

**TAMIL NADU STATE JUDICIAL ACADEMY – HEADQUARTERS, CHENNAI**  
WEBINAR ON SPECIFIC RELIEF ACT – SUBSTITUTED PERFORMANCE & INFRASTRUCTURE PROJECTS  
28.08.2021

**Event Report**

The programme commenced with Mr. D. Lingeswaran, Director, TNSJA, warmly welcoming the District Judges participating in the webinar and the resource person, Mr. R. Abdul Mubeen, Advocate, High Court of Madras. The Director highlighted that the objective of the 2018 Amendment to the Specific Relief Act, 1963 is to remedy the discrepancies in the contract-enforcement mechanisms which causes delay in completion of projects. In this regard it was emphasised that the object of contract law is not to punish the defaulting promisor by compelling specific performance, but to ensure that the promisee is put in a position as if the contract is performed.

**Origin of Legislation**

The law on specific relief was discussed as first being legislated in 1877, followed by a series of Amendments. The erstwhile 1877 Act was modelled on the New York Civil Code but embodied the practice of English Equity Courts, which followed the principles of Justice, Equity and Good Conscience. It brought out the distinction between 'Specific Performance' and 'Specific Delivery', and also specified the cases where specific performance could be enforceable. It also recognised the right of a third party to sue in exceptional circumstances.

The 9<sup>th</sup> Law Commission Report recommended the overhaul of the Specific Relief Act, 1877, in order to remove the weaknesses of the Common Law and provide for segregated remedies such as recovery of possession, declaratory remedies, and injunction, thus resulting in the Specific Relief Act, 1963. Subsequent Amendments were carried out in 1964, 1974 and 2018. It was

discussed that, the measures were purported to increase the Ease of Doing Business rankings, particularly by providing a leeway for infrastructure projects.

### **Nature and Scope of Amendment Act**

The 2018 Amendment to the Specific Relief Act was brought out on 1<sup>st</sup> October 2018. The Amendment provides for an alternative remedy of substituted performance, which reflects the suggestions of the Expert Committee. It was discussed that the 2018 Amendment reflects the words of Sir Edward Fry, who authored the Treatise on Specific Performance of Contracts, who said, "it may be suggested that a perfect system of jurisprudence ought to enforce the actual performance of contracts of every kind and class except only when there are circumstances which render such enforcement unnecessary or inexpedient. It ought to be assumed that every contract is specifically enforceable, unless the contrary is shown."

The Amendment acts as a deterrent for indiscipline in contract behaviour, and along with other Amendments to the Insolvency and Bankruptcy Code, Arbitration and Conciliation Act and the Real Estate Regulatory Authority is intended to attract more foreign investment. The Amendment also seeks to minimise judicial intervention in maintaining the sanctity of a contract.

### **Prospective/Retrospective Effect of 2018 Amendment**

On the question whether the 2018 Amendment to the Specific Relief Act is prospective or retrospective, a plethora of decisions were discussed. It was discussed that, the general principle of law is that if the amendment pertains to substantive provisions, it has prospective effect, and if it pertains to procedural provisions, it has retrospective effect, which was also held in the case of *K.S. Paripooranam v. State of Kerala [1994 5 SCC 593]*. In *Garikapati*

*Veeraya v. N. Subbiah Choudhary* [1957 SCR 488], it was observed that in order to determine the prospective/retrospective application of the amendment, it needs to be seen whether the Amendment affects the vested rights of parties. In *Hazara Singh v. Custodian of Evacuee Property* [AIR 1960 P&H 133], it was observed that if the Amendment is of provisions affecting pleadings, evidence, practice or change of jurisdiction, it implies an Amendment involving procedural aspects and therefore it applies retrospectively. The *Hazara Singh* case further observed that, remedial statutes do not give parties new rights, but only a remedy for existing rights. Right to remedy is not a vested right. It was discussed in its essence that, the Specific Relief Act, 1963 was procedural in nature and thus as per the decisions in *Moulvi Ali Hassain Mian v. Rajkumar Haldar* [AIR 1943 Cal 417] and *Hanumanth Rao Deshmukh Vs. Krishna Bai* [1986 1 Bom CR 50], *Radhashyam Kamila Vs. Kiran Bala* [AIR 1971 Cal 341] the Act was said to have retrospective application.

Section 6 of the General Clauses Act, 1897 was discussed to suggest that the 2018 Amendment pertains to substantive provisions and is hence prospective in application. The divergent view as propounded by Pollock and Mulla [The Indian Contract Act and Specific Relief, Vol 2, 15<sup>th</sup> edn. 2017, at pg. 1781] was referred to, wherein it was stated that, a mere right to take advantage of provisions is not considered as an accrued right. The 2018 Amendment introduces the substitution of Section 10, which now provides that, specific performance shall be enforced subject to Sections 11, 14 and 16. This provides for a corresponding right and privilege to the defendant.

In *Keshava Madhava Menon v. State of Bombay* [AIR 1951 SC 128], it was held that an Amendment, *prima facie* applies prospectively, unless the contrary is expressly mentioned. In *K.C. Arora v. State of Haryana* [1984 3

*SCC 281*], it was held that the cardinal principle of construction is that, every statute is prima facie prospective, unless it was expressly intended to have retrospective effect. In *R. Rajagopal Reddy v. Padmini Chandraekharan* [1995 2 SCC 630], with regard to the Benami Act it was held that, rights were given to the *benamidhar* and the original owner's rights were diminished, and hence it was prospective. In *N.K. Bajpai v. Union of India* [AIR 2012 SC 1310], it was held that Section 28, Indian Contract Act, 1872, is clarificatory in nature and is hence prospective.

It was discussed in conclusion that, it can be stated that the 2018 Amendment to the Specific Relief Act is prospective. However, the contrary opinions prevailing in the discourse were discussed. In *The Church of North India v. Rev. Ashok Bisvas* [2019 SCC Online Cal 3842], which is the latest decision on this debate, involved a case where the Amendment came into force during the pendency of the suit. The High Court held that, the language of Section 14, Specific Relief Act, is the determining factor, and the absence of a non-obstante clause would have been added implies that, the Amendment is retrospective in operation. In *Gottumukala Venkata Krishnam Raju v. Union of India* [2018 SCC Online SC 1386], it was held that, absolute obliteration of the old provision, gives way for the retrospective operation of the new provision.

### **Analysis of Old and Amended Acts**

The concept of specific performance was discussed in detail by going through every provision in the Specific Relief Act [the Act] and analysing the impact of the 2018 Amendment to such provisions. The jurisdiction to order specific performance arises only upon a valid and enforceable contract. Freedom of contract is the foundation of the obligation between the parties, and the relief

of specific performance is granted to enforce that obligation. The Court's intervention in this regard does not repudiate the principle of mutuality.

Section 6 of the Act pertains to suit filed for dispossession of immovable property. The 2018 Amendment inserted the words "through whom he has been in possession or any person". The insertion of these words in the amended provision grants the owner an additional remedy in case of dispossession by a third party. Section 10 of the Act provides for the cases for which specific performance is enforceable. The 2018 Amendment to this provision to make specific performance a regular relief and not an exceptional one, thus reducing the discretionary power of the court, since the word 'may', has been replaced with 'shall'. The amended Section 11 of the Act also carries a similar mandate upon the Court by replacing the word 'may' with 'shall'. It was discussed that the overall aim of the Act is to mandate specific performance. The significant provisions were, Section 14, wherein Section 14(a) provides for substituted performance, which acts as a bar to specific performance. Section 14A provides for the power to engage experts, and that the opinion of the expert will be taken as court record, and the Court has the power to secure attendance of expert for providing evidence including production of documents. Through this provision, courts are given an additional tool to determine the dispute.

Section 15 specifies who can obtain specific performance. The Amendment has widened the scope of this provision by introducing clause (fa), which provides for a new Limited Liability Partnership [LLP], resulting from the amalgamation of two LLPs, to step into the shoes of the erstwhile entity to claim specific performance. Section 16(a) is the equivalent to Section 14(a), as it places a restriction on seeking specific performance once substituted performance is obtained. The amended Section 16(c) has removed the term

'aver', which implies that no pleading is required and that it is sufficient to establish willingness to perform through evidence. Section 19 provides against whom specific performance can be sought. The Amendment inserted clause (ca) which enables claim of specific performance from an LLP which is the result of amalgamation of two erstwhile LLPs.

Thus the 2018 Amendment provides for substitution as well as creation of new rights.

### **Substituted Performance of Contract**

Section 20 is a remedial provision, which minimises judicial intervention in cases of breach of contract, by enabling the fulfilment of obligation through a third party. The time limit for notice in writing is mandated at thirty days, while the time limit for substituted performance is set at the discretion of the affected party. The objective of the Amendment is to ensure that through the third party, the public works goes on without interruption. The decisions in *King Emperor v. Shibnath Banerji* [1945 FCR 195] and *Shiv Kirpal Singh v. Shri V.V. Giri* [AIR 1970 SC 2097] discussed the phrase "Without prejudice to the generality of the provisions of the Indian Contract Act, 1872" as contained in Section 20 as an indication that the provisions are intended to abrogate the applicability of the Indian Contract Act. The phrase "except as otherwise agreed upon by the parties" implies that, substituted performance can be stipulated in the contract itself. In order to invoke Section 20, there must be a breach of contract, performance through third party or agency, recover costs and expenses, notice period. After obtaining substituted performance, compensation can be claimed but not specific performance. Section 73, Indian Contract Act which provides for compensation in case of breach acts as a necessary corollary to Section 20, Specific Relief Act.

Substituted performance is a remedy subject to Section 41, Indian Contract Act, *ex contractu* claim of compensation. Section 20, Specific Relief Act is to be read with Sections 73 and 41 of the Indian Contract Act. It was discussed that further research is required on the topic of substituted performance. It was discussed that, the self-help theory is the basis for substituted performance, wherein the substitute performer replaces the promisor, thus reducing judicial intervention in further of reducing inordinate delay in seeking relief from Courts.

The principles on international commercial contracts as per UNIDROIT, to which India is a signatory, were discussed in brief, along with the comparative study of substituted performance in foreign jurisdictions. The special provisions applicable to infrastructure projects was discussed. Section 20A, which is equivalent to Section 41(ha), states that, "no injunction can be sought for infrastructure projects, if it would cause delay or hindrance to the completion of the project".

Section 20B, provides for the establishment of Special Courts, Section 20C provides a benefit to the party at loss, by prescribes a time limit of 12 months to dispose of a case. These measures are intended to ensure speedy disposal of cases, which would lead to better development of infrastructure facilities of the country, attract foreign investment and aid in industrial development and economic growth. Section 21 provides for compensation to the promisee, which is a right in addition to the remedy of substituted performance.

### **Implications of Substituted Performance**

It was explained that, the concept of substituted performance is the antithesis of the inadequacy test. Promisee is the best judge to see whether the substituted satisfy his needs, and is unlikely to sue for specific performance if

substituted or compensated. This suggestion was taken forward by the Expert Committee and subsequently by the Parliament. The principle of *Substitutio personarum* which refers to assignment of contracts, through substitution of legal relationships of persons, was discussed. This takes place in the nature of an equitable assignment by a collateral contract. In *Kharadah Co. Ltd. v. Raymon & Co. India Ltd.* [AIR 1962 SC 1810], at para 7, on the assignment of contracts, the Court observed that, "obligations can be transferred only upon consent of the promisee, which leads to novation of contract, resulting in substitution of liabilities". It was discussed that, generally, rights under a contract are assignable unless they involve a personal skill, or are incapable of assignment either by law or under an agreement between the parties. In *British Wagon Co. v. Lea & Co.* [5 QBD 149], the concept of substitution and assignment was discussed and it was observed that, where the promisor has been selected based on individual skill, competence or personal qualification their inability to perform or execute the contract, renders it possible to seek performance through a third party, if they are equally qualified to do the service.

The transfer of actionable claims, under Sections 130 and 131 of the Transfer of Property Act, 1882 were discussed in relation to the concept of assignment of obligations as distinct from assignment of rights. The decision in *Kapilaben & Ors. v. Ashok Kumar Jayantilal Sheth & Ors.* [2019 SCC Online 1512] discussed the validity of assignment, only upon consent of the promisee, and held that, "Section 15(b), Specific Relief Act, is only a formulation of the principles laid down in the precedent in *Kharadah Co.* and *British Wagon Co.*". It was further discussed that, post the substitution of the promisor, the jural relationship between the parties is now that of a debtor and creditor, to the extent of claim of damages from the defaulting promisor.

The session was followed by an interactive discussion wherein the participants' queries were answered. Hon'ble Mr. Justice N. Anand Venkatesh, Judge, High Court of Madras, engaged in the discussion and stated that the 2018 Amendment signifies a shift in mindset, in order to get the job as per the contract done.