

# Dispute Resolution Hotline

July 27, 2018

## CONTRACT ENFORCEMENT FINALLY SEES RELIEF

### AMENDMENTS TO THE SPECIFIC RELIEF ACT - HIGHLIGHTS

- Courts must grant specific performance of a contract when claimed by a party unless such remedy is barred under the limited grounds contained in the statute.
- If a contract is broken due to non-performance of a promise by a party, the party suffering the breach has the option of substituting performance through a third party or through its own agency.
- A suit filed under the Specific Relief Act must be disposed of by the court within 12 months from the date of service of summons to the defendant. Such period can be extended by 6 months after recording written reasons by the court.
- No injunction can be granted by the court in relation to an infrastructure project if such injunction would cause delay or impediment in the progress or completion of the infrastructure project.

On July 23, 2018, the Parliament passed the Specific Relief (Amendment) Bill, 2018 ("**Amendment Bill**"). The Amendment Bill substantially alters the Specific Relief Act, 1963 ("**Original Act**"). The Amendment Bill has been passed by the Parliament and is awaiting Presidential assent. The amendments are made pursuant to the recommendations in the Expert Committee's Report on Specific Relief Act, 1963 dated May 26, 2016 ("**Expert Committee Report**"). The Amendment Bill contains very limited grounds for refusal of specific performance in line with international principles such as the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts. These amendments are introduced with the aim of keeping pace with rapid economic growth in the country. The amendments, which intend on increasing contract enforceability, will potentially increase India's ranking on the 'ease of doing business index' which is released by the World Bank.

Some of these key changes are discussed below.

### COURTS NO LONGER HAVE DISCRETION IN GRANTING SPECIFIC RELIEF

Under Section 20 of the Original Act, courts had discretion in granting the remedy of specific relief. Courts were not bound to grant specific relief merely because it was lawful to do so. Therefore, specific relief was granted only in exceptional circumstances.

The Amendment Bill has entirely removed the concept of the court's discretionary powers in granting specific relief. In Section 10, it is stated that specific performance of a contract *shall* be enforced by the court subject to the limited grounds of refusal defined in the statute. Specific relief has now been made a general rule.

**Comment:** The Amendment Bill has changed the nature of specific relief from an equitable, discretionary remedy to a statutory remedy. The discretionary nature of remedy created uncertainty and the grant of the relief was not uniform. With the amendment, specific performance now must be granted by courts unless the claim for relief is barred under limited grounds prescribed in the statute. The interpretation of the provisions of other statutes which are subject to the provisions of the Specific Relief Act (such as the Indian Contract Act, 1872 and the Sale of Goods Act, 1930) should be construed in line with the amendments to the Specific Relief Act.

### CASES WHERE SPECIFIC PERFORMANCE CAN BE REFUSED

The Original Act under Section 14 provided situations in which contracts could not be specifically enforced. The Original Act was based on the premise that specific performance could not be granted or enforced in a situation where monetary compensation was an adequate relief. The Amendment Bill does away with this premise entirely. The Amendment Bill has replaced Section 14 and limited the grounds under which specific performance can be refused. The personal bars for obtaining relief under Section 16 have been amended in the same manner.

Further, it is no longer necessary for parties to *aver* their readiness and willingness to perform the contract in order to seek specific performance. It is sufficient to merely prove that they have been ready and willing.

A comparison of the original position and the amended position can be found [here](#).

**Comment:** The Amendment Bill has deleted the settled ground that specific performance is granted only when monetary compensation is not adequate, making specific performance a general remedy available to any person who wishes to claim it unless she is barred under specific grounds laid out in the statute. Therefore, the primacy given to damages as a relief over specific performance under Indian law has been removed. As the courts no longer have the discretion to decide upon granting specific relief, there is far more certainty that the parties will be successful in obtaining specific relief. However, considering the removal of discretion in the grant of relief of specific performance, the Expert Committee Report recommended insertion of various additional grounds for denial of such relief such as:

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1. Where performance of the contract would involve some hardship on the defendant which was not foreseeable at the time of entering into the contract, whereas its non-performance would involve no such hardship;
2. Where the terms of the contract or conduct of the parties at the time of entering into the contract are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant.

These were also the specific circumstances wherein the court had the ability to exercise discretion under Section 20 of the Original Act. However, the amendments do not introduce such specific grounds for denial of relief of specific performance. Whilst this is going to bring about greater enforceability and lesser uncertainty, it may also create incongruous situations where the court has to order specific performance irrespective of the circumstances.

Separately, the Expert Committee Report noted that the requirement of *avement* of readiness and willingness to perform the contract in order to seek specific performance has been removed pursuant to the interpretation adopted by courts. Judgments on this point suggest that there is no necessity to adopt a literal compliance to the language and it is sufficient if the averments in substance and spirit indicate the continuous readiness and willingness on the part of the person suing to perform his part of the contract.<sup>1</sup>

#### SUBSTITUTED PERFORMANCE OF CONTRACT

The Amendment Bill introduces the concept of substituted performance. If a contract is broken due to non-performance of a promise by a party, the party suffering the breach has the option of availing substituted performance through a third party or through its own agency after giving a notice in writing of not less than 30 days to the party in breach. The party suffering the breach is entitled to recover the costs and expenses for the substituted performance by a third party or through its own agency from the party committing the breach.

**Comment:** The introduction of substituted performance will enable parties to satisfy performance of the contract work even if there is a breach as the party not in breach can ensure the performance of the contractual objective through a third party or through its own agency. The party not in breach would not suffer inordinate delays of litigation in ensuring the performance of the intended contractual obligations.

Earlier, upon a breach of contract, a party could, in appropriate circumstances, have the contract performed through another party. In such circumstances, there would be a claim of compensation under S. 73 of the Indian Contract Act, 1872 which would require the party obtaining substituted performance to ensure that the cost mitigation measures are taken and that the compensation would relate only to foreseeable costs. The introduction of a specific provision allowing recovery of costs pursuant to substituted performance would reduce the risks and uncertainty around the ability to claim complete costs of substituted performance.

Further, the notice period of 30 days may also deter the occurrence of a breach of contract. Parties may choose to perform or renegotiate the contract within the notice period. This would encourage continuation of contractual relationships and achieve the intended objectives of the contract.

#### SPECIAL PROVISIONS FOR INFRASTRUCTURE PROJECT CONTRACTS

The Amendment Bill has introduced special provisions for infrastructure project contracts. No injunction shall be granted by the court in relation to an infrastructure project (as defined in the Schedule) if such injunction would cause delay or impediment in the progress or completion of the infrastructure project.

The Amendment Bill has also suggested the designation of 'Special Courts' by the State Government in consultation with the Chief Justice of the High Court. These Special Courts will try suits in relation to infrastructure projects.

**Comment:** The Expert Committee Report suggested that public works contracts such as those relating to infrastructure projects have an inherent public interest involved in them. Therefore, granting indiscriminate injunctive relief in cases involving public interest can result in delays, costs and cause grave injury to public interest.

Special Courts for suits pertaining to infrastructural projects are to be designated for expeditious disposal of suits, given the element of public interest in such suits.

#### TIMELINES

The Amendment Bill prescribes a timeline for a suit filed under the Specific Relief Act. Such suit would have to be disposed of by the court within 12 months from the date of service of summons to the defendant. This period can be extended by 6 months after the recording of written reasons by the court.

**Comment:** Timelines are prescribed to reduce delays and ensure expeditious disposal of suits by courts. A harmonious interpretation would have to be given to these timelines to avoid a potential conflict with the timelines prescribed under the Commercial Courts Act, 2015. Further, substantial infrastructure would be required to be created to ensure timely disposal of cases to meet the aggressive timeline of 12 months.

#### POWER OF COURT TO ENGAGE EXPERTS

The Amendment Bill has introduced Section 14A which gives courts the power to get an expert opinion on any specific issue, engage experts to report to the court on such an issue and procure expert assistance in providing evidence and production of documents. Such opinion or report will form part of the records of the suit and the court. The expert can be subject to examination by the parties in open court with the permission of the court. The costs, fees or expenses of the expert will be payable by the parties in the proportion determined by the court.

**Comment:** The Amendment Bill now grants courts the opportunity to receive expert assistance when faced with a technical or scientific issue. Although parties can provide expert evidence to support their cases, a court-appointed expert would may be more independent and impartial.

#### LLP CAN OBTAIN SPECIFIC PERFORMANCE

The Amendment Bill inserts Section 15(1)(a) which states that when an LLP has entered into a contract and subsequently becomes amalgamated with another LLP, the new LLP which arises out of such amalgamation can obtain specific performance of a contract.

**Comment:** Section 15 includes a list of persons and entities who can claim specific performance of a contract. Apart from the parties to the contract, this section includes certain other entities. The Amendment Bill has now inserted a new category of entities who are permitted to claim specific performance of contract, *i.e.*, amalgamated LLPs.

#### CONCLUDING REMARKS

The amendments to the Specific Relief Act are likely to reduce litigations and ensure the performance of the contractual work in a timely manner with the introduction of the concepts of substituted performance and the imposition of time limits for disposal of cases. Altering the nature of specific relief from an exceptional rule to a general rule will certainly ensure contractual enforcement.

It remains to be seen how courts will interpret the applicability of the various provisions of the Amendment Bill. There may be litigation in relation to this, for instance, questions such as whether the amendments will be applicable based on the date a contract is signed, breached or at the time of seeking relief may be raised. Further, there may be a requirement for reconsideration or modification of boilerplate clauses related to specific performance in contracts.

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You can direct your queries or comments to the authors

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<sup>1</sup> Motilal Jain v. Ramdasi Devi, AIR 2000 SC 2408.

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