purchaser and he was not aware of previous contract.

In a suit for Specific performance of contracts, the plaintiff must plead and prove that he was ready and willing to perform his part of the contract continuously between the date of contract and the date of hearing of the suit(Refer Sec.16(c)). The Hon’ble Supreme Court in a catena of decisions pointed out that in a suit for specific performance it is incumbent on the part of the plaintiff not only to set out the details of the agreement, it
must be pleaded that he was always ready and willing to perform his part of contract and if such averment is absent in the plaint, the suit itself is not maintainable. (A.I.R 1990 SC 682 & 1969(2)SCC 539). It is also considered in recent judgment of the Hon’ble Supreme Court in the case of KAMAL KUMAR V.PREMLATA JOSHI (2019(1) ALT 30 (SC).

Whether the plaintiff has to actually **tender to the defendant or to deposit the amount due under the contract** in the court or not and whether it is a prerequisite condition for institution of a suit for specific performance of contract or not. It is relevant to refer explanation to Sec.16 (c) of the Act. The explanation says that where a contract involves the payment of money it is not essential for the plaintiff to tender the amount due to the defendant or to deposit the same in court except when so directed by the court. Thus, it shows that if the court directs the plaintiff to deposit the money due under the contract, the said amount has to be deposited so as to prove the readiness and willingness of the plaintiff to get the contract executed.

Whether the court can **grant alternative or supplemental to the relief of specific performance or not.** It is relevant to refer Secs.21 to 24 of the Act. Sec.21 of the Act enables the plaintiff to claim compensation for its breach either in addition to or in substitution of specific performance and compensation cannot be granted unless it is claimed. However, the plaintiff can seek amendment of the pleadings at any stage seeking payment of compensation also. It means that if no claim is made compensation cannot be awarded. Thus the Sec.21 of the Act clearly enables the plaintiff to claim the damages in addition to the relief of specific performance of contract.

Whether the plaintiff can seek compensation for breach of contract once the suit for specific performance is dismissed. The plaintiff cannot seek compensation. Sec.24 bars
the plaintiff to file a fresh suit seeking compensation as the plaintiff can as well seek compensation under section 21 of the Act in the suit for specific performance of the contract.

Section 23 enables the plaintiff to seek liquidated damages in the event of breach of contract. Merely because the plaintiff seeks liquidated damages in the event of breach of contract it does not bar and dis-entitle the plaintiff to seek specific performance.

Section 15 of the Act deals with the persons who are entitled to seek specific performance. Section 11 is in relation to the performance of the contracts connected with trusts enforceable.

The above brief aspects is an overall view with regard to the specific performance of contracts with reference to Principal Act, 1963.

Now, I wish to look at the provisions of the Amendment Act which came into operation from 1.10.2018. The main reason for bringing the amendment to the Principal Act is to address the issue of delay in relation to the enforceability of the contract and also to provide additional remedies to parties whose contractual rights were violated. The amendment Act minimizes the discretion of the courts unless the contract falls within the categories specified in the amendment section 14 of the Act like where a party obtained substituted performance, a contract the performance of which involves the performance of a continuous duty which the court cannot supervise and a contract which is so dependent on the personal qualifications of the parties, such contracts cannot be enforce specifically. The Court can seek opinion of expert on any specific issue (Sec.14A(1)) and the opinion of the expert can be used by either of the parties.

The amendment Act further permits the aggrieved party to seek compensation for breach of a contract in addition to specific performance of the said contract. (Sec.20(4) of the
Amendment Act). Prior to amendment such claim for compensation was either in addition to or in substitution of seeking specific performance. The amended Act also prevents the court from granting injunctions in suits where the contract relates to infrastructures like transport, energy, water and sanitation, communication and social and commercial infrastructure. The main intention behind it is to reduce the intervention of the courts in infrastructure courts (Sec.20A of the Amendment Act).

The amendment Act also amended Sec.20 of the Act to provide for substituted performances. In the event of breach of contract the aggrieved party is entitled to get the contract performed by a third party or by his own agency and to recover the costs and expenses actually incurred. It is in addition to claiming compensation from the defaulting party. However, the aggrieved party before undertaking the substitution of service shall issue notice to the other side, not less than thirty days, calling upon to perform the contract within such time as specified in the notice and only on refusal the aggrieved party may get the same performed by a third party or by his own agency.

These are some important aspects in relation to the specific performance of contract with reference to the Principal Act and Amendment Act.

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In the Principal Act, the plaintiff must aver and prove that he has always been ready and willing to perform the essential terms of the Contract. Failure to aver the same in the plaint would dis-entitle the plaintiff to seek specific performance of contract. But, the same is amended in the Amendment Act As per Section 16(l) of the Amendment Act, it need not be averred in the plaint that the plaintiff has always been ready and willing but he must prove it by adducing evidence.

The above presentation is only touching the basic outlines of the specific performance of the contract without going into the niceties and minute details of both the Principal and Amendment Act.
**Scope of Courts’ discretionary power in granting relief of Specific Performance:**

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**Introduction:**

As per Black’s Law Dictionary (10th ed., 2014) 'Specific Performance’ is a remedy ordered by courts, that requires precise fulfillment of the contractual or legal obligation. The plain and uncomplicated meaning of Specific performance is ‘enforcement of exact terms of the contract’. In India the relief of specific performance is codified in the Specific Relief Act, 1963, to deal with the remedies that are granted at the discretion of the court for the enforcement of civil rights of the individuals. The relief of specific performance is sought in the case of breach of contract and for the enforcement of terms of the contract. Indian Contract Act, 1872 is the law governing contracts in India.

*Then why the relief of Specific Performance is codified separately?*

Sections 73 to 75 of Indian Contract Act provides for compensation in case of breach of contract. But what is the remedy when actual damages cannot be ascertained or when compensation in the form of money would not make good of loss occurred due to non-performance of the contract?

So, to fill such gap, the relief of specific performance was codified under the Specific relief act, 1877, by the British. The Courts of equity and Courts of Chancery at one point of time started granting the relief of specific
performance of contract in case of breach of contract whenever it was felt that compensation in terms of money cannot make good of loss. But the courts awarded compensation as a rule and specific performance as an exception. The interpretation of granting the relief of Specific performance is explained and emphasized by the Privy Council in *Ardeshir H. Mama vs Flora Sassoon, AIR 1928 PC 208*. As explained by the Privy Council the reliefs codified under the specific relief act are interpreted as equitable reliefs but not as statutory reliefs, even today by the Indian Judiciary. Interpretation of doctrine of specific performance did not change even after enactment of Specific Relief act, 1963, repealing the 1877 Act.

** Scope of courts’ discretionary power in granting Specific Performance under the Un-amended Specific Relief Act, 1963:**

Under the un-amended Act, the remedy of specific performance was not available to a party as a matter of right, but it was granted at the discretion of the court. Section 10 of the un-amended act postulates as:

“Except as otherwise provided in this chapter, the *specific performance of any contract may, in the discretion of the court, be enforced* .......”

** What does this discretion and power of court means?**

Section 20 of the Act says:-

1. The jurisdiction to decree specific performance is discretionary.
2. The Court is not bound to grant such relief merely because it is lawful to do.
3. The discretion of the Court should not be arbitrary but sound and reasonable, guarded by judicial principles and capable of correction by a Court of appeal.
In a slew of judgments the scope of discretion of the courts in granting specific performance has been ushered, a few of them are as follows:-

** In GOBIND RAM vs. GIAN CHAND, (2000) 7 SCC 548, Apex Court has held as follows:

"7. It is the settled position of law that grant of a decree for specific performance of contract is not automatic and is one of the discretions of the court and the court has to consider whether it will be fair, just and equitable. The court is guided by principles of justice, equity and good conscience. As stated in P.V. Joseph's Son Mathew (1987 Supp SCC 340) the court should meticulously consider all facts and circumstances of the case and motive behind the litigation should also be considered."

** In BAL KRISHNA AND ANOTHER vs. BHAGWAN DAS (DEAD) BY LRS. AND OTHERS, (2008) 12 SCC 145, Apex Court has held as follows:

"14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the
contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void."

** Nallam Seeta Mahalakshmi and Ors.Vs.Talari Vijayalakshmi, 2005(4)ALD130

"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."

While the law stands so, the Specific Relief (Amendment) Act, 2018 (the "Amendment Act") , amending the provisions of the Specific Relief Act, 1963 came into force on 1-10-18 vide notification SO..4888 (E) dated 19-09-2018. The Amendment Act aims at assuring enforceability of contract and subsequently to improve of "ease of doing business " in India.

** Scope of Specific Performance under the Amended Act:**
The Amendment Act has brought about a substantive change in the substratum and ethos of the Act. By virtue of Amendment Act, the courts are bound to enforce the specific performance of a contract as a rule, but subject to limited exceptions.

The other major changes include:

1. The introduction of the remedy of substituted performance.
2. A new Section 20A to the principal Act provides that for infrastructure project contracts, the court shall not grant an injunction in any suit, where it would cause hindrance or delay in the continuance or completion of the infrastructure project.
3. Designation of a recognized civil court as Special court for expeditious disposal.
4. Bringing Limited Liability Partnership into the scope of the Act etc.

** Specific performance will be a general rule rather than a limited right:

Previously, under Section 10 of the Principal Act, specific performance of a contract was a discretionary remedy which could be granted only when:

a. the actual damage caused due to the non-performance of the action could not be ascertained; or
b. when monetary compensation would not be adequate relief for the non-performance of contract.

The Amendment Act now minimizes the discretion of the courts in cases seeking specific performance of contracts and grants a right to an aggrieved party to seek specific performance of a contract in certain cases, subject to the provisions contained in Sections 11(2), 14 and 16 of the Act. The Amendment Act also grants an additional right, which appears to be in
alternative and without prejudice to other rights under the Act and the Indian Contract Act, 1872, to have the option of substituted performance through a third party and recover the expenses and other costs actually incurred, spent or suffered by such aggrieved party, from the party committing the breach of the contract (Refer section 20).

** Now we have to look at the limitations that are being enunciated under sections 11(2), 14 and 16:

Sec. 11(2): A contract made by a trustee in excess of his powers or in breach of trust can not be specifically enforced.

Sec. 14: Contracts not specifically enforceable—The following contracts can not 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 can not supervise;

(c) A contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of it’s material terms; and

(d) a contract which is in its nature determinable.

Section 16:

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(a) who has obtained substituted performance of a contract under sec 20;

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully 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 been ready and willing to perform the essential terms of the
contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.

These 3 sections enunciate the circumstances under which specific performance can not be granted.

**Ambit and Scope of Additional remedy of Substituted Performance:**

By introducing the remedy of 'substituted performance', the Amendment Act has given statutory recognition to the concept of 'Right to Cover' in contracts (usually an agreed contractual term between parties), which allows an aggrieved party in case of non-performance of a contract, to obtain performance from a third party and at the same time recover the consequent costs or loss for such substituted performance from the breaching party. Though a remedy akin to substituted performance is provided under the Indian Contract Act, 1872 where, a non-defaulting party can buy the goods or services elsewhere at an additional cost and such cost be considered for calculating damages to be awarded, the award of damages is circumscribed by tests of foreseeable and extenuation of losses. Also, generally any indirect loss / costs incurred by a non-defaulting party does not fall within the ambit of damages recoverable under Indian contractual law. By providing the remedy of 'substituted performance', the Amendment Act seeks to restore a non-defaulting party to the position it would have otherwise occupied, but for the breach of contract. The newly substituted Section 20 of the Principal Act provides an aggrieved party the option of 'substituted performance' through a third party or by its own agency. Further, while availing the remedy of 'substituted performance,' dis-entitles
an aggrieved party from claiming specific performance, but it does not dis-en-titles the aggrieved party from claiming damages for the breach of contract.

However, Section 20 lays down that the costs recovered from the defaulting party must be those actually incurred, spent or suffered by the non-defaulting party. Therefore, where the costs claimed from the defaulting party for 'substituted performance' exceed the contract price leading to a dispute, the non-defaulting party would need to prove in court (a) performance of the contract by a third party or own agency; and (b) the quantum of actual costs incurred by such 'substituted performance'.

The primary restriction across all legal systems including international conventions is that specific performance should not be granted when the aggrieved party could have obtained substitutes. This forces an aggrieved party to get the contract completed by obtaining substitute performance from another person, and claim his loss, if he suffers any, from the contract-breaker. While this may appear very similar to the current provisions that make specific performance exceptional in nature, the restriction operates in a different way. The burden falls upon the person who breaches the contract to show that the party seeking specific performance had substitutes.

** The open ended question before judiciary with the advent of this amendment to Specific relief act is that;

Whether the amended act is prospective or retrospective?

The Amendment Act itself does not provide any guidance as to whether the amendments would operate ‘prospectively’ or ‘retrospectively’. A “saving clause” or a “transitory provision” is conspicuous by its absence.

The possible argument to say that the Amendment Act is prospective;
1. Usually, amendments do not purport to be either declaratory or clarificatory. The amendments seek to bring about a substantive change in the law of remedies, by stating that the remedy of specific performance when sought for breach of contract, would no longer be exceptional or discretionary and would be available to a party as a matter of right. This amendment takes away the discretionary power of the Court. Remedial statues are necessarily regarded as prospective.

   So, from this perspective, this amendment can be considered as Prospective.

2. In view of section 6 of the General Clauses Act, 1897, any law that deals with the rights and obligations of the parties have its effect prospectively unless otherwise expressed. The nature of provisions that have substituted and amended the provisions of the Principal Act are, conferring the rights, remedies and imposing obligations on the parties and so, by analyzing the nature of the Amendment Act, the same can be brought under the category of substantive law and so it is prospective in nature. Therefore the rights and obligations accrued prior to the amended act came into force on 01.10.2018, would stand undisturbed by the 2018 Act.

   If the Amendment Act is considered to be prospective then it is applicable to all breaches and disputes that arose subsequent to 01.10.2018 irrespective of whether the contract was concluded before 01.10.2018 or not.

   The amending Act has an objective to prevent errant contractors from breaking their contracts and hampering infrastructure projects. The ultimate aim of the Act is to enhance the standing of India in the ‘ease of doing business’ ranking. The discussion among academicians is that this amendment is centered around infrastructure contracts only and it is not restricted to business contracts, but applies to the common man and his personal contracts.
Therefore, it is turn of the judiciary now, to come up with a panoramic scope of interpretation, since this law is in its nascent stage.
INTRODUCTION

The Specific Relief Act, 1963 provides for Specific Reliefs. Specific Relief means relief of certain species i.e., an exact or particular or determined relief. In the case of specific relief, the plaintiff obtains (claims) the very thing to which he is entitled to. In other words, it is a remedy which aims at exact fulfillment of an obligation or specific performance of the contract. For instance, if a person was dispossessed unlawfully by someone, then that person can claim a general relief of compensation to be paid by the defendant equivalent to the loss suffered by that person due to his unlawful acts or can claim specific relief to enable him to have possession over the same property.

Specific performance is equitable relief, given by the court to enforce against a defendant, the duty of doing what he agreed by contract to do. Thus, the remedy of specific performance is in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract. Damages and specific performance are both remedies available upon breach of obligations by a party to the contract. The former is a ‘substitutional’ remedy, and the latter a ‘specific’ remedy.

Discretionary power:

As per THE SPECIFIC RELIEF ACT, 1963, 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. The Amendment Act has brought about a substantive change in the substratum and ethos of the Act. As per the Amendment Act, the courts are bound to enforce the specific performance of a contract as a rule, subject to limited exceptions.

20. Discretion as to decreeing specific performance: [OLD]

(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.

(2) 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 of 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, whereas its non-performance would involve no such hardship on the plaintiff; or

(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 involve 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.

(3) 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.

(4) 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 party.

**Substituted performance:**

In THE SPECIFIC RELIEF (AMENDMENT) ACT, 2018, Section 20 of the old Act was totally substituted with the new provision as shown below. It provides an alternative to the party who suffers by breach of contract to go for substituted performance through a third party or by his own agency, and he can recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach, subject to conditions mentioned below.

**20. Substituted performance of contract : [NEW]**

(1) Without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872 (9 of 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.

As per Section 20 of Amendment Act:

When there is a breach of contract by any party, then the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency provided, he 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.

➢ He can recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

➢ 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.

➢ 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) i.e., substituted performance, then he shall not be entitled to claim relief of specific performance against the party in breach, as he has already got the contract performed through third party or by his own agency. At this point he can only claim to recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

➢ If the party suffering breach of contract has not opted for substituted
performance, then he can claim the relief of specific performance. Further if he intends to claim compensation, then he can claim compensation as an additional relief to that of specific relief, but not as an alternative relief.

Alternative remedies for Specific Performance of Contracts:

As per THE SPECIFIC RELIEF ACT, 1963 a plaintiff can claim compensation in addition to, or in substitution of a relief for specific performance in a suit for specific performance of a contract. It means as per old Act, compensation can be claimed as an alternative relief for specific performance.

But as per THE SPECIFIC RELIEF (AMENDMENT) ACT, 2018 in section 21(1) of the principal Act, for the words “, either in addition to, or in substitution of,” the words “in addition to” was substituted. It means as per latest amendment, compensation can only be claimed as an additional relief, but cannot be claimed as an alternative relief to the relief of specific performance.

21. Power to award compensation in certain cases: (OLD)

(1) In a suit for a specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such
compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872.

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

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

Explanation : The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

21. Power to award compensation in certain cases: (NEW)

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach [in addition to] such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.
(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872.

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

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

Explanation: The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

As per Section 21, in a suit for specific performance of a contract, if the plaintiff claimed specific relief in addition to compensation, then:

➢ If the court is of the opinion that specific performance should not to be granted, but there is a breach of contract between the parties and that the plaintiff is entitled to compensation for that breach, then the court shall award him such compensation accordingly.

➢ If the court is of the opinion that specific performance should be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, then court shall award him such compensation along with the specific relief.

➢ The amount of any compensation awarded under this section shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872.

➢ Unless the plaintiff has claimed the compensation specifically, No
compensation shall be awarded to the plaintiff. If the plaintiff has not claimed any such compensation in the plaint, at any stage of the proceeding the plaint can be amended and can include a claim for such compensation.

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

Under Section 22(1) any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for:

(a) possession, or partition and separate possession, of the property as an additional relief or

(b) refund of any earnest money or deposit paid or made by him as an alternative relief, in case his claim for specific performance is refused or

(c) any other relief to which he may be entitled

Above reliefs under section 22(1) shall be granted by the court only if they are specifically claimed. If the plaintiff has not claimed any such relief in the plaint, then at any stage of the proceeding court shall allow him to amend the plaint for including a claim for such relief.

➔ The Full Bench, in Kathavan Servai v. Rahima Beevi, (1989) 1 Mad LJ 278 , held:

"The alternative relief includes refund of any earnest money or deposit paid or made by the plaintiff. The grant of an alternative relief would arise only in case the plaintiff’s claim for specific performance is refused. When the plaintiff asks for the alternative relief, there is no legal presumption or assumption that he gives up the main or primary relief of specific performance of the contract “
In Roop Chand Chaudhari vs Smt. Ranjit Kumari (AIR 1991 P H 212 ) Hon’ble Punjab & Haryana High Court held that :

“Once a suit for return of the earnest money/advance or grant of damages is filed, such a plaintiff disentitles himself to the alternative relief of specific performance even if claimed in the suit. If that is so, he cannot be allowed to amend his plaint later on to claim specific performance of the contract as the first relief and return of earnest money/advance and/or damages as an alternative relief.”

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

According to Section 24, the plaintiff cannot claim compensation by instituting a separate suit when the claim for specific performance is dismissed in the first instance. This is similar to the provision Order 2, Rule 2 of C.P.C, where it is provided that suit must include whole claim. However, the plaintiff can claim any other relief in the subsequent suit.

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

Under Section 29 also a plaintiff instituting a suit for the specific performance of a contract in writing may pray an alternative relief 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.

In PREM RAJ Vs. D.L.F. HOUSING & CONSTRUCTION PVT. LTD. & ANR. (1968 AIR 1355) Hon’ble Supreme Court held that :

“A plaintiff suing for specific performance of the contract may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled. But , it is not open to a plaintiff to sue for rescission of the agreement and in the alternative sue for specific performance”.
Section 30: Court may require parties rescinding to do equity

As per Section 30 of the Act upon adjudging the rescission of a contract, the court may require the party in whose favour such relief is granted to restore any benefit which he may have received from the other party and to make any compensation to him which justice may require.
INTRODUCTION:

The Court possess a power to rectify the written agreement to coincide with the true intent of the parties. The Court does not rectify the contract but it merely reforms the written expression of the agreement. The Specific Relief Act, 1963 act allows the Court to issue orders for rectification of documents executed in mutual mistake of the parties. The provision relating to rectification of instruments is contained in S. 26 of the Act. The rectification of the instrument can be made on the ground of mistake of law.

Cancellation of a document can be prayed in court in a situation when the plaintiff has an apprehension that the document would be used against him. Cancellation of a sale deed or a written instrument is a very important and crucial aspect of the civil laws in India. Such situations often arise due to misrepresentation of facts, suppression of facts and other related factors. The cancellation of any sale deed or any other document related to the property requires specific grounds about which a discussion is being given here by our experts. The provisions with respect to cancellation of instrument is enshrined under S.31 to 33 of Specific Relief Act, 1963.

1. RECTIFICATION – RELIEF UNDER S.26 OF SPECIFIC RELIEF ACT:

The principle underlying in S.26 is that - "The actual expression of a thought very often fails to express the whole thought, sometimes more may be expressed, sometimes less and sometimes; sometimes totally different may be expressed. When parties have come to contract, but have failed to express
themselves correctly, and the mistake is a real one and mutual and can be established by satisfactory proofs, a court of equity, will reform the written instrument, so as to make it conformable to the precise intent of the parties. The real intention may have been misrepresented in writing, either by mutual mistake or fraud. Equity affords relief in either case, in faith and confidence in the formation of contracts."

1.1. 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 (1 of 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 defence 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.

'Instrument' used in S.26 of the Specific Relief Act has a very wide meaning. As per S.2(14) of Indian Stamp Act it means and includes every document by which any right or liability is, or is purported to be created, transferred, limited, extended, extinguished or recorded.

1.2 Requisites for Rectification:

In *Joseph John Peter Sandy v. Veronica Thomas Rajkumar*,¹ – Ruled that S. 26 is attracted in limited cases. It is applicable only where it is pleaded and proved that through fraud or mutual mistake of the parties, the real intention of the parties is not expressed in instrument. Such rectification is permissible only by parties to instrument and none else. Pleading and proof of fraud or a mutual mistake of the parties are mandatory requirements for obtaining a relief of rectification of an instrument. It is clear from Order 6 Rule 4 of the CPC, that particulars like fraud, breach of trust, wilful default, undue influence, etc. have to be specifically pleaded.

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

a) 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.

b) 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

¹ (2013) 3 SCC 801
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.

c) 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.

d) Fourthly, a party should seek rectification of literal mistakes, so as to enable the parties to act according to their intentions already revealed clearly and unequivocally, so as to prevent them from nullifying their prior agreement.

Madras High Court in **Raipur Manufacturing Co., Ltd Vs. Joolaganti Venkatasubba RaoVeerasamy & Co,**\(^2\) wherein it was held that where in the course of a suit for damages for breach of contract, the plaintiff contends that there is a clerical error in the document embodying the contract, it is not always necessary that a separate suit should have been brought for rectification of the document and it is open to the court in a proper case to allow the plaintiff to amend the plaint and ask for the necessary rectification.

It is the intention of the parties, which is to be given effect to. The intention is to be gathered from the deed itself. If from the deed, it can be ascertained that the intention was to transfer a particular property, a mere mistake would not defeat the conveyance.

A reading of these two conditions made under S.26 of the Act would amply show that either party may institute a suit to have the instrument rectified or a party who has already filed a suit in which any right arising under the instrument is in issue may claim in his pleading that the instrument be rectified.

**In Shanti Ranjan Das v. Dasuram,\(^3\)** it was held that even a representative in interest may apply for rectification. However, such rectification cannot affect the right of the third party.\(^4\)

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\(^2\) AIR 1921 Mad 664
\(^3\) AIR 1957 Assam 49.
\(^4\) Also laid in Sheo Murat Vs. Ram Murat, AIR 2004 All 263.
1.3 Scope and Extent of Rectification:

In *Sambhu Nath Dalal And Anr. vs Radharaman Middya And Ors.*,⁵ it was laid down that S.26 is an enabling provision. It enables a transferee to seek relief by rectification. But such rectification is not the only remedy as said in *Palani Velappa v. Nachappa*,⁶. He can sue for a declaration that the property belongs to him without seeking rectification. In such a case he can avail himself of the benefit of the provisions of S.95 to 97 of the Evidence Act. The failure to resort to S.26 cannot deprive the purchaser of the rights conveyed to him by the sale deed.

In *Vaikunthi Bai v. State of MP*,⁷ it was held that in a suit for declaration can be maintained without rectification in the sale deed. If the plaintiff can prove his title to the property, he can seek a decree for declaration of title without seeking the relief of rectification of the document of title. U/s.26, it is open to the Court to give effect to the real intention of the parties that was arranged and arrived at by agreement between them before it was reduced into writing.⁸, it was held that a purchaser is not bound to institute a suit for rectification since this section is an enabling one. If a purchaser does not utilize the benefit of this section, it would not deprive him of the rights conveyed to him.

S. 26 does not speak about specific performance of the contract. When a deed is executed, the contract is concluded and is governed by different rules and principles; rectification, therefore, is not specific performance of the contract.

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⁵ (2003) 1 CALLT 301 HC  
⁶ AIR 1919 Mad. 247  
⁷ 1987 MPLJ 469  
U/s.18, the suit is always for specific performance of the contract, and it is the defendant who claims variation or rectification albeit the contract; however, U/s.26, both, that is, the plaintiff or the defendant can claim variation (that is, rectification) of an instrument, and the suit can be any suit based on an instrument/document.

Any bona-fide purchaser who has purchased some property against some value/consideration, without having knowledge of any defect in the title, the law protects the rights of such a person and as per S.26(2), if a rectification of an instrument is to be made, then the rectification will be allowed only to the extent that it does not affect the rights of such a bona-fide purchaser. S.26 does not apply in case of unilateral mistake.

In Subhadra & Ors. v. Thankam\(^9\), this Court while deciding upon whether the agreement suffers from any ambiguity and whether rectification is needed, held that when the description of the entire property has been given and in the face of the matters being beyond ambiguity, the question of rectification in terms of S.26 of the Act would, thus, not arise.

\textit{Puran Ram Vs. Bhaguram and anr, AIR 2008 SC 1906}, after closely examining the provisions made under S.26, in a suit for specific performance of contract for sale, it is permissible to amend a part of the description of the suit property not only in the plaint but also in the agreement.

In Molli Eswara Rao, vs Kurcha Chandra Rao, Civil Revision Petition No. 3210 of 2011, it was ruled that change in a part of the description of the suit property in the plaint cannot convert the suit for specific performance of the contract to a suit for declaration.

Jurisdiction of Civil Court to grant rectification of Trust Deed can be effectively invoked and that Court does not suffer from any inherent lack of

\(^9\) AIR 2010 SC 3031.
jurisdiction as under S.34 of Indian Trusts Act which has laid no such jurisdiction to City Civil Court in A.P.

The legal heir of a party, who is entitled to claim the relief of rectification, under S. 26 of the Act can pursue the matter if only, the proceedings were initiated by such party during his lifetime. It is impermissible for the legal heirs to initiate proceedings for rectification for the first time, after the death of the party to the instrument. It conforms to logic as well as reason that when the party himself was not of the view, that there was any mutual mistake or fraud, his legal heirs cannot plead that the party was subjected to such fraud or mistake.¹⁰

1.4 Mere Prayer Insufficient:

In *State of Karnataka v. K.K.Mohandas, AIR 2007 SC 2917*, the Supreme Court observed that in the absence of any foundation in the pleadings laid by the plaintiffs for establishing a ground for the grant of relief of rectification, the mere adding of a prayer by way of an amendment could not be considered sufficient to grant the relief. Rectification of written contract, in the absence of plea of mutual mistake, a fraud, such relief not permissible.

1.5 Limitation:

The limitation with regard to the relief is related to person, who has come to the Court. The limitation is governed under *Article 113 of the Limitation Act, 1963*, which is *three years* either from the execution of the document or from the date of notice or knowledge about the mistake. The time would commence to run from the date of discovery of the mistake. There cannot be any time limit for discovery of the mistake as held in *Gerela Kalita v. Dhanneswar, AIR 1961 Assam 14*. The limitation is to be computed from the date on which the cause of action arises. Cause of action arises only when the person suing comes to know about the mutual mistake in the instrument that it does not express the real intention of the parties.

¹⁰ Akkira Suwarathi and anr. Vs. Mohd. Jehangir Pasha and ors., 2004(6)ALD144,
In *Balo v. Kuklan*, the Privy Council had held that there can be no right to sue until there is accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe the right by the defendant against whom the suit is instituted.

2. CANCELLATION – RELIEF UNDER S.31 OF SPECIFIC RELIEF ACT:

2.1 When cancellation may be ordered:

The relief as to delivery and cancellation of an instrument is founded upon the administration of the protective justice for fear that the instrument may be vexatiously or injuriously used by the defendant against the plaintiff or it may throw a cloud or suspicion over his title or interest. 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.11 This is called cancellation of Instruments. S.31 is stipulated as under12:-

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 canceled.

2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 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.

Cancellation under S.31 of the Specific Relief Act, 1963 relates to mistake in the formation of any instrument and remedy of rectification available under S.26 of the Specific Relief Act, 1963 relates to mistake in expression of the


contract only. In case of cancellation U/s.31 of the Specific Relief Act, 1963, the relief of specific performance is out of question.

2.2 Pre-requisites of S.31:

In relation to the conditions to be satisfied in a suit under S.31 of the Act, in *Dunia Lal Datta vs Nagendra Nath Datta And Anr.*, *AIR 1982 Cal 163* it was held as under:

A plaintiff in a suit under S.31 of the Act has to establish three conditions:

1. that the plaintiff is such a person against whom the instrument is void or voidable.
2. that the plaintiff can entertain a reasonable apprehension that if such an instrument is left outstanding it may cause him serious injury.
3. that the Court must adjudge the instrument void or voidable in its discretion.

In *Kotrabassappaya v. Chenvirappaya* 23 ILR 375 (Bombay) *(D.B.)*, 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.

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.

But possession in itself or for that matter a possessory title does not, entitle a person to a decree for cancellation of a written instrument under S.31

unless all the three ingredients are established. Held in **Tekulapally Veera Reddy And Ors. vs Tekulapally Narayana Reddy, 2008 (3) ALD 326.**

The discretion to make the agreement cancelled is not arbitrary but sound and reasonable. Court must apply the equitable doctrine of ‘in pari delicto’ held in **Kamarbai vs Badrinarayan, AIR 1977 Bom 228.**

A person who is aggrieved by the findings of registrar can challenge sale deed U/s.31 of the Act in a competent civil Court and the civil Court shall go into the issue regarding due execution. Registering authority has no jurisdiction to go into the question that the signature on the document had been obtained by fraud, mis-representation, undue influence and mistake by executant because the aforesaid questions have to be gone into by competent civil Court. Held in **N.M.Ramachandraiah and anr. Vs State of Karnataka and ors, AIR 2007 Kant 164.**

A sale deed which was executed by practicing fraud on the transferor who was also not of sound mind, was held liable to be quashed and not to be specifically enforced.14

This S.31 is available to a person affected by an instrument even though he may not be a party to the instrument. Held in **B.Rajgorhia vs Central Bank of India, (1976) 76 Cal WN 807.**15

But in case of **Kishori Prasad v. IIIrd Addl.Dist Judge, AIR 2003 All 58**16 held that for cancellation of sale deed which is void, suit could be filed in civil court by recorded tenure holder, executant of sale deed or his successor. The suit filed by 3rd party was not maintainable.

In certain cases even persons who are not party or executant of the instrument has locus standi to file suit for cancellation provided his right is

15 Also held in Kedar Prasad vs Ganga Prasad, AIR 1980 All 85.
16 Hameed v. Kanhaiya, AIR 2004 All 405, the plaintiff was able to prove that he was the son of the owner of the property on whom fraud was committed. He was allowed to sue.
seriously injured. A Full Bench of the Orissa High Court in *Keshab Chandra Nayak v. Laxmidhar Nayak and Others AIR 1993 Orissa 1*, which was a case dealing in benami transactions, taking the same view that S.31 of the Specific Relief Act could be called into aid by a person who was not a party to the agreement, held that in certain circumstances, even a sham transaction can also be treated as voidable at the instance of some persons and these persons may approach the appropriate authority for getting it so adjudged and for its cancellation, as permitted by S.31 of the Specific Relief Act, 1963.

2.3 Kinds Of Cancellation:

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.

(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.

As per S.32 of Specific Relief Act Partial Cancellation is done by Court. Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

2.4 Instruments that can be cancelled:

Following instruments can be cancelled:

(a) Written Instrument

(b) Registered Instrument
When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of law, as it is nullity. S.31 refers to both void and voidable documents. It provides for discretionary relief.

In Prem Singh v. Birbal, (2006) 5 SCC 353, The deed in this case was void by reason of the fact that it purported to convey the interest of minor. The court said, "If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court."

2.5 Cancellation of Decree:

In Pratabmull Rameswar vs K.C. Sethia, AIR 1960 Cal 702, held that U/s.31 plaintiff cannot be given relief of adjudging the decree as void or voidable as the decree will not come with in the general expression ‘written instrument’.

But a consent decree is contract between the parties and suit for adjudging it void or setting aside a decree on the ground of having been obtained through misrepresentation or fraud lies under S.31 of S.R.Act. Held in Mohanbai vs Jaikishan, AIR 1988 Raj 22.
2.6 Cancellation different from Declaration:

The remedy of cancellation of such an instrument cannot be granted because such a relief would not remove the cloud upon his title by the instrument and the proper remedy to seek is a declaration of his own title or a declaration that the sale deed is not binding or valid against him.

In *Vellayya Konar v. Ramaswami Kdnar AIR 1939 Madras 894*, it was held that there is a difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding upon the plaintiff. When plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void in toto and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration.

But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled in toto. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore, in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed.

2.7 S.151 & S.152 CPC cannot be invoked for mistakes in deed:

S. 152 of Code of Civil Procedure is for the purpose of correcting errors and directly involved in the proceedings themselves and not for correcting errors which are anterior to the proceedings particularly in documents upon which suits are brought. Hence, where there is a mutual mistake in the insertion of a wrong survey number in the mortgage deed, sale deed or any other instrument and the
error is repeated in the plaint and the decree, the Court cannot rectify the error under S. 152 as it is not a clerical or of arithmetical error or an accidental slip or omission. The remedy lies by way of suit under S. 31 of Specific Relief Act.

It was also observed by the Madras High Court\(^{17}\) that S. 151 also cannot be invoked for correcting the mistake in the deed because S. 151 does not confer any jurisdiction upon the Court to merely declare that nothing shall limit or otherwise affect the Court's inherent power and the Court cannot be set to possess inherent power to make an order for rectification of a document when a remedy by way of suit under S. 31 of Specific Relief Act, is provided.'

**2.8 Certain Restrictions to S.31**

1. The relief under Section 31 of Specific Relief Act cannot be claimed as a matter of right; the court will act upon the principle of the exercise of sound discretion, having due regard to the conduct of the parties.

2. Where the parties are in pari delicto and fraud is alleged as the ground for cancellation, the court may refuse the relief to the plaintiff, as he is equally to blame with the defendant.

3. No relief can be granted under Section 31 of the Specific Relief Act where there is a question of mere inadequacy of consideration.

4. No suit for the cancellation of a will can be instituted during testators lifetime.

**2.9 Limitation:**

The period of limitation for a suit to cancel or set aside an instrument or decree is three years and the time of limitation starts to run when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside first become known to him.

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17 *Ramakrishna Chettiar v. Radhakrishna Chettiar*, AIR (35) 1948 Mad. 13; *Cherukuwada Vijaya Laxmi Vs. Veluri Sitpathi and ors.*, 2004(2)ALD570.
A sale deed was executed in respect of ancestral property. The transferor's sons challenged it and sought declaration that the sale was null and void. There was nothing to show their ages and whether they have birth-right in the property. The suit was also time barred because it could be filed only within 3 years of cause of action whereas 13 years have already passed.¹⁸

S.33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.—

(1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

(2) Where a defendant successfully resists any suit on the ground—
(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;
(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

Conclusion

Thus from the above discussion it is clear that the doctrine of rectification of instrument is based on the maxim equity looks to the intent rather than the form. The 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. If rectification is granted the order has only prospective effect, so the rectified document will be read as if it had originally been drawn up in its rectified form.

To conclude, it can be stated that cancellation of instruments is a discretionary relief. To avail such kinds of discretionary relief, plaintiff is under burden to prove that some instrument or any part of its is void or voidable against him and can cause serious injury to him.