

# CONCEPT OF SPECIFIC PERFORMANCE AND THE RIGHTS OF PLAINTIFF CLAIMING IT UNDER THE SPECIFIC RELIEF ACT, 1877

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## ABSTRACT

Specific performance of the contract is one of the equitable remedies developed in the Courts of Equity in England. The Court grants it by exercising its discretionary power. The Specific Relief Act, 1877 contains the cases where, and how specific performance will be granted and who will be entitled to claim the same. Since it has arose from the Law of Equity, the Court remains cautioned in applying discretion during scrutiny of the fact and circumstance so that neither the plaintiff nor the defendant has to face injustice. The aim of this paper is to understand the concept of specific performance and to address the plaintiff's rights provided under this Act for seeking specific performance of contract in the appropriate Court of law. This paper shall also make an attempt to describe the discretionary power of the Court along with the relevant provisions regarding related to the specific performance of contract. Some judicial decisions will be cited to reflect the practical applications of these provisions in the Courts.

## INTRODUCTION

The Specific Relief Act, 1877 has a dedicated chapter for regulating the cases of specific performance of contract. Chapter II contains sections 12 to 30 which deal with the various circumstances of the specific performance. Some of the sections protect the rights and interests of the plaintiffs who seek to enforce a contract to perform specifically, and some of the sections defend the defendants by prohibiting the granting of specific performance against them. It is a remedy for handling situations where non-performance of the contract cannot be substituted by any other remedy. For tackling such situations, it is an important remedy for the ends of justice. This chapter of the Act has a strong connection, and relevancy with some other laws for its proper implication, like the Code of Civil Procedure, 1908 for the procedure of civil case, the Limitation Act, 1908 for computing the time for institution of suit, the Court Fees Act, 1870 for calculating the fees of the Court, and the Contract Act, 1872 and the Transfer of Property Act, 1882 for some similar concepts.

## CONCEPT OF SPECIFIC PERFORMANCE

The term, "Specific Performance" has been defined in the Black's Law Dictionary as the performance of a promise through the judgment or decree of the Court.<sup>i</sup> G.W. Keeton summarizes the specific performance as the execution of the terms of contract which may be contradictory with the compensation.<sup>ii</sup>

According to Law of Equity, specific performance is one of the equitable remedies where the Court requires a party to act according to the contract what he has agreed to do. If a party breaches his obligation made in the contract, the other party may sue in the Court for the completion of such contract through the specific performance where the Court orders the defaulting party to perform his part and to complete the contract. But the Court is not bound by the law to order specific performance of any contract, although it is lawful. Rather, it exercises its discretion during granting of an order to perform specifically as mentioned under section 22 of the Specific Relief Act, 1877. Discretionary power does not give the power to the Court to act arbitrary whatever it wants. This power limits the ambit of the Court to exercise its discretionary power following the guidance of the judicial principles; also, it should be reasonable to serve justice to the parties. The object of application of the discretionary power

is to scrutiny every fact and circumstance of the case so that the plaintiff can get an equitable remedy, and the defendant does not have to face hardship for performing any specific act ordered by the Court. So, the Court must remain more cautious during handling cases regarding specific performance. This relief is refused in cases when compensation is appropriate and adequate for recovering the damage of the plaintiff.

## **BRIEF HISTORY OF SPECIFIC PERFORMANCE**

The origin of specific performance has a long history. It originated in the time of Henry VIII, King of England, and was developed by the Courts of Equity under the Lord Chancellor. It got popularized among the people because of dissatisfaction with the Common Law. The Common Law had the only remedy of awarding compensation to the plaintiff. There were some cases where compensation was neither appropriate nor an adequate remedy for recovering the loss sustained by the plaintiff. Even failure to maintain a strict and rigid procedure was liable to reject the petition. So, the disappointed party started to file petitions to the King's Court, which were transferred to the Lord Chancellor for disposal. Later, it was turned into as the Court of Chancery. The Lord Chancellor used to dispose of the case with consciousness and reasonableness, because, it had less formality and was not bound by the precedent. Sometimes, the Common Law didn't serve justice to the plaintiff and made the justice system rigid, pile for formality and could not go beyond precedent. The Law of Equity started originating in the 15<sup>th</sup> century and had become a part of law by the middle of the 17<sup>th</sup> century. It had become such an important part of the justice system that it was given the prevalence, if there was any contradiction between the decision of Common Law and the Court of Equity. Until the Judicature Act, 1873 amalgamated administration of the Common Law and the Law of Equity, these two were administered as two distinct entities of law.

## **DISCRETION OF THE COURT TO GRANT SPECIFIC PERFORMANCE**

The Courts exercise its discretion for granting a decree to perform an act specifically where compensation is not adequate or cannot be an appropriate relief. Section 22 of this Act states

about this power. During application of the discretionary power of the Court, the Court makes sure the power has been exercised for the interests of the parties and for the ends of justice. It is not allowed for the Court to act arbitrarily.<sup>iii</sup> The Court considers all the facts and circumstances of each case. For this reason, a plaintiff cannot make the Court bound for granting of a relief just relying on the ground that it is lawful.<sup>iv</sup> It is discretionary power which does not limit the Court within the legal mechanism and the codified law. Rather, it gives a wide power to apply the judicial mind which is reasonable and guided by the judicial principles. But this power does not include varying of the terms of contract without reasonable cause of such variation.<sup>v</sup> Discretionary power disentitles the plaintiff from claiming specific performance where the plaintiff itself is a defaulting party.<sup>vi</sup> In other words, although the plaintiff has the right to obtain a lawful relief, but the Court is not bound to do so, by applying its discretionary power, where it finds the plaintiff has not come with clean hands, for instances, the plaintiff has not performed his part agreed in the contract.<sup>vii</sup> Clause III of section 22 of the Specific Relief Act, 1877 provides for cases where the Court may exercise its discretion to grant specific performance of contract. It says in favor of the plaintiff that if he already has performed his part substantially, or suffered losses because of the contract, it would be inequitable to the plaintiff if the contract is not performed. So, the Court may then pass a decree for specific performance of contract in favor of such plaintiff directing the defendant to do the act stated in the contract.

## **WHERE SPECIFIC PERFORMANCE IS ENFORCEABLE**

Section 12 of the Specific Relief Act, 1877 lays down the cases in which specific performance is enforceable. If a contract for the transferring of immovable property is breached, the Court shall presume the monetary compensation will be inadequate, and in the case of movable property, it is adequate, unless and until the plaintiff proves it contrary. So, a suit seeking specific performance of contract for breach of it to transfer a movable property must be proved that pecuniary compensation will not be adequate. It is also necessary for the plaintiff to satisfy the Court that he has performed his part in the contract, and that the case fulfills any of the four following requirements mentioned under this section.

- i. If the act in the contract has been agreed to be done in the performance of a trust, the Court may grant specific performance to perform the obligation. In other words, if a

trustee breaches the terms and the duties of the trust, the Court may, by exercising its discretion, enforce the specific performance to restore the same.

- ii. Where the actual damage of for non-performance of the act is of such nature that no standard exists for determining the same. For example: If a contract takes place between two persons for selling of a cricket bat bearing the signature of an all-rounder cricketer, which is only one in number. The damage caused by non-performance of such contract cannot be determined. For this reason, the Court may order specific performance of the contract exercising its discretion.
- iii. If the agreed act is such that monetary compensation would not be an adequate relief to the plaintiff for its non-performance. For example: A contracts with B to deliver some lifesaving medicines for B, which cannot be found elsewhere. In a suit brought by B for non-performance of such contract by A, B is entitled to a decree to deliver such medicines. Because pecuniary compensation will be inadequate here if the contract has not been performed specifically.
- iv. Where the person in default is unable to give pecuniary compensation for the non-performance of the act agreed by him to be done. For example: An insolvent person cannot give pecuniary compensation for non-performance of a contract; in such case, the Court may grant specific performance.

It is important to mention that the plaintiff must prove the genuineness of the contract to be entitled for getting a decree of specific performance as held in case of *AH Akbar (Md.) v Shininess Bezva and others* (2006).<sup>viii</sup> A deed of contract containing the elements of fraud is not proper for getting a decree of specific performance. Since a contract can be made in written or in oral, the same requirement is also applicable for the oral contract. In *Md. Moslem Uddin and others v Md. Jonab Ali and another* (1997),<sup>ix</sup> the Court held that the existence of oral contract shall have to be proved by cogent and reliable evidence, along with the time when the contract was made, and the place where the parties entered into the contract.

**Court Fees:** Ad valorem court fee is to be paid on the institution of the suit, which means the Court fees shall be paid in proportionate to the value of the contract. Section 7(x) of the Court Fees Act, 1870 contains the computation of fees to be paid for the suit of specific performance.

**Limitation:** According to Article 113 of the Limitation Act, 1908, the limitation for the institution of the suit for specific performance is one year. The computation of time shall be started from the date of the performance of such contract, if the contract bears the fixed date;

and if no such date is mentioned in the contract, the time shall be computing from when the plaintiff comes to know the defendant has refused to perform the contract.

## WHO CAN BE A PLAINTIFF TO A SUIT

Section 23 provides for eight types of persons who may obtain specific performance in the capacity of a plaintiff in a suit. An outsider of the contract cannot institute a suit for enforcing a contract specifically, except a suit against a trust. To be entitled to bring a suit in the Court, one may must come under any of the following categories:

- i. Any party to the contract.
- ii. The representative in interest of any party to the contract, or the principal appointed by the agent of any party to the contract. The representative in interest includes the executor, administrator, assignee, and legal representative as well.<sup>x</sup> There is a proviso in this subsection containing the grounds where the representative in interest or the principal shall not be entitled to take any action for the specific performance of the contract, namely:
  - a. Where in a contract, the skill, personal quality, or learning of a party to such contract is a material ingredient.
  - b. If the contract clearly prohibits the interest from being assigned to any other person.

But the abovementioned two conditions will not be applicable, and the representative in interest or the principal shall be entitled to specific performance, in the case, where the part performance of such party has already been done. Because it wants the contract to be performed personally.<sup>xi</sup>

- iii. If a settlement on marriage is raised out of a contract, or where the rights between the members of the same family were in doubt, which has been compromised, the person beneficial under the contract may obtain specific performance. But the settlement and the compromise must be reasonable.
- iv. The remainderman may claim specific performance of a contract against the person with whom the tenant for life has entered into a contract for the maintenance, management, and better enjoyment of the property by exercising his power.

Tenant for life is the holder of the property along with all the rights over it during his or her lifetime. The contract with the tenant for life may contain the direction regarding the future interest of the property. Remainderman acquires such interest after the death of the tenant for life.

- v. If the contract does not contain anything about the remainderman, such property is reverted to the owner after the death of the tenant for life. That person is called a reversioner in possession. Covenant entered into by the tenant for life may be claimed by the reversioner in possession for specific performance.
- vi. If there is no remainderman in the contract, the property shall be reverted to the owner of the same after the lifetime of the tenant for life. That owner is termed as the reversioner in remainder. The reversioner in remainder may obtain specific performance of a contract entered into by the tenant for life if the third party commits any breach of contract for which the reversioner sustains material injury.
- vii. The new company consisting of two public companies after amalgamation, may obtain specific performance of a contract which was entered into by a company before amalgamation.
- viii. Before incorporation of a public company, if the promoters have entered into a contract for the purpose of incorporation of the company, it may be enforced if the contract is warranted by the company after its incorporation.

## **RIGHTS OF THE PLAINTIFF CLAIMING SPECIFIC PERFORMANCE OF CONTRACT**

### ***Plaintiff's Claim as to Specific Performance When the Subject Matter has Partially Ceased to Exist***

Since specific performance is an equitable remedy based on the law of equity, the Court finds a remedy for providing equity to both parties considering the situation of the case. Section 13 of the Specific Relief Act, 1877 protects the plaintiff by granting specific performance against the defendant even when a portion of the subject matter of the contract has ceased to exist at the time of performance of the contract. This section is an exception to section 56 of the Contract Act, 1872, where, in case of the cessation of the subject matter of the contract, makes

such contract completely impossible to perform. But section 13 of the Specific Relief Act has an overriding effect over section 56 of the Contract Act, 1872, and saves the contract from being impossible to perform as whole, if only a portion of the subject matter of the contract becomes ceased to exist at the time of the performance of such contract.

### ***Protection of Plaintiff's Interest Where Unperformed Part is Small***

The Court gives an equitable and just relief to the plaintiff under section 14 of the Specific Relief Act, 1877 where he cannot get the whole of the contract performed. If only a small portion of the contract is left unperformed by one party and he is ready to compensate the other party for such unperformed portion, the party seeking specific performance is entitled to get the contract specifically performed, and monetary compensation for the deficiency. In other words, the Court may order specific performance of a contract so much as can be performed, and award compensation for the unperformed portion. A suit under this section can be brought by either party to the contract. It was held in the case of *Malik Tanveer Ali and another v Sardar Aki Imam and 2 others* (2010),<sup>xii</sup> a suit under this section must meet the following conditions, the unperformed portion is small of the whole of the contract, and the compensation for the unperformed portion of the contract is capable to be assessed by money.

### ***Right of the Plaintiff to Claim Independent Part of the Contract to be Specially Performed***

Section 16 provides an opportunity to the plaintiff for enforcing separate and independent part of the contract specifically which can and ought to be performed. If the contract contains separate and independent parts from which a part can and ought to be performed specifically, and another part cannot, in that case, the Court may direct such separate and independent part of the same contract, which can and ought to be performed, be specifically performed. In the case of *Archana Prasad Nandi v Miss Randolph and others* (1982),<sup>xiii</sup> a contract comprised of three vendors from one of such vendors was minor. The contract is declared void in respect of the one third of the whole. Because the contract was divisible in nature, the suit for specific performance of the contract was granted in respect of the rest of the contract.

### ***Plaintiff's Right to Get Perfect Title of the Property***

Section 18 has similarity with section 43 of the Transfer of Property Act, 1882. This section protects the rights of the purchaser or lessee, providing the right to sue against the vendor or



lessor, as the case may be, claiming his title to a property of imperfect title. There are three rights among the four mentioned under this section which are applicable for the plaintiff. Namely:

- i. Where the vendor or lessee contracts to sell or let property over which his title was not perfect, but later has acquired interest in the property after sale or lease, then the purchaser or lessee has the right to compel him to enforce such contract. For example: One person had entered into a contract to sell or let of a land which belonged to his father. He had no title in the property to dispose of the same. But after the death of his father, the land was inherited by him. Now he may be compelled by the purchaser or lessee to enforce the contract.
- ii. If any other persons are necessary to validate the title of the property, and such persons are bound to do so, the vendor or lessor may be compelled by the purchaser or lessee to take the appropriate steps for doing so. For example: A property is owned by three persons. The purchaser or lessee may compel the vendor or lessor to validate the title through the other persons, since they also form a party to the contract.
- iii. If the vendor claimed the property as an unencumbered one during the making of the contract, but subsequently the purchaser has discovered the mortgage over the property. In such case, the purchaser has the right to compel the vendor to redeem the mortgage and transfer the same to him. Two conditions are to be fulfilled in order to exercise the rights provided under this clause. One is, the mortgage amount is equal or less than the purchased money of the property, and another is, the vendor has the right to redeem the mortgaged property.

### ***Plaintiff's Right to Claim Compensation with or without Specific Performance of Contract***

Section 19 provides the opportunity for the plaintiff to claim compensation as an alternative to the specific performance or as an addition to the specific performance. In other words, the plaintiff may ask for compensation for the breach of contract with or without specific performance. But a valid contract is necessary for the claiming of such relief. A plaintiff cannot claim this remedy with an invalid contract.<sup>xiv</sup> In such a case, the Court shall see whether the specific performance should be granted or not. If it is granted and the Court thinks that compensation should be imposed on the defendant for satisfying justice, the Court shall award compensation. Although the Court finds the specific performance ought not to be granted, but

compensation should be awarded for the breach, it shall award only compensation. So, granting of the specific performance shall have no impact on imposing compensation. The amount to be imposed as compensation shall be determined by the Court. Claiming compensation along with the specific performance of the contract in the suit cannot be construed as the plaintiff was not interested in the relief of specific performance.<sup>xv</sup> It is important to mention that, if the plaintiff does not claim compensation under section 19, and if this suit is dismissed, he shall be prevented under section 29 from instituting another for compensation. But he shall be entitled to institute a suit for getting the whole consideration or the earnest money back within 3 years of the dismissal of the former suit.

Section 20 does not preclude the plaintiff from claiming specific performance of contract where the contract contains the clause regarding the amount of compensation in case of breach of the contract, called the liquidation of damages. This provision was applied in the case of *Mathai Thommen v Thomas Mathew* (1952).<sup>xvi</sup>

**Limitation:** If compensation is claimed without specific performance of the contract, the limitation period is three years computing from date of the breach of contract, and if it is claimed with the specific performance, the suit is to be instituted within 1 year.

### ***Plaintiff's Right to Get Specific Performance in the Contract to Lease***

Section 27A deals with the specific performance in the contract to lease immovable property where one party has already performed his part. To apply this section, the contract is to be made in written form, and duly signed by the parties, but not registered under the Registration Act, 1908. Even so, the contract is unregistered; any party to such contract, whose rights have been violated, may sue the other party for specific performance. In *Gokul Chandra v Haji Mohammad Din* ILR (1938) 1 Cal. 563, the Court held that, this section also applies to the valid oral agreement to lease, although the section does not clearly mention that.<sup>xvii</sup> If the lessor has performed his part of the contract by delivering the possession of the property to the lessee, may seek for specific performance of the contract. On the other hand, where the lessee sues for specific performance of contract by completing the performance of his part by taking possession of the property or continuing the possession in the property, and has done any other act concerning the contract, may claim specific performance of such contract.

This section contains a proviso stating that, where a transferee has no notice of the contract or the part performance of such contract, his / her rights shall not be affected by this section. In

other words, to give effect to the rights of the transferee under this section, it is mandatory for the transferee to have the knowledge of the contract or of its part performance.

## CONCLUSION

The Specific Relief Act, 1877 is not an exhaustive law. For this reason, specific performance is not only mentioned under this Act; but also in some other laws, like the Transfer of Property Act, 1882, the Partnership Act, 1932, also contain the provisions for specific performance. This concept is so vast that it is quite difficult to address every content about it in a single paper. But undoubtedly, it works as a safeguard for the plaintiff from sustaining damage, or in recovering such damage caused for the non-performance of the contract by the defaulting party. If the plaintiff has no default on his part and fulfills all the requirements for claiming specific performance, he may obtain a decree in his favor. At the end, specific performance reminds us of the maxim of Equity that, “He who comes into equity must come with clean hands.”

## ENDNOTES

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- <sup>i</sup> Black, B. and Garner, Black's Law Dictionary (8th edn, 2004) p.4379  
<sup>ii</sup> Keeton, George W., An Introduction to Equity (Fifth edn, Sir Isaac Pitman & Sons 1961) p.361  
<sup>iii</sup> Roshanally Mohamed Hajri & Anr v A.K.M. Zakir Hossain & Anr (2011) 19 BLT (HCD) 318  
<sup>iv</sup> Ram Chandra Das and others v Md. Khalilur Rahman and another (1985) 37 DLR (AD) 21  
<sup>v</sup> Bazlur Rahman Bhuiyan v Bangladesh Shipping Corporation (1982) 34 DLR (AD) 42  
<sup>vi</sup> Singh, Avtar, Law of Contract & Specific Relief (Twelve edn, Eastern Book Company, Lucknow 2017) p.894  
<sup>vii</sup> Rash Behari Moshalkar v Hiran Bala Debi and another (1985) 5 BLD (AD) 51  
<sup>viii</sup> 11 MLR (AD) 205  
<sup>ix</sup> 2 MLR (AD) 295  
<sup>x</sup> Venkateswara Aiyar v Kallor Illath Raman Nambudhri AIR (1917) Mad. 358  
<sup>xi</sup> Jain, Dr. Ashok, Specific Relief Acts with Equity and Trusts (Second edn, Ascent Publications 2019) p.27  
<sup>xii</sup> PLJ (2010) Lah. 200  
<sup>xiii</sup> 2 BLD (AD) 90  
<sup>xiv</sup> Mahmood, Shaukat, The Specific Relief Act (Tenth edn, Legal Research Centre 2014) p.229  
<sup>xv</sup> 1990 MLD 712 (DB)  
<sup>xvi</sup> AIR (1952) Trav-Co. 199  
<sup>xvii</sup> Mahmood, Shaukat, The Specific Relief Act (Tenth edn, Legal Research Centre 2014) p.338