

Topic: Alternative Remedies for specific performance of contract

Definition of Specific Performance:

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 as to complete performance of the contract.

To safe guard the right of the perform who seek equitable relief the Act was enacted it is called Specific Relief Act 1963.

It contains 8 chapters 44 sections the definition of “Specific Performance” the performance of a contractual duty, as ordered in cases where damages would not be adequate remedy.

Recently the Act was amended by way of Amendment Act 2018 came in to force on 01-10-2018.

This Act deals with:

- (i) Specific performance of contract
- (ii) Contract which can be specifically
- (iii) Contract which can not be specifically
- (iv) Person or again whom contract may be specifically enforced
- (v) Substituted performance of contract and enforcement of awards.
- (vi) Rectification of instruments
- (vii) Revision of contract
- (viii) Cancellation of instrument
- (ix) Declaratory decrees
- (x) Injunction by way of preventive reliefs.

ALTERNATIVE REMEDIES FOR SPECIFIC PERFORMANCE OF CONTRACT:-

The specific performance is a specialised remedy used by the courts when no other remedy will adequately compensate the other party. Most of the time, the courts grant the specific performance when the subject of the contract is unique, when it is not the matter of money that is involved and when the true amount of damage is unclear.

The inadequacy test was the primary test which the plaintiff must satisfy for seeking the specific performance. When no other proper relief can be obtained, the specific performance has to be granted. A remedy will be considered inadequate when monetary relief will not be adequate. This test of “adequacy of alternative remedies” was the first hurdle for a plaintiff to claim an equitable relief and the plaintiff must overcome the same. This test of inadequacy is found in Section 10 of the Specific Relief Act. The amendment for the Section 10 w.e.f from 01-10-2018 is very significant and now Section 10 of Specific Relief Act reads as follows:-

“Specific performance in respect of contracts:-The specific performance of a contract shall be enforced by the court subject to the provision contained in sub-section (2) of Section 11, Section 14 and Section 16.

Section 11 deals with specific performance of contract connected with trust, section 14 deals with contracts not specifically enforceable and section 16 deals with personal bars to relief.

Now “**shall**” is used and earlier it was “may in the discretion of the court be enforced”. So, the specific performance of contract is made a general rule rather than an exception.

2(a). Whenever the contract is broken, there should be an alternative remedy at the option of the party who suffers the broken contract. So, the substituted performance of contracts is provided

during the recent amendments. Now the party who suffers would be entitled to get the contract performed by third party or his own agency and recover the expenses and costs, including compensation from the party who failed to perform his part of contract. This is the best alternative remedy now introduced during the recent amendments.

Section 20 (Substituted performance of contract) reads as follows:

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.

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

Section 20(A) deals with special provisions for contract relating to infrastructure project, section 20(B) deals with the special courts for trying the suits under this act for the contracts relating to infrastructure projects and section 20(C) deals with expeditious disposal of the suits under the provision of this act and the time period is 12 months from the date of service of summons to the defendant. Further extension also cannot be beyond 6 months in aggregate after recording the reasons in writing for such extension by the court.

It is relevant to mention here that the Indian Contract Act, 1872 has already recognized that an aggrieved party can get the contracted work done through another and claim the costs, expenses from the contract breaker. It is opined by the experts that under the contract Act, the aggrieved person was not assured of covering all his expenses and that now this new provision will give him the right to the expenses and hence, the confidence of the victim of getting his work completed from a third person after giving an opportunity to the contract breaker to fulfil his part of contract will enhance. Section 73 of the Indian Contract Act 1872 deals with compensation for loss or damage caused by breach of contract and section 74 deals with compensation for breach of contract where penalty is stipulated for.

3. Adverting to the other alternative remedies for specific performance of contract now available, it is necessary to examine the sections 21, 22, 23 and 29 of the Act.

Section 21 deals with the power to award compensation in certain cases:

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach **in addition** to such performance (**earlier, prior to amendment, it was “either in addition to or in substitution of”**)

(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 (9 of 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 circumstances that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

3(a). The claim should be there in the plaint by the plaintiff for sake of compensation. Also, proviso speaks that the courts shall at any stage of the proceedings allow the plaintiff to amend the plaint for including such claim for compensation. In *ShamsuSuharabeevi –vs G. Alex and another* (2004) (8) SCC 569, it was observed that there should be prayer in the plaint seeking compensation under Section 21 and equity must yield to law. So, without there being a prayer, no relief can be granted. The grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible at all (This is a detailed judgment on this aspect).

It was observed in *Jagdish Singh VsNathu Singh* (AIR 1992 Supreme Court page.1604) that section 21 enables the award of compensation in lieu and substitution of specific performance. (Now the amendment says that the compensation can be claimed for breach in addition to such performance).

Further, it was observed in *Jagdish Singh's* case that if the decree for specific performance of contract was found incapable being executed, the decree shall stand suitably substituted. In this case, since the subject matter i.e the land was acquired by the government during land acquisition proceedings, it was held that plaintiff shall have the right to recover such land acquisition compensation with solatium etc., Also, the distinction between the compensation under section 21 of Specific Relief Act and Section 73 of Indian Contract Act was taken up for discussion in this case.

By following this citation, our Hon'ble Apex Court in the subsequent case between *Vurmila Devi –vs Deity, Mandi Shree Chamunda Devi* (2018) (1) ALT 59 SC has held that when the contract has become impossible with no fault of the plaintiff, Section 21 enables the Court to award compensation in law of specific performance and the honourable apex court in this case has examined in detail the scope and ambit of section 21

4. Section 22 deals with the power to grant relief of possession, partition,refund of earnest money:

1. Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in any appropriate case, ask for:

- a. Possession, or partition and separate possession, of the property, in addition to such performance, or
 - b. any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or (made by) him, in case his claim for specific performance is refused.
2. No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief 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 relief.

3. The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

It was observed by Hon'ble Apex Court in Babulal –vs- HazariLalKishariLal reported in AIR 1982 SC 818 that Section 22 (2) says that at any stage of proceedings, the court may allow for amendment if the plaintiff has not claimed such relief in the plaint. So, this includes execution proceedings also. The court when allows the prayer for specific performance, it vests the executing court all the powers required to give full effect to the decree of specific performance and the court has to find out the real contract between the parties and declare that such a contract exists and it is for the executing court to do the rest.

4(a). Ordinarily, the relief for specific performance of a contract implies the relief for possession of the immovable property also and in such a case, the plaintiff need not even ask for the decree for possession and as soon as a decree for specific performance of the contract is passed, the plaintiff would be entitled to ask for possession in execution of such a decree. The facts if indicate that the possession follows the relief of specific performance of the contract, when no third party has intervened, when the property is in possession of the contracting party, the decree for specific performance of the contract would also ensure for possession of the property in execution of that decree. "HemchandV.Karilal, 1986 Law suit (Rajasthan page 62)"

It is held in a Plethora of cases by honourable High Courts and apex court that in case of decree for specific performance of agreement of sale against defendant in possession of property, the specific prayer for delivery of possession is not necessary. If the defendant is in possession of the property agreed to be sold and the decree directs a specific performance of the agreement of sale, the defendant is bound to execute the sale deed as per the decree and to put the plaintiff in possession of the property as contemplated by section 55(1) (f) of the Transfer of Property Act. In such a case it is not necessary to specifically claim the relief of possession in the suit.

Sarverunnisa Begum Vs Syed Rafeeq (2015 Law Suit (Hyd)169) is one such case wherein our honourable High Court has held that the executing court is competent to order delivery of property covered by the suit agreement of sale. The decree for mere specific performance implies a decree for possession also.

4(b). The term "proceeding" is a very wide and comprehensive term and it includes execution proceedings also. The expression "at any stage of the proceeding" gives widest powers to the court to allow amendment at any stage of the proceeding including the execution of the decree. The amendment can be allowed even in an appeal arising out of the order passed by the executing court rejecting the prayer for possession. The proviso recognises the well settled position that the court passing a decree for specific performance retains control over the subject matter as long as anything remains to be done in the case.

In Pasupuleti Rangamma Vs PasupuletiRanganayakulu case reported in 2014 Law Suit (A.P.) page 206, our honourable High Court has discussed regarding sec.22 of the Act. In that case, the plaintiff filed suit for specific performance of agreement of sale and during the pendency of that suit, two daughters of the defendant filed another suit for partition. In that partition suit, 1/6 th share each to plaintiffs and Defendant No.2, 3/6 th share to Defendant No.1 who is plaintiff in suit for specific performance was allotted. As far as the suit for specific performance of contract is concerned, it was decreed in favour of plaintiff in respect of 1/3 rd share only. During the second appeal, it was argued before honourable High Court by the defendants of the specific performance suit that there is no specific prayer and under section 22 (2) of specific relief Act, this relief of partly decreeing the specific performance suit is contrary to the provisions of this Act. But honourable High Court observed that granting of decree for a lesser relief does not fall within the expression “any other relief” of section 22 (1) (b) of specific relief Act and hence, the decree is not contrary to section 22 of the specific relief Act.

5. Section 23 says that Liquidation of damages not a bar to specific performance.

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same. If the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) While enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

According to section 24, after the dismissal of suit for specific performance, the right of plaintiff to claim compensation for breach of contract is barred. So, this relief has to be claimed in same suit.

The existence of default clause containing provision for cancellation of contract as regards both the parties cannot be a bar so as to grant the relief of specific performance.

If there is clause in agreement providing that in case of violation of terms and conditions of agreement, the plaintiff could be entitled to recover damages, it can be stated that it is strictly a penalty clause for securing the performance of contract. This would not mean that contract is not to be performed.

6. Another important Section is section 29 which deals with alternative prayer for rescission in a suit for specific performance. Section 29 reads as follows:-

“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 sets out that in a case where plaintiff has sought specific performance of a contract in writing, the plaintiff can pray in the alternative that if the contract cannot be specifically enforced, it may be rescinded and delivered upto be cancelled. This therefore, is a right conferred by Statute on the plaintiff in a suit for specific performance to pray in the alternative that if the contract cannot be performed, to get it rescinded.

7. CONCLUSION:-

The alternative remedies 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 gave up the main or primary relief of the specific performance of the contract.

The plaintiff primarily wants the relief of the specific performance of contract and pleads that in case that the primary relief is to be refused, he should be granted the alternative remedy.

7(a). it is very important here to refer to the recent decision of Hon'ble apex court dt.7-01-2019 between Kamal Kumar V/s Premlata Joshi & Others (2019 Law Suit (SC) 12) wherein the material questions, which are required to be gone into by the courts for grant of the relief of specific performance, are set out. It was opined by the Hon'ble Apex Court that these questions are part of the statutory requirements (Sections 16(c), 20, 21, 22, 23 of the Specific Relief Act, 1963 and the forms 47/48 of Appendix A to C of the code of Civil Procedure). First, it should be seen 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 of 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. So it is the duty of the court to examine the entitlement of plaintiff for grant of alternative relief basing on his or her pleadings and with the aid of evidence in accordance with law.

Submitted by

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