

The Specific Relief (Amendment) Act 2018: a Hurried Legislation.

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The Specific Relief (Amendment) Act 2018 has been passed by both Houses of Parliament after a brief discussion, but without debate. Like many other laws passed for enhancing business capabilities, this Amendment is likely to be yet another instance of *'legislate in haste, amend at leisure'*.

The amending Act, it has been stated in both Houses of Parliament, has an objective to prevent errant contractors from breaking their contracts and hampering infrastructure projects. The ultimate aim of the Act is to enhance the standing of India in the 'ease of doing business' ranking. The discussion in the Houses centred around infrastructure contracts only. The entire discussion in both Houses has overlooked the fact that the same amendment, and the Specific Relief Act as amended, is not restricted to business contracts, but applies to the common man and his personal contracts. The Amendment grossly violates his expectations of fairness and justice in enforcement of contractual remedies.

Expert Committee Report.

The amending Act follows a Report submitted to the Government by an Expert Committee of six members consisting of legal practitioners and academics constituted in January 2016 for suggesting amendments to the Specific Relief Act so that 'specific performance is granted as a general rule', and to 'ensure that discretionary relief is done away with' for ensuring 'ease of doing business in India'. The Committee submitted its report two years ago (in June 2016) to the Union Law and Justice Minister recommending inter alia (i) a change of approach making specific performance a rule, and damages an alternative remedy, (ii) guidelines for reducing the discretion of Courts while granting specific relief. The Committee also suggested a regulatory mechanism for public works projects. The amending Act has not adopted all recommendations of the Committee relating to the changed approach of remedies, and has disregarded recommendations that ensured fairness in procedure. The amendment has become a patchwork of some contradictory and inconsistent provisions. The amendment has been rushed without consultation with the main stakeholders who administer this Act : advocates and judges.

The Ministry did not publish the Report of the Expert Committee. It has, however, been made available under the RTI Act. The pre-legislative consultation policy that each Ministry should follow requires that proposed legislation should be published widely, feedback from stakeholders including Government departments and the public should be invited, and feedback received should also published. The amending Act did not go through this process.

Views expressed in this article are personal, and are not of the Expert Committee of which the author was a member. Visit www.obiterdicta.in for more articles on the subject.

Main provisions of the Amendment of 2018

The most important changes in the amending Act are: (i) making specific performance available as a remedy by choice, (ii) providing a new remedy of substituted performance of contract, and (iii) restricting power of courts to grant injunctions that will stop progress of infrastructure projects.

Exceptional and discretionary remedy

Specific performance is an order of civil courts that requires the contract-breaker to perform the promise he has made. An order of compensation, on the other hand, requires the contract-breaker to pay in money terms for the loss suffered. Under the existing Specific Relief Act 1963, specific performance is granted as an exception only where compensation would not be adequate relief, and it is discretionary relief. This approach of the Act of 1963 is not outdated; it is in tune with the law currently in force in the UK, most states of the USA, Singapore and other common law countries. Although this exceptional nature of this relief traces its roots in the history of courts in England, there is much justification for this in current literature on the basis of economic analysis. On the other hand, the laws of France, Germany, other states of the USA, China and many other countries allow a contracting party to choose any of the two remedies. The amending Act seeks to remove the restriction that makes specific performance an exceptional remedy. Specific performance cannot be a compulsory remedy. The amending Act also does not make specific performance a rule, despite such interpretation made by the Minister of Law in the Rajya Sabha when he introduced the bill, and moved it after discussion. No person approaching any court can be compelled to adopt any remedy, he can choose from among the remedies available to him.

Remedies and contracting behaviour

How does the nature of remedy affect contracts and contracting parties? Under the current law of 1963, if a party breaks his contract, the other party may not be able to prove and claim all the losses he suffered by the breach. Nor is he able to ask specific performance confidently, because there is no guarantee he will get it. With the amendment, he will be able to claim specific performance if he wishes to do so. This also fulfils the natural desire of contracting parties that their contracts shall be fulfilled. This approach, it is expected, will improve contracting culture, and encourage performance by a contracting party. To that extent, the change of approach is desirable.

Specific performance and substituted performance are remedies available to a party aggrieved when the other party has broken the contract. Although these are granted by the court when a party approaches it, any design of remedies affects the contracting behavior of persons. The remedy, and its contours, affect the manner in which parties will negotiate their contract, the terms of the contract, how they will perform it, how they will renegotiate in cases of difficulty, and whether they would like to continue performance when performance becomes too costly. It affects transactions. It affects the advice that lawyers will give to clients about their contracts. The impact of the law relating to contractual remedies thus affects persons even before they

make their contract. If making specific performance generally available would change contracting behavior for the better, it will be a desirable change.

Amendment removes mitigating factors

The amending Act is not restricted in its application to infrastructure projects, nor to parties in a business relationship. It applies to and affects contracts made by any member of the public. It especially affects agreements for purchase or transfers of immovable property. The amending Act is a cause of concern, because it removes the mitigating factors that must surround grant of any remedy.

However, any contract remedy cannot give full reparation to a party of what he has asked from the court. The law relating to the remedy of compensation in contracts (in force since 1872) does not compensate the entire loss that an aggrieved party may suffer because of breach. Requirements of causation, contemplation or foreseeability and mitigation restrict the power of a court to grant the entire loss. These conditions restricting remedies balance the interests of all parties when they approach a court. As a contract remedy, specific performance is also universally subject to restrictions on grant, even in legal systems in which it is available as a general remedy or the first remedy. These conditions ensure fairness and justice especially when parties, while remaining within their rights, indulge in sharp practices during formation of their contract or its performance. These conditions are also recognized by international documents and conventions viz. UNIDROIT Principles, Principles of European Contract Law, International Convention on Sale of Goods. The Expert Committee recommended that a court should be able to refuse specific performance and injunction on stated grounds. But this has not been considered in the amending Act.

No specific performance where substitutes available

The primary restriction across all legal systems including international conventions is that specific performance should not be granted when the aggrieved party could have obtained substitutes. This forces an aggrieved party to get the contract completed by obtaining substitute performance from another person, and claim his loss, if he suffers any, from the contract-breaker. While this may appear very similar to the current provisions that make specific performance exceptional in nature, the restriction operates in a different way. The burden falls upon the contract breaker to show that the party seeking specific performance had substitutes. Under the existing Act of 1963, the burden fell on the aggrieved party to show that compensation will not be enough. The amending Act does not provide for this important restriction.

No specific performance where enforcement not possible

Across all jurisdictions, specific performance is refused where the contract has become incapable of performance, or where the terms of the contract prohibit the remedy of specific performance. These are also not incorporated into the Act. While under the existing Act of 1963, specific performance could be granted in certain circumstances ordering the defendant to construct a building although this would involve continuous supervision from the Court, the amendment removes this possibility.

Other grounds for refusing relief recognized across most jurisdictions relate to situations where the terms of the contract or the relations between parties at the time of making the contract gives the contract breaker an unfair advantage, or subjects the aggrieved party to undue hardship. These grounds ensure fairness and justice between parties, and balance the interests of all parties before the court. These grounds allow a court to give hearing to the contract-breaker's story. While these grounds were elements affecting court's discretion under the existing Act of 1963, the expert committee suggested incorporating them as specific grounds to be proved before the relief can be refused or granted. These and other similar grounds for refusing relief have not been included in the amending Act.

Substituted performance: a new remedy

The remedy of substituted performance is new only in its expression. It is a remedy under which, after giving an opportunity to the contract breaker to perform his part, the aggrieved party can get the contract performed through other channels, and claim the costs and expenses from the contract breaker. The amendment makes this a statutory right. The Indian Contract Act 1872 already recognised that an aggrieved party can get the contracted work done through another and claim the costs and expenses from the contract breaker. But this right was subject to the three conditions for grant of compensation mentioned earlier, and hence the aggrieved party was not assured of covering all his expenses. Parties, especially the government, also included 'Risk and Cost' clauses that gave the government the right to recover such costs and expenses. The new provisions will give him the right to these expenses, and hence the confidence of getting his work completed from a third person, after giving an opportunity to the contract breaker to fulfill his part of the contract. Parties having disputes indulge in sharp practices and take extreme positions. It is likely that the aggrieved party might incur unreasonable or spend extra amounts on extra works, and claim them from the contract breaker. It is only fair and just that some control over such claims is necessary. The recommendation of the Expert Committee suggesting such control is not part of the amending Act.

Certainty of enforcement essential in business contracting

How does this affect business contracts. It cannot be denied that courts must and will find grounds that will allow them to give relief in a manner that will ensure fairness and justice. It is expected that exceptions to the grant of relief will eventually get moulded by case-law. It is likely that these exceptions will follow the well-trodden path of existing thought. This possibility makes grant of reliefs uncertain. Uncertainty in grant of remedies affects contracting the most. Certainty is essential if parties should have faith in their contracts. It is essential if they should find it 'easy for doing business' confidently. If grounds of refusing specific performance are recognized directly, it confines exceptions to those provided. It is better these be brought by legislation rather than leaving them to be decided by any High Court or the Supreme Court.

Injunctions in public works contracts restricted

The introduction of the Bill in both houses, the discussions and the replies of the Minister of Law gave considerable importance to the new provision that restricts the powers of courts from granting injunctions that would delay the progress of infrastructure projects. The introduction

and summing up by the Minister stated that such injunction will not be granted in favour of contract breakers. However, the relevant amendment is not restricted to contract disputes. Fear is expressed that the amendment will violate essential rights of parties, viz. relating to their property affected by infrastructure projects. Fears expressed about this aspect from all quarters are well-founded, because the amendment to section 41 allows a court to refuse injunction in all types of matters, whether involving contract dispute or not.

Applicability of the Amending Act

The amendment also suffers other defects. In the interest of, and pursuant to the objective of achieving certainty, provision should have been made relating to the contracts to which it will apply. The amendment should apply only to contracts that are made after the amendment becomes law, because parties, especially business parties, decide their terms and price with reference to remedies available when they make their contract.

No compensation in substitution of specific performance

The amendment to section 21 takes away the right of a party seeking specific performance from claiming compensation instead of specific performance. When the court refuses to grant specific performance of grounds given in the law (some of which the amendment recognises), a plaintiff can pursue his claim for compensation. This is not possible under the amendment. The plaintiff loses his right because the Civil Procedure Code prevents him from bringing another suit. Such a plaintiff remains without a remedy.

Redundant provisions

New sections 14(a) and 16 (a) provide that specific performance cannot be granted if a party has obtained substituted performance. This provision is not required because of the express provision in the amended section 20(3)

Other issues

Many more smaller and finer aspects have been ignored in the amending Act. Providing remedy of substituted performance in section 20 can lead to confusion because section 20 of the existing Act of 1963 that provided for discretion in grant of specific performance will continue to apply to pending matters. The section dealing with substituted performance should have been numbered 20A.

Wider consultation desirable

If the Bill were circulated for consultation, comments would have come from the judiciary and the legal fraternity, especially trial lawyers who conduct specific performance suits, and are in a position to state the effect of the Bill's provisions. Such opinions and views would have enhanced the usefulness of this legislation.
