

SCOPE OF EXERCISING DISCRETION TO
GRANT RELIEF OF SPECIFIC PERFORMANCE

Submitted by:
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The Specific Performance Act 1963 has recently been amended by Amendment Act of 18/2018. It came into force from 1st August, 2018. The Amended Act has brought changes to the existing Specific Relief Act, 1963 of sections 6, 11, 15, 19, 21, 25 and 41 of the Act with certain words are inserted. Whereas, sections 19, 14 and 20 are substituted with new text.

Prior to amendment, Section 20 reads as “the jurisdiction to decree specific performance is discretionary. The Court is not bound to grant such relief merely because, it is lawful to do so. But discretion of the Court shall not be exercised arbitrarily but sound and reasonable guided by the judicial principles and capable of correction by court of Appeal. In the following cases, the Court may exercise discretion not to decree specific performance.

- a) The circumstances of the contract are such that it gives the plaintiff an unfair advantage over the defendant.
- b) The performance of contract would involve some hardship on the defendant, whereas its non-performance would involve no such hardship on the plaintiff.
- c) The contract makes it inequitable to enforce the specific performance.

Section 20 further explains that mere inadequacy of consideration of the contract is onerous to the defendant, it shall not be deemed to constitute as unfair advantage or hardship. This provision further explain that the question whether performance of contract would involve hardship on the defendant has to be determined with reference to the circumstances existing at the time of contract. The Court may properly exercise discretion to decree specific performance. In any case, where the plaintiff has done substantial acts or suffered loss in consequences of contract capable of specific performance the Court shall not refuse specific performance of contract on the ground that contract is not enforceable at the instance of party.

By going through the Section 20 of Specific Relief Act, one could easily understand that those provisions give wide range of discretion to the Courts either to decree the suit or to dismiss it. It has been in practice to award compensation when contract is breached. Only in exceptional cases, suits are decreed granting specific performance.

On account of amendment to the Specific Relief Act, which came into force on 1st August, 2018 section 20 of the Act has completely been substituted. The amended Section 20 reads as “If contract is broken due to non-performance of promise by any party, the party who suffers shall have the option of substituted performance through a third party or by his own agency and such party can recover expenses and other costs suffered by him from the party committing such breach.”

Such substituted performance shall not be undertaken unless the party who suffered such breach has given a notice in writing, in not less than 30 days, to the opposite party calling upon him to perform his contract within such period. On his refusal or failure, he may get the same performed by a third party. The party who suffered such breach is not entitled to recover the expenses unless he gets the contract performed through a third party. He shall not later entitle to claim the relief of specific performance from the opposite party who breach the contract. But he can claim compensation.

New provisions viz., Section 20-A to 20-C of the Act have been added. As per these provisions, no injunction shall be granted by the Court under the act involving contracts relating to infrastructure projects specified in the schedule (newly added one). Special Courts are to be constituted. The suits under this act shall be disposed of within 12 months from the date of service of summons. The said period may be extended another six months on recording reasons.

The discretion given to the courts under Section 20 old Act has completely Act says, been taken away by newly amended Act. The newly amended the party who suffered breach of contract may have option substituted performance through a third party. Of The expenses for getting it done through the third party may be recovered with compensation from the

opposite party who breach the contract. However, he cannot claim specific performance of contract from the opposite party.

As per Section 20 old Act, discretion conferred on the courts shall be exercised on sound and reasonable principles guided by judicial principles and that court shall not exercise such discretion arbitrarily.

Some of the case laws relating to section 20 of the Specific Relief Act, 1963 are:

In Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruwila's Son and Ors reported in AIR 1987 SC 2328, the Hon'ble court held as follows:

"Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff..."

A similar view was adopted by the Hon'ble Court in Sardar Singh v. Smt. Krishna Devi and another reported in (1994) 4, SCC 18 which held that:

"Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract."

Reiterating the position in K. Narendra v. Riviera Apartments (P) Ltd reported in (1999) 5, SCC 77, which held that:

"Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India."

However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in Lourdu Mari David v. Louis Chinnaya

Arogiaswamy by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court."

These principles were followed by in A.C. Arulappan v. Smt. Ahalya Naik reported in (2001) 6 SCC 600 with the following observations :

"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."

A Bench of three Judges of the Hon'ble Court considered the position in Nirmala Anand Vs. Advent Corporation (P) Ltd. and Ors.[5], reported in (2002) 8 SCC 146 held

"It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while

granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

In K. Nanjappa vs. R.A. Hameed, (2016) 1 SCC 762, It was held that

“in a suit for specific performance of a contract, the court has to keep in mind Section 20 of the Specific Relief Act, 1963. Section 20 preserves judicial discretion to grant decree for specific performance. However, the Court is not bound to grant specific performance merely because it is lawful to do so. The Court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant. Relief of specific performance is discretionary but not arbitrary, hence, discretion must be exercised in accordance with sound and reasonable judicial principles. The cases providing for a guide to courts to exercise discretion one way or the other are only illustrative, they are not intended to be exhaustive.”

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

"Though the decree for specific performance is a discretionary power, yet the court is not bound to grant such a relief merely because it is lawful to do so; but the discretion of the court is not arbitrary, but . sound and reasonable, guided by judicial principles of law and capable of correction by a court of appeal. Therefore, the discretion should be properly exercised keeping in view⁵³ the settled principles of law as envisaged in Section 20 of the Act. This case demonstrates that the High Court took irrelevant consideration into account to refuse to grant the decree for specific performance. It also committed manifest illegality in reversing the concurrent finding of facts recorded by the trial court as well as the first appellatant court, namely the appellatant has always been ready and willing to perform his part of the contract." It is equally well settled that relief of specific performance is discretionary but not arbitrary, hence, discretion must be exercised in accordance with sound and reasonably judicial principles. The cases providing for a guide to courts to exercise discretion one way or other are only illustrative, they are not intended to be exhaustive, In England, the relief of specific performance pertains to the domain of equity, but in India the exercise of discretion is governed by the statutory provisions.”

In the case of Mayawanti vs. Kaushalya Devi, (1990) 3 SCC 1, the Hon'ble court observed as under:-

"In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within . which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a

decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order performance is to enforce that obligation."

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

Zarina Siddiqui vs. A. Ramalingam, 2015 (1) SCC 705, the Hon'ble Court observed as under:-

"The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance."

Similar reiteration of law can be found in Satish Kumar vs. Karan Singh, (2016) 4 SCC 352, wherein it was observed as under:-

"It is well settled that the jurisdiction to order specific performance of contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the Court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the Court will not be there even though the contract is otherwise valid and enforceable.

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of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."

Position in Nirmala Anand Vs. Advent Corporation (P) Ltd.and Ors., the Hon'ble court held:

"It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case.

Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of ."

The other provisions:- section 10 of Specific Relief Act, the specific performance of any contract may, in the discretion of the Court, be enforced. Where: a) When there is no possibility of ascertaining actual damages and b) Compensation in money would not offered adequate relief.

These provisions has been completely substituted with the following provision. New provision to Section 10 reads as follows:

"The specific performance of contract shall be enforced by the Court subject to provisions contained in sub section 2 of 11, Sec. 14 and Sec. 16. By substituting relevancy new provision, the discretion of the Court has no relevancy. "

Section 11 of old Act says that specific performance of contract in the discretion of the Court be enforced, when the Act under the performance of a trust. But as per the amended Act, the word ' contract may in the discretion of the Court' substituted by ' contract shall'.

Section 14 of the old Act reads following contracts cannot be specifically enforced namely :-

- a) compensation in money is adequate relief
- b) the contracts runs into minute or numerous appeals
- c) the contract in its nature determinable
- d) it involves performance of a continuous duty.

But in newly inserted Section 14, the contracts cannot be specifically enforced when the party obtained substituted performance as per Section 20. The remaining conditions viz., B to D remain unchanged. As per Section 14-A, the Court can get expert opinion.

Another major change is to Section 16 of old Act. In old Act, one can found the following words. "He who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract is not entitled to claim specific performance". But in the new act, Section 16 reads that:

"He who fails to prove that he has performed, has already been ready and willing to perform his part of contract, is not entitled to claim specific performance. It is conspicuous that the words " who fails to aver" have been omitted. It is experience of all the judicial officers that number of suits were dismissed solely on the ground that the plaintiff failed to aver in the plaint that he was always ready and willing to perform his part of contract. By this newly amended Section 16 of the Act, the plaintiff need not aver in the plaint that he was always ready and willing to perform his part of contract, but it is sufficient to prove his ready and willingness throughout."

Conclusion:

By amendment to the specific relief act, the law makers intended to remove the difficulties to the litigant public. The appointment of expert as contemplated under Section 14-A, the substituted service as contemplated under section 20 are the new features. At the same time, when the opposite party is in financial distress, compelling to perform his part of contract might be impracticable. It has to be seen how the Courts and litigant public react to the time frame of 12 months, additional six months fixed under Section 20-C amended act. Therefore, it is observed that from the above judgment that the amendment to the Specific relief Act was done keeping in view the global ranking of India in enforceability of contracts and ease of doing business. The main aim to the new amendment is to avoid delays and to provide additional remedies to the parties who suffered such breach.

