

Specific Relief (Amendment) Act, 2018: a paradigm shift?

1. Introduction

The Specific Relief (Amendment) Act, 2018¹ (“**Amendment**”) was notified in the official gazette on August 1, 2018 thereby amending the Specific Relief Act, 1963 (“**Act**”), which essentially prescribes remedies for parties either by awarding specific performance of a contract, or granting an injunction, or declaration in favor of the aggrieved party. “Specific relief” is a remedy decreed by courts, and requires precise fulfillment of contractual or legal obligations by a defaulting party when monetary damages are inappropriate or inadequate.² The Amendment was introduced pursuant to recommendations of the Expert Committee headed by Mr. Anand Desai in its report dated May 26, 2016, with the primary objective of, amongst other things, to regulate enforceability of contracts concerning infrastructure development in India in order to promote public interest and ease of doing business, to address issues of delay in enforceability of contracts, and to provide an effective remedy to parties who have suffered loss due to breach or non-fulfillment of a contract. It is noteworthy that the Amendment is also in line with the UNIDROIT Principles of International Commercial Contracts, which aspire to achieve harmonization in international law governing commercial contracts and are a reflection of concepts found in majority of legal systems worldwide.³

This newsletter examines crucial amendments to the Act and analyses its plausible implications on commercial arrangements.

2. Key takeaways

2.1 Specific performance: discretionary or mandatory?

Until the Amendment, courts dealing with issues of non-performance or breach of contracts exercised their judicial discretion in granting specific performance in accordance with sections 10 and 20 of the Act. However, post the amendment to section 10, the words “*may, in the discretion of the court*” as appearing in the un-amended section have been substituted by “*shall*”, thereby limiting courts’ discretion in decreeing specific performance of a contract, which shall now be granted subject only to sections 11(2), 14 or 16 of the Act.⁴

Erstwhile section 10 of the Act recognized performance of contract as a discretionary remedy, which could be granted by a court only when either:

- a. actual damage caused due to the non-performance of a promise could not be ascertained; or
- b. monetary compensation would not by itself be adequate relief for alleged the non-performance.

¹ See <http://www.egazette.nic.in/WriteReadData/2018/187919.pdf> (last accessed on October 15, 2018)

² See Black’s Law Dictionary, Bryan A., Garner (8th ed., Thomson West, Dallas, Texas, USA, 2004), pg. 1435

³ See <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> (last accessed on October 15, 2018)

⁴ See section 3 of the Amendment

According to section 20 of the Act, previously courts would grant specific relief basis the following principles, i.e. (i) exercise of discretion should not be arbitrary but sound and reasonable and shall be guided by judicial principles; (ii) under no circumstances, should the court exercise its discretion where it would be improper to do so; (iii) substantial acts under the contract had been performed by the aggrieved party; and (iv) it/he/she was willing to take necessary actions on its/his/her part. Notably, the Amendment while amending section 10 has also repealed section 20, thereby limiting the discretion vested in courts to grant specific performance.

Indeed, this is a positive step favoring parties to a contract who intend enforcing performance of the pre-agreed contractual bargain by the defaulting parties as it is now unambiguous that specific performance of a contract is now the rule rather than exception. Further, the Amendment should act as a deterrent to contracting parties who intend escaping performance of their contractual obligations post execution of a contract. Pertinently, the onus is now on courts to justify not granting specific performance of a contract. Section 11 of the Act concerning private trusts, has also been amended to replace the words “*contract may, in discretion of the court*” with “*contract shall*” thereby reiterating the legislative intent of effective enforcement of contracts.⁵ Hence, now it will be mandatory for courts to grant specific performance of contracts concluded by private trusts provided the requirements of section 11 are met.

2.2 Substituted performance

This is a novel concept introduced by the Amendment under a new section 20, which stipulates that a party aggrieved by a contractual breach or non-performance shall have the option of having such contract performed through an alternate arrangement, i.e. a third party or its own agency, at the cost of the defaulting party.⁶ However, in order to exercise this option the aggrieved party shall first furnish a written notice of at least 30 days’ on the defaulting party directing it to perform its/his/her obligations under the contract, failing which, the aggrieved party can enforce substituted performance. The purpose of such rectification notice is to accord one last opportunity to the defaulting party to cure its/his/her default and perform its/his/her part of the contract.

Pursuant to this new section, it is now statutorily recognized for an aggrieved party to recover the costs and expenses of substituted performance from the defaulting party. Of course, the aggrieved party can only recover such costs of substituted performance after they have been incurred by the aggrieved party. Interestingly, an aggrieved party seeking substituted performance can also claim damages suffered consequent to non-performance by the defaulting party in addition to substituted performance. The ability to avail this remedy would enable an aggrieved party to be restored to the position it would have been in, had the breach of promise not occurred. The law goes on to ensure that if an aggrieved party suffering from the breach of contract has chosen substituted performance of the contract, it/he/she shall not be entitled to claim specific performance of the same contract.

It is expected that the introduction of substituted performance will result in reducing litigation as the contracting parties will now have an option of choosing between specific or substituted performance. I see this is a step in the right direction, which shall encourage continuity

⁵ See section 4 of the Amendment

⁶ See section 10 of the Amendment

of contractual relationships towards achieving the pre-agreed objectives identified by contracting parties.

2.3 Specific performance and compensation

Furthermore, the legislature has also amended section 21(1) of the Act to substitute the words “*either in addition to, or in substitution of*” with “*in addition to*”. The net effect of this particular amendment is that it alters the earlier legal position wherein specific performance would not be granted when either damage could be ascertained or compensation is an adequate relief. This amendment establishes that compensation can now be sought in addition to a prayer for specific performance of a contract and does not have to be in substitution of it.⁷ Accordingly, it is my submission that primacy accorded to grant of damages over specific performance has been dispensed with.

2.4 Infrastructure projects

The Amendment has inserted certain new provisions governing specific performance of contracts concerning infrastructure projects. Sections 20A, 20B and 20C have been introduced to regulate contractual disputes in the infrastructure sector. The explanation to section 20A(1), defines an “Infrastructure Project” as different categories of projects stated in the new schedule added to the Act and covers Transport, Energy, Water & Sanitation, Communication, and Social & Commercial Infrastructure, which can be altered by the Central Government by a notification published in the Official Gazette. Further, section 20A bars courts from granting an injunction where the contract involved is related to an infrastructure project, if the court is of the opinion that awarding such relief would cause an impediment or delay in the progress or completion of such project.⁸

Furthermore, section 20B provides for creation of civil courts designated as special courts by the State Governments in consultation with the Chief Justice of the respective High Court to specifically entertain suits pertaining to infrastructure project related contracts.⁹ However, it would be interesting to see if jurisdiction of such proposed special courts would overlap with that of the commercial courts set up under the Commercial Courts Act, 2015 (“CCA”). Courts designated under CCA also govern commercial disputes concerning construction and infrastructure contracts and, the Amendment does not categorically bar such commercial courts from entertaining matters that would now be dealt by the special courts.

Additionally, section 20C has also been inserted to address the issue of delay in administration of justice. This section mandates speedy disposal of suits filed under the Act and directs that they must be disposed within 12 months from the date of service of summons to a defendant. This period may be extended by the court for a maximum of 6 months but, after recording reasons for such extension, in writing. Timelines prescribed by the legislature is a positive step towards providing timely disposal of cases but, only time will tell if the intentions translate into action.

⁷ See section 11 of the Amendment

⁸ See section 10 of the Amendment

⁹ Ibid

The rationale behind these particular amendments is predominantly to preserve the inherent public interest in infrastructure projects by ensuring that the progress of such projects is not adversely affected by unforeseeable hindrances such as a dispute between contracting parties. Further, if a dispute so arises, it must be resolved in an expeditious and efficient manner which shall also benefit private parties' party to an infrastructure contract. Hence, the legislature has given this task of adjudication to special courts and not to regular civil courts in order to ensure that there are no undue delays in completion of infrastructure projects while the interests of parties is also protected.

3. Conclusion

In summation, the Amendment is a delayed but welcome change as law makers have attempted to strengthen the existing law pertaining to specific performance of contracts and mitigate uncertainties in enforcement of such contracts.¹⁰ They have followed a practical approach by giving substituted performance statutory recognition as recourse to this solution has been a common practice amongst parties to settle disputes arising out of real estate contracts. In the aftermath of the Amendment, parties while entering into new contracts may be prompted to include specific clauses identifying a procedure for substituted performance in case of specified events of default or non-performance. Indeed, the Amendment has widened the scope of specific performance as a remedy to contracting parties irrespective of whether damages are an adequate relief. While these amendments are compelling from both commercial and public policy perspectives, their real-time impact can only be fathomed in the days to come.

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¹⁰ The Committee headed by Mr. Anand Desai was set up on January 28, 2016 and had given its recommendations on May 26, 2016