

PAPER PRESENTATION
ON THE
TOPIC OF

THE CONTOURS OF SPECIFIC
PERFORMANCE OF CONTRACT

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THE CONTOURS OF SPECIFIC PERFORMANCE OF CONTRACT

INTRODUCTION:

The Specific Relief Act, 1963, an act comprising almost 70% of the civil litigation in the subordinate courts in India, the specific Relief Act mainly aims at the exact fulfillment of an obligation. And deals with the concept of protection of right and prevention of wrong. The Reliefs provided thereunder are equitable reliefs. Generally where a breach has been committed by one party, the other party is having the following remedies to pursue:

1. Rescission of contract,
2. Suit for Damages,
3. Suit for Specific Performance,
4. Suit for Injunction

SPECIFIC PERFORMANCE OF CONTRACT:

The specific performance is also an equitable relief. The plaintiff seeking this remedy must first satisfy the court that the normal remedy of damages is inadequate, the presumption being that in cases of contracts for transfer of immovable property , damages will not be adequate. Even in these cases specific performance is not always granted, as it is a discretionary remedy.

Section 10 of the Specific Relief Act, 1963:

Cases in which specific performance of contract enforceable:

Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the court, be enforced:

- (a) Where there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or
- (b) when the act agreed to be done is such that compensation in money for its non performance would not afford adequate relief.

Explanation: Unless and until the contrary is proved, the court shall presume:

- (i) that the breach of a contract to transfer immovable property cannot be adequately

relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.”

Amendment: Section 10 of the Act - The specific performance of a contract shall be enforced by the court of law subject to the contracts which cannot be specifically enforced as provided in Sections 11(2), 14 and 16 of the Act.

A major change introduced by the Amendment Act, is that it now makes it mandatory for courts to enforce specific performance of contracts, except for certain types of contracts where performance is not specifically enforceable. The discretion granted to courts previously while granting the remedy of specific performance including the two circumstances under which specific performance could be granted (as discussed above) have been removed.

Section 11: Cases in which specific performance of contracts connected with trusts enforceable:

(1) Except as otherwise provided in this Act, specific performance of a contract shall, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

Section 12 of the Specific Relief Act, 1963:

Specific performance of part of contract

(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either

(a) forms a considerable part of the whole, though admitting of compensation in money;
or

(b) does not admit of compensation in money, he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the

whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part. Explanation. For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.

A court will not, as a general rule, compel specific performance of a contract unless it can execute the whole contract. This section deals with classes of cases in which specific performance may be granted with or subject to special conditions or restrictions. When a part of the contract is not capable of performance is always whether the contract can be executed in substance. This provision can be invoked only where terms of the contract permit segregation of interests and rights of parties in the property, and if not this provision cannot be invoked.

Section 14 of the Specific Reliefs Act, 1963

provides for certain circumstances wherein a contract cannot be specifically performed. These have been discussed as follows:-

Amendment: Section 14 of the Act - The following contracts cannot be specifically enforced, namely:

(a) where a party to the contract has obtained substituted performance of contract as per

Section 20 of the Act;

(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;

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

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

Contracts which cannot be specifically enforced:

1. Contracts which involve the performance of continuous duty which court cannot supervise:

Earlier under Specific Relief act, 1877 the continuous duty which court cannot supervise is considered over a period of 3 years which was omitted under Specific Relief Act, 1963 and no time limit restricted for the performance of a continuous duty. These include contract of appointment of employees for continuous service.

2. A contract which is in its nature determinable:

Determinable contract means a contract which can be determined or revoked or put to an end by a party to the contract. For example in case of partnership at will any partner can retire by giving notice in writing to other partners and can dissolve the firm.

3. Substituted performance: In line with the shift to a pro-performance regime, the newly substituted Section 14 has reduced the categories of The amended Section 14 now recognises only 4 categories of contracts that cannot be specifically enforced. 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 foreseeability and

mitigation of losses. Also, generally any indirect loss/cost 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' disentitles an aggrieved party from claiming specific performance, it does not disentitle the aggrieved party from claiming damages for the breach of contract.

The Amendment Act signals a welcome departure from granting specific performance as an exceptional equitable remedy to statutorily mandating that contracts must now be specifically enforced. The amendments are designed to protect contractual rights while lending greater certainty in enforcement of contracts by reducing the element of court discretion.

Amendment: Section 14A of the Act - Where the court considers it necessary to get expert opinion to assist it on any specific issue involved in the suit, it may engage one or more experts for providing evidence, including production of documents on the issue which shall be based on relevant information and form a part of the record.

contracts that are not specifically enforceable.

Section 16 in The Specific Relief Act, 1963:

Personal bars to the relief of specific performance. Specific performance of a contract cannot be enforced in favour of a person:

- (a) who has obtained substituted performance of contract under section 20 or
- (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:

- (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.

The Hon'ble Supreme Court of India, in a recent judgment laid down requirements for the parties in their respective pleadings, and proof with evidence in accordance with law in suit for specific performance in **Kamal Kumar V Premlata Joshi & Ors, Civil Appeal No. 4453 Of 2009, 7th Of January 2019.** held as under:

“It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property; Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds.

In our opinion, the aforementioned questions are part of the statutory requirements (See 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). These requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance with law. It is only then the Court is entitled to exercise its discretion and accordingly grant or refuse the relief of specific performance depending upon the case made out by the parties on facts.”

In this case, the appellant filed a civil suit against the respondents claiming specific performance of contract in relation to the suit property, which was contested by

the latter. The trial court dismissed the suit. The appellant felt aggrieved and filed first appeal before the Hon'ble High court. The Hon'ble High Court dismissed the appeal and affirmed the trial court's judgment and decree, and the same was challenged by way of special leave before the Hon'ble Apex Court. While allowing the appeal, the Hon'ble Supreme Court listed out requirements to be met in a specific performance suit as under:

1. Whether a valid and concluded contract exists between the parties for sale/purchase of the suit property?
2. Whether the plaintiff has been ready and willing to perform their part of contract and whether they are still ready and willing to perform their part as mentioned in the contract?
3. Whether the plaintiff has, in fact, performed their part of the contract and, if so, how and to what extent, and in what manner they have performed. And whether such performance was in conformity with the terms of the contract.
4. Whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to the suit property. Or will it cause hardship to the defendant and, if so, how and in what manner and extent if such relief is eventually granted to the plaintiff?
5. Whether the plaintiff is entitled to the grant of any alternative relief. and, if so, on what grounds?

The Hon'ble Supreme Court held that these requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance with law. Only then can the court can exercise its discretion and grant or refuse the relief of specific performance.

Readiness And Willingness:

The Hon'ble Supreme Court of India in (1996) 4 SCC 526 in *His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar* Held as under “There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. The factum of readiness and willingness to perform plaintiff's part of the

contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.”

Amendment: The Amendment Act also provides for a time line of 12 months from the date of service of summons on the defendant for the disposal of a suit for specific performance. This period can be further extended by 6 months by the court.
