

# **The Specific Relief Act 2018**

**C. Jamnadas & Co. I**

**THE SPECIFIC RELIEF ACT, 1963**

**TAXPERT**

## **C. JAMNADAS & CO.**

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**The Specific Relief Act, 1963**

***Revised Sixth Edition***

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## Preface to Sixth Edition

We are happy to place before the student community the thoroughly revised and enlarged sixth edition of the Specific Relief Act. The book adopts a topic-wise, rather than a section-wise approach, which will be immensely beneficial to students. Questions asked at the recent examinations of the Mumbai and Pune Universities have been given at the appropriate places. This, we feel, will enhance the utility of the book.

*The Specific Relief Act, 1963, does not contain any Illustrations.* However, the earlier Act had several Illustrations, and these have been reproduced in the book at the appropriate places, as they serve as useful examples of the principles contained in the corresponding sections of the present Act.

In this edition, a Summary of the Specific Relief Act has been added for the convenience of students. Likewise, the bare text of the Act has also been given at the end of the book. These features will enhance the utility of this popular book.

We trust that this book will prove to be of great benefit to the students. Suggestions, if any, are most welcome.

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## Preliminary

### INTRODUCTION & DEFINITIONS

Question:

What is Trust, as defined under Specific Relief Act? (2 marks) B.U. Apr. 2016 Jan. 2017

The Specific Relief Act, 1963, is an Act which *defines* and *amends* the law relating to *certain kinds of specific relief*. It extends to the *whole of India, except* the State of Jammu and Kashmir, and came into force on 1st March, 1964. The Act replaces the earlier Specific Relief Act of 1877, and incorporates the recommendations of the Law Commission of India.

In civil law, legal remedies are for enforcing *primary rights* or for enforcing *secondary rights*. When there is a breach of contract, if the Court orders specific performance in favour of the innocent party, this is in the nature of enforcement of a *primary right*. If, however, the Court orders payment of damages to the innocent party, this would be enforcement of a *sanctioning right*. The *main objective* of the Specific Relief Act is to *protect and enforce primary rights*.

As observed by *Pollock and Mulla*, "Specific relief, as a form of judicial redress, belongs to the law of procedure, and in a body of written law arranged according to the natural affinities of the subject matter, would find itself placed as a distinct part or other division of the Civil Procedure Code."

The following are the seven kinds of specific relief available under the Act:

- I. Recovery of possession of property (Ss. 5-8)
- II. Specific performance of contracts (Ss. 9-25)
- III. Rectification of instruments (S. 26)
- IV. Rescission of contracts (Ss. 27-30)
- V. Cancellation of instruments (Ss. 31-33)
- VI. Declaratory decrees (Ss. 34 & 35)
- VII. Injunctions (Ss. 36-42)

#### ***Origins of specific relief in England***

The Common Law in England, developed from the times of the Norman Kings, was a *general law of the realm*. But at the same time, due to the technicality of the procedure, it became *rigid*. The procedure of the writ system was responsible for the rigidity of Common Law. At the time, only certain specific types of "writs" were available, and unless one of these writs was available, no relief could be claimed by a litigant in a Court of Common Law. This resulted in the following defects:

1. There were certain rights which did *not* have corresponding remedies in Common Law if such rights were infringed, *e.g.*, the rights of a mortgagor or the rights of a beneficiary in the case of a trust.
2. Though certain other rights had remedies in Common Law, the remedies were *inadequate*. For example, under Common Law, there could only be a suit for *damages* in the case of a breach of contract; neither *specific performance* of a contract nor an *injunction* to prevent a breach of contract could be given.
3. The Common Law Courts could *not* give certain auxiliary help to the litigants; for example, if the presence of a particular witness was necessary in the Courts, the Common Law Courts could *not* compel his presence.

In England, at that time, the King was supposed to be the *Fountain of Justice*. As the rigidity of the writ procedure developed in the Courts of Common Law, aggrieved persons would

approach the Lord Chancellor who was, in a sense, the representative of the Crown in matters of administration of justice. The Common Law Courts would generally grant damages if there was infringement of a civil right, but they would *not* enforce the right itself *in specie*, e.g., if there was a contract for sale of immovable property and the seller did *not* perform his part of the contract, the aggrieved buyer could only claim damages in a Court of Common Law; he could never compel the promisor to sell the land. However, the Courts of Equity began to enforce these specific reliefs. All the reliefs provided for in the Specific Relief Act are the reliefs developed by Courts of Equity in England. Thus, the defects of the common law, mainly arising out of the rigidity of its procedure, were corrected by the Courts of Equity.

The following are the principles on which specific relief was granted under English law:

- 1) Equity acts *in personam*.
- 2) The Courts of Equity are Courts of Conscience.
- 3) The Courts of Equity would grant relief only when the reliefs under Common Law were inadequate.

These principles are, to a large extent, reflected in the Specific Relief Act also.

Specific performance is relief *in specie*. It is a remedy which aims at the exact fulfillment of an obligation. As seen above, the jurisdiction to grant specific relief was exercised by the Court of Equity in England. *The Courts of Equity were courts of conscience.*

Therefore, specific relief was *not* granted in a mechanical way. Specific relief would be the result of judicial discretion based on several factors. Such discretion was generally guided by the following three maxims of equity:

{1} *He who comes to equity must come with clean hands*

The person may be disentitled to specific relief if his *past conduct* pertaining to the matter in litigation was *not clean*. If he was himself guilty of any unfairness, he would be disentitled to get specific relief.

(2) *He who wants equity must do equity*

This maxim of equity imposed certain equitable obligations on the plaintiff, if he wanted relief in a Court of Equity. If a person had pledged his jewellery to take a loan, but the debt was barred by limitation, the creditor would *not be* able to sue the debtor in a court of law. But, if the debtor sued to claim back his jewellery, the equity court would call upon him to repay the loan, even though it was time-barred.

(3) *Delay defeats equity*

The principle in equity was that equity helped the vigilant, and *not* the indolent. Therefore, irrespective of the Law of Limitation, the plaintiff in a Court of Equity had to be vigilant and act promptly, and *not* to sleep and slumber over his rights.

Today, of course, statutes of limitation lay down specific periods of time after which a suit would become 'time-barred'.

It will be seen later that these cardinal principles of equity in England guide to a large extent, the grant of specific relief.

### ***Applicability of English Law in India***

Needless to state, an Indian Court is bound to decide the rights and liabilities of the parties to a suit as per the provisions of the Specific Relief Act. However, as this Act is based on English law, in cases where the Act does *not* specifically deal with a particular situation, it is permissible to refer to English law. (*R. Unnissa v. Srimoga*, AIR 1951, Mys. 59)

### **Definitions (S. 2)**

Specific terms used in the Specific Relief Act are defined in S. 2 of the Act. All other words and expressions used in the Act, but which are *not* defined in S. 2, have the same meaning as are assigned to them by the Indian Contract Act, 1872. Thus, terms like "*agreement*", "*contract*",

“*consideration*”, “*fraud*”, *etc.* are to be understood in the same manner as they have been defined in the Indian Contract Act.

### **“Obligation”**

Unless the context otherwise requires, the term “*obligation*” includes every duty enforceable by law.

This definition is an *inclusive definition* and suggests a tie or bond between persons in the eyes of law. Generally, it is a right of any person against another in respect of property. In this sense, it is a proprietary right *in personam*. Under S. 2, the term covers only those duties that are enforceable at law. Therefore, moral, social and religious obligations, which are *not* enforceable in law, are obviously excluded.

The term “obligation” would normally assume one of the following *five* forms :

- a) obligation arising out of *tort*;
- b) obligation arising out of *contract*;
- c) obligation arising out of a *quasi-contract*,
- d) obligation arising under a *law* or a *statute*; and
- e) obligation arising out of a *trust*.

### **“Settlement”**

Unless the context otherwise requires, the word “*settlement*” is defined to mean an instrument, *other than a will or a codicil* (as defined by the Indian Succession Act, 1925), whereby the destination or devolution of successive interests in movable or immovable property is disposed of *or* is agreed to be disposed of.

### **“Trust” and “Trustee”**

The term “*trust*”, as used in the Act, has the same meaning as in S. 3 of the Indian Trusts Act, 1882. It also includes an obligation in the nature of a trust, as for instance, an *implied trust* or a *resulting trust* or a *constructive trust* under the Indian Trusts Act.

The term “*trustee*” is defined to include every person holding property in trust.

Under S. 3 of the Indian Trusts Act, a *trust* is defined as follows:

“A *trust* is an obligation annexed to the ownership of property arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. The person who reposes or declares the confidence is called the *author of the trust*. The person who accepts the confidence is called the *trustee*.

The person for whose benefit the confidence is accepted is called the “*beneficiary*”.

In *Halsbury’s Laws of England*, the terms “*trust*” and “*trustee*” are defined as under:

“When a person has property or rights which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights *in trust* for that other or those others, or for that purpose or those purposes, and he is called a *trustee*.”

### **Illustrations**

- (a) B bequeaths land to A, “not doubting that he will pay there out an annuity of Rs 1,000 to B for his life.” A accepts the bequest. A is a trustee within the meaning of this Act, for B, to the extent of the annuity. (This is an example of what is known in English Law as a *precatory trust*.)
- (b) A is the legal, medical or spiritual adviser of B. By availing himself of his situation as such adviser, A gains some pecuniary advantage which might otherwise have occurred to B. A is a trustee for B, within the meaning of this Act, of such advantage.

- (c) A, being B's banker, discloses for his own purpose, the state of B's account. A is a trustee, within the meaning of this Act, for B, of the benefit gained by him by means of such disclosure.
- (d) A, the mortgagee of certain leaseholds, renews the lease in his own name. A is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.
- (e) A, one of several partners, is employed to purchase goods for the firm. A, unknown to his co-partners supplies them, at the market- price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A is a trustee for his Co-partners within the meaning of this Act, of the profit so made.
- (f) A, the manager of B's indigo factory, becomes agent for C, a vendor of indigo-seed, and receives, without B's assent, commission on the seeds purchased from C for the factory. A is a trustee, within the meaning of this Act, for B, of the commission so received.
- (g) A buys certain land with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Act, for B, of the land so bought.
- (h) A buys land from B, having notice that C is in occupation of the land. A omits to make any inquiry as to the nature of C's interest therein. A is a trustee, within the meaning of this Act, for C, to the extent of that interest.

Note: It may be noted that the illustrations given above and elsewhere in the book are illustrations contained in the corresponding sections of the earlier Act. The current Act, *i.e.* the Specific Relief Act, 1963, does *not* contain any Illustrations.

### **Savings (S. 3)**

S. 3 lays down that the Specific Relief Act is *not* to be deemed:

- (a) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; *or*
- (b) to affect the operation of the Indian Registration Act, 1908, on instruments.

In other words, the Act does *not* take away or affect any right or relief which a person has under the Indian Contract Act. Nor does it affect, in any way, the provisions of the Indian Registration Act relating to registration of documents.

### **Specific relief: *Only for enforcement of individual civil rights, and not for enforcing penal laws* (S. 4)**

S. 4 makes it clear that specific relief can be granted by a Court *only for the purpose of enforcing individual civil rights* and *not* for the *mere purpose* of enforcing penal laws.

The *effect* of the use of the word "*mere*" is that the relief is *not available* when the *sole object* is to enforce a criminal law *But*, if enforcement of a penal law is *only incidental or ancillary* to the grant of specific relief for any other purpose, *such relief will be granted*. If the plaintiff is asking for specific relief in respect of an individual right, such relief will *not* be denied, *only because* a penal law is also enforced thereby.

The Legislature has intentionally used the word "*mere*" to emphasize the fact that it is not the purpose of the Act to enforce a penal law which is divorced from civil rights. Even in England, it was *not* the function of a Court of Equity to deal with criminal matters.

However, there are certain acts which are *both civil wrongs*, (torts) as well as criminal wrongs (crimes), as for example, *defamation*. An injunction under the Specific Relief Act *can* be granted to prevent defamation, which is a *tort*, and it *cannot* be argued that since defamation is also a crime, no such injunction can be passed.

The Calcutta High Court has observed that, since under a local Act, demolition of a structure does *not* attract a penal provision, S. 4 of the Act is *not* a bar to a suit for demolition of an unauthorized construction. (*Commissioner v. A. K. Mustafi*, AIR 1979, NOC 87 - Cal.)

Likewise, a suit by a Municipal Committee for a mandatory injunction for demolishing an

illegal construction is maintainable under the Act and is *not* hit by S. 4. (*Commissioner v. A. K. Mustaffi*, 83 Cal. WN, 888)

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**Chapter -1**  
**RECOVERING POSSESSION OF PROPERTY**  
**(Sections 5 to 8)**

This Chapter is discussed under the following *two* heads:

- A. Recovery of *immovable* property (Ss. 5 & 6)
- B. Recovery of *movable* property (Ss. 7 & 8)

**Questions:**

Explain the provisions of the Specific Relief Act relating to recovery of possession of specific immovable property. B.U. Apr. 2009 Apr. 2011 Apr. 2013 Apr. 2014 Apr. 2016 May 2017

Discuss the law relating to possessory remedies under the Specific Relief Act. B.U. Nov. 2015

Write a short note on: Recovery of specific immovable property. B.U. Nov. 2008

What is the object of summary remedy provided under Section 6 of Specific Relief Act? B.U. Jan 2017

Discuss the law relating to recovery of specific movable property and the liability of the person in possession who is not the owner to deliver the property to the person entitled to its immediate possession. B.U, Nov. 2008

Write a short note on: Mode of recovery of specific movable property. B.U. Oct 2011, Nov, 2013, Nov 2014.

**A. RECOVERY OF IMMOVABLE PROPERTY (Ss. 5 & 6) (Possessory Remedies)**

S. 5 is a clarification section, and lays down that if any person is entitled to the possession of *immovable property*, he can recover it in the manner provided by the Code of Civil Procedure, 1908 (C. P. C). In such a suit, the plaintiff would be able to eject the defendant, *if he can prove that he had a good title to such property*. In other words, this would be a suit for the ejectment of the defendant *on the basis of the plaintiff's title*. However, he *cannot* take the law in his own hands and obtain the possession of the property by force, even though he is legally entitled, to it.

In such cases, the court would require the plaintiff to prove his title, after which a judgment would be given in his favour. Needless to say, the whole process would take quite a few years.

S. 6 then provides a *speedy possessory remedy* to any person who is *forcibly evicted* from *immovable* property. Such a person - or any other person claiming through him - can recover possession of such property, *irrespective of the question of title to such property*, if the following *six conditions* are fulfilled:

He should have been in *possession of the immovable property*.

He should have been thereafter *dispossessed* of such property.

Such dispossession should have been *without his consent*.

Such dispossession should have been *otherwise than in due course of law*.

The dispossession should *not* have been *by the Government*.

The suit should be filed *within six months* from the date of such dispossession.

It will be seen that, for the purpose of S. 6, *possession* is sufficient evidence of right as against the trespasser. If the plaintiff proves that he was in *possession* of the immovable

property, (*whether or not* he is the owner thereof) that he was dispossessed, and that such dispossession was *not* in due course of law, he can recover possession of such property, *without reference to any question of title.*

As observed by the Andhra Pradesh High Court, it is *not proof of title*, but *actual possession* of the property, that entitles the plaintiff to recover possession under S. 6 of the Act. The fact of dispossession and the actual date of possession have, of course, to be proved. {*M. Narasimha Reddy v. K. Vinoba Devi*, 2003, AIHC 618- A.P.)

In such a suit, the plaintiff must only aver *previous possession* and *subsequent dispossession* without his consent and without the due process of law. All other averments and claims would be irrelevant in such suits. The Court would confine itself to the claim for recovery of possession only. (*Shri Madon Singh v. Shri Talyab Hussain*, 1989 Guj. L. R. 275)

As the jurisdiction of the Court under S. 6 is quite limited, *it cannot adjudicate on the question of title*. Nor can it give any direction as regards removal of structures on such land. The *only scope* of its order would be *to restore possession* of the immovable property to the plaintiff.

As observed by the Kerala High Court in *Abdul Rahim v. Nalakath Muhammed Haji* (AIR 1997 Ker. 23):

“S. 6 provides a summary, cheap and useful remedy to a person dispossessed of immovable property otherwise than in due course of law. The object of the section is to discourage people from taking the law in their own hands, however good their title may be. It provides a summary remedy to a person who has, without his content, been wrongly deprived of immovable property, for recovery of possession without establishing title.”

#### *Immovable property*

As seen above, S. 6 applies only to *immovable property*. The term “*immovable property*” is *not defined* in the Specific Relief Act. However, it is defined under the Transfer of Property Act and the General Clauses Act, as under:

“Immovable property shall include —

- (a) land,
- (b) benefits to arise out of land, *and*
- (c) things - attached to the (and, or

- permanently fastened to anything attached to the earth.

There is considerable difference of opinion on the question as to whether the term “immovable property” under this section would mean only actual and physical objects *or* whether it would include other benefits arising out of land.

There is a conflict of opinion amongst courts on this point. The Calcutta High Court has *held* that immovable property, as used under this section, would mean only actual and physical objects (*Sitalv. Delanney*, 34 I. C. 450). On the other hand, the High Court of Bombay has *held* that immovable property would include even incorporeal rights like the right to fish. (*Bundal Pande v. Pandolpos*, 12 Born. 221). The Madras High Court has taken a view similar to that of the Bombay High Court, and has *held* that the right of ferry, standing crops and the right to collect rents are immovable property for the purpose of this

section. (*Alpanna v. Krishnamma*, A.I.R. 1935 Mad. 134).

#### *Possession*

The plaintiff should be in actual, and *not* construction possession of the immovable property. Moreover, the possession must be *juridical* possession, and *not* merely actual possession. For example, possession as a custodian or as a caretaker or as a mere servant may be actual, but it is *not* juridical possession so as to entitle him to maintain a suit under this section.

Similarly, a trespasser who has been dispossessed *cannot* sue under this section. However, it has been *held* by the Bombay High Court that the possession of a tenant holding over after the termination of the tenancy, is juridical, and therefore, such a tenant *can* sue his landlord for recovery of possession under this section if the landlord had dispossessed the tenant *without* his consent. (*Rudrappa v. Narasingrao*, (1905) 29 Born. 213).

#### *Trespasser*

A mere trespasser *cannot*, by the very act of trespass, immediately and without acquiescence, consider himself to be in possession against the person whom he ejects. The true owner can, without reasonable delay, re-enter upon the property. The true owner can recover possession forcibly from such a trespasser. Even if such re-entry is forcible, the true owner *cannot* be sued by the trespasser who has entered by force or fraud, either for recovery of possession under Section 6 or for ejectment upon the strength of his temporary prior possession. (*Mustapha Sahib v. Senth Pillai*, 23 Mad. 189)

#### *Tenant or Lessee*

As stated above, tenant holding over *cannot* be forcibly dispossessed. Such a tenant can invoke the protection of Section 6. Similarly, a tenant by sufferance, *i.e.*, a person who continues in possession of the property after the expiry of the tenancy, *cannot* be regarded as a mere trespasser. His entry was lawful, and therefore, he *cannot* be forcibly ejected. If he is so ejected, he can invoke the protection of Section 6.

#### *Servant*

A servant *can* be forcibly ejected. He *cannot* sue his master under Section 6 in respect of property left in his care, because a servant or a manager who exercises control in a purely representative capacity *cannot* be said to be in juridical possession. (*Bawa Chhatagiri v. Motonomal*, 4 I.C. 359)

#### *Dispossession*

S. 6 will *not* apply if the plaintiff had willingly and voluntarily parted with the possession of the property *or* if he was dispossessed in due course of law.

The dispossession of the plaintiff must be *physical*. It must be *actual ouster*. Mere interference with the rights of enjoyment of the property does *not* constitute dispossession.

Where the plaintiff was in actual possession of land upon which a market was held, and the dispossession complained of was realisation of tolls by the defendant from stall-keepers, it was *held* that such realisation was *not* dispossession. (*Sona Mia v. Prakash*, A.I.R. 1940 Cal. 464)

If the suit is brought within the prescribed period, that is, *within six months* from the date of

dispossession, even the rightful owner is precluded from showing his title to the land. A person who has been dispossessed within six months can successfully sue under Section 6. Any reference to his title to the property is *irrelevant*.

*Dispossession which is otherwise than in “due course of law”*

It is further necessary that such dispossession should be otherwise than in due course of law.

*“In due course of law”* means in the regular, normal process and effect of law. It will *not* be in due course of law, if the dispossession has been by legal process which ought *not* to have been applied. For example, possession obtained through an officer of the Court who is *not* authorised to act in that direction is *not* in due course of law. (*Annopchand v. Ammerchand*, AIR 1951 Mys. 101)

In one case, the plaintiff was dispossessed of his property by an order of a Sub-Divisional Magistrate in proceedings under S.145 of the Criminal Procedure Code, in which the plaintiff was *not* even a party. The Rajasthan High Court *held* that in such a case, the dispossession of the plaintiff is not in due process of law. He can, therefore, file a suit under S.6 of the Act. (*Ganeshmal v. Velaram*, AIR 2000 Raj. 76)

A person is said to be dispossessed otherwise than in due course of law, if he is dispossessed by another acting of his own authority and without the intervention of a court of law. The words “due course of law” are *not* merely equivalent to the word “legally” for a thing which is perfectly legal may still be by no means the regular, normal process and effect of law operating on a matter which has been laid before it for adjudication. Thus, though a landlord is entitled to possession of his land from his tenant after the expiry of the period of tenancy, yet if the tenant holds over, he *cannot* dispossess him of his own authority. If he does so, the tenant can sue the landlord for possession under this section.

In *East India Hotels Ltd. v. Syndicate Bank* (1992) 2 Civ. L. J. 497, S.C. J.), the Syndicate Bank had been occupying premises of EIH as licensee and it continued in possession despite termination of the licence. Suddenly, a fire broke out, rendering the premises unfit for carrying on its business and the Bank temporarily shifted to another place. After renovation, EIH refused to accommodate the Bank in the premises and the Bank filed a suit under sec. 6. The question was whether the suit could succeed. The Court was of the view that after termination of the licence, the Bank became a trespasser and the law would *not* assist it in the recovery of possession.

In the above case, explaining the words “*due course of law*”, the Supreme Court *held* that, in each particular case, it means such an exercise of the power by a duly constituted Tribunal or Court in accordance with the procedure established by law under such safeguards for the protection of individual rights. In its comprehensive sense, it means a course of legal proceedings according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. Thus, there must be a Tribunal or Court competent to decide the subject-matter of the suit or proceeding, there must be service of process on the defendant, the person affected should have the right to be present before the Court or Tribunal which pronounces judgement upon the question of life, liberty or property, he should be given right to be heard, and every material fact which bears on the question of fact or liability must be conclusively proved against him.

In *Girajawoa v. Basawwa* (AIR 1991 Kart. 51), the plaintiff, while in possession, was unlawfully dispossessed by the act of the defendants, and therefore she filed a suit under S. 6. Her title was disputed by the defendants. It was *held* that the question of considering any title does *not*

arise in a suit under S. 6; if the plaintiff proves illegal acts of dispossession, it is sufficient to give her the necessary relief under S. 6 of the Act.

**Problem:** A tenant handed over possession of his premises to the landlord for the marriage of the landlord. However, even after the marriage was over, the landlord failed to hand back possession of the premises to the tenant, who files a suit against the landlord under S. 6 of the Act. Will he succeed?

**Ans.:** No. He will *not* succeed. Even if it is assumed that the tenant discovered, later on, that he was deceived by the landlord, it does *not* change the fact that he had handed over possession of the premises voluntarily and with his free consent. Therefore, S. 6 is *not* applicable in such a case.

### ***No suit against the Government***

No suit can be filed under S. 6 against the Government. However, this does *not* mean that the Government can dispossess a person in possession, except under due process of law. (*Chandra & Co. v. Sfafe of Rajasthan*, AIR 1981 Raj. 217)

**Problem:** A person is dispossessed, without his consent, of two immovable properties, X and Y respectively, otherwise than in due course of law. He is dispossessed of V by the Central Government which has no title to it. He is dispossessed of X by the person legally entitled to it. Has he any right to sue in either case under Section 6 of the Specific Relief Act, 1963?

**Ans.:** In this case, under Sec. 6, no suit shall be brought against the Government. Therefore, the person has no right to recover possession of V which he is dispossessed of by the Central Government. He can, however, sue the person legally entitled to X for possession under Sec. 6 of the Act.

### ***Possessory remedies distinguished from proprietary remedies***

The mere right of possession receives protection from the law. Under Section 6 of the Specific Relief Act, a person dispossessed from immovable property can sue for restoration of possession. If he brings the suit *within six months* from the date of dispossession, he can succeed on mere proof of his prior possession. The defendant *cannot* resist the suit by setting up any title in himself. The question of ownership or title to the property is *irrelevant* in such a suit. Even if the defendant has a better title, he must first surrender possession to the plaintiff, and then bring his own suit based upon his title. This *proprietary remedy* of the defendant is to be distinguished from the *possessory remedy* afforded to the plaintiff under section 6 of the Act.

### ***WHY Possessory remedies: The rationale behind possessory remedies***

There are *three reasons* as to why a legal system affords possessory remedies, *even against the true owner*, namely -

1. If violent self-help is permitted, preservation of peace and order would be at stake. Therefore, no one should be permitted to take the law into his own hands and forcibly eject a person in possession.
2. When there is a disputed title, if dispossession by force is permitted, it would put the person in prior possession into difficulties. The person who enjoys possession must have the benefit of it until his right to possession is legally challenged.
3. Generally speaking, proving title or ownership is more difficult than proving the fact of possession. Therefore, if a person is forcibly ejected, the person in possession must *not* enjoy the advantage of his act of force.

### ***Whether remedies available under S. 5 and S. 6 are alternate remedies?***

The summary remedy available under S. 6 of the Act can be availed of only within *six months* of dispossession. However, if the person who is dispossessed does not sue under S. 6 within six months, he is not barred from filing a suit under S. 5 of the Act, where he would have to prove his title to the property.

However, the remedy of obtaining possession under S. 5 and that of regaining possession under S. 6 are *alternate and mutually exclusive remedies*. The plaintiff has a choice in the matter. He can file a claim on the basis of his title under S. 5 of the Act. He will *not* be allowed to do both.

## **B. RECOVERY OF SPECIFIC MOVABLE PROPERTY (Ss. 7 & 8)**

The Act makes two provisions with respect to movable property:

- I. Recovery of specific movable property (S. 7)
- II. Liability of a person who is *not* the owner of movable property, but is in possession thereof (S. 8)

### **I. Recovery of specific movable property (S. 7)**

S. 7 of the Act deals with recovery of specific *movable property*, i.e. movable property *in specie*, namely a thing which is ascertained and is capable of identification, as for instance, a particular gold chain, a specific ship, *etc.* Any person entitled to possession of such property can recover it in the manner provided by the Code of Civil Procedure, 1908. All that is necessary under this section is that the person should be entitled to the *immediate possession* of such property. In a given case, he may be so entitled even without being the owner thereof.

It is clarified that a *trustee* may sue under S. 7 for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled.

Likewise, it is also clarified that a *special or temporary right* to the present possession of movable property is sufficient to support a suit under the section. In other words, the right conferred by S. 7 is *not* confined only to owners of specific movable property.

### **Illustrations**

- (a) A bequeaths land to B for his life with remainder to C. A dies. B enters on the land, but C without B's consent, obtains possession of the title-deeds. B may recover them from C.
- (b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is *not* entitled to their possession, whatever right he may have to secure their safe custody. (*Donald v. Suckling*, (1866) L.R.I. Q. B. 585)
- (c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B. (*Oliver v. Oliver* (1861) II C.B.N.S. 139)
- (d) A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under S. 168 of the Indian Contract Act, 1872.
- (e) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

The Madras High Court has *held* that a decree under S. 7 of the Act *cannot* be passed if the movable property in question is *not* in the possession or power of the defendant. In such cases, the *only remedy* would be *damages or compensation*. (*Murugesu v. Jotha Ram*, ILR 22 Mad. 478)

The expression "person entitled to the possession" means that such person must have a right to the immediate possession of the goods. Such a right may exist on account of ownership; but, it may also be a temporary or special right, which is independent of ownership. (*Patta Kumariv. Nirmal Kumar*, AIR 1948, Cal. 97)

In cases where a third party wrongfully deprives a bailee of the bailed goods, *either* the *bailor* (i.e. the owner) who had *no previous possession immediately*, or the *bailee* who *did* have previous



possession by virtue of a special right created by the bailment, can recover possession from the third party. (*Fowler v. Down*, 1796 1 B & P, 47)

However, neither a thief nor a person to whom he has pledged the stolen goods, *i.e.* the thief's pledgee, has any right to immediate possession, as in such cases, the owner has *not* lost his right of ownership. (*SagarMalv. Abdul Hafeez*, 1964 2 Andhra WR 366)

Claims under S. 7 are claims for recovery of specific movables, *i.e.* those that are ascertained or ascertainable. A decree is granted for the recovery of *that very property*, and *not* its equivalent or substitute. Therefore, the goods should be capable of being identified. Coins or grains of rice *cannot* be said to be "specific movable property", as they cannot be distinguished from other coins or grains of rice. A *suit for money* will thus *not* be covered by S. 7. (*Sankunni v. Govinda*, ILR 37 Mad. 381) But, a *suit for recovery of a specific coin* will lie under S. 7. (*Maung Ni v. Maung Aung*, ILR 4 Rangoon, 227)

## **II. Liability of a person who is not the owner of movable property, but is in possession thereof (S. 8)**

Under S. 8, any person having the *possession or control* of a particular article of movable property, of which he is *not* the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following *four cases*:

(a) When the thing claimed is held by the defendant as the *agent* or *trustee* of the plaintiff.

Thus, A, proceeding to Europe, leaves his furniture in charge of B, as his agent during his absence. B, without A's authority, pledges the furniture to C, and C, knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee. (*Wood v. Rowcliffe* (1844) 3 Hare, 304)

(b) When compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed.

Thus, Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A, as compensation in money would *not*, in this case, afford adequate relief for the loss of the family idol.

(c) When it would be extremely difficult to ascertain the actual damage caused by its loss.

Thus, A is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of too special a character to bear an ascertainable market value, B may be compelled to deliver them to A. (*Falcke v. Groy* (1859) 4 Drew. 651)

(d) When the possession of the thing claimed has been wrongfully transferred from the plaintiff.

It is also provided that *unless and until the contrary is proved*, the Court shall, in respect of any article of *movable property* claimed under clause (b) or clause (c) of this section, *presume*, -

a) that compensation in money would *not* afford the plaintiff adequate relief for the loss of the thing claimed; *and*

b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

An order under this section can be made in the case of rare *things like antiques*. Thus, in one case, the plaintiff was an heir who sued to recover a *family horn* with an inscription thereon. The horn was a token of the family for centuries. In the circumstances, specific relief was granted to him, and the horn was ordered to be handed over to him. (*Pusey v. Pusey*)

A, who is going to USA for a long holiday with his family, leaves his furniture under the care of his friend, B. In the circumstances, B becomes a trustee of the furniture and is bound to return it to A when the latter comes back and asks for it. If, in the meantime, B pledges the furniture to C, even C will be subject to the same trust and must return it to A when demanded by him. (*Wood v. Rowcliffe*, (1844) 3 Hare 304)

It may be noted that the grounds for relief under this section are almost the same as in the case of a suit for specific performance of a contract.

It will be clear from the above that the four requirements of S. 8 are:

- a) The defendant should be in possession or control of a movable property, for instance, a particular article.
- b) The section will *not* apply in cases of immovable property.
- c) The defendant should *not* be the owner of such property.
- d) The plaintiff should be entitled to the immediate possession of such movable property.

***Difference between S. 7 and S. 8***

There are *two* points of difference between S. 7 and S. 8, as under:

- (a) Under S. 7, a person having a special right" to present possession of movable property can bring a suit even against the owner of that property. Under S. 8, no suit can be filed against the owner of the property.
- (b) Under S. 7, a person can sue for the return of the specific movable property *or alternately, for its value*. Under S. 8, the suit can be *only* for the return of the specific movable property.

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## Chapter - II

### SPECIFIC PERFORMANCE OF CONTRACTS (Sections 9 to 25)

Questions:

Mention two types of contracts which can be specifically enforced. (2 marks) B.U. Apr. 2014

Write a short note on : Contracts which are specifically enforceable. B.U. Nov. 2015

What is “specific performance” of a contract? What are the circumstances in which specific performance of a contract may be enforced by a Court? B.U. Nov. 2008

Discuss the contracts which cannot be specifically enforced. B.U. May 2012

Write a short note on Contracts which are not specifically enforceable. B.U. Apr. 2007

Which contracts can and which cannot be specifically enforced? B.U. Nov. 2014

State the rules regarding specific performance of a part of a contract. B.U. Apr. 2015

Write a short note on Specific performance of a part of a contract. B.U. Apr. 2009

Who can obtain specific performance under the specific Relief act. B.U. Nov 2008, Apr. 2009, Nov 2009, Apr 2001

Who Can obtain specific performance? (2 marks) B.U. Apr 2011, Nov 2012, Apr 2013, Apr 2014.

Against whom can specific performance be enforced? (2 Marks) B.U. 2010, May 2012

**“The relief granted under the Specific Relief Act is discretionary” Explain. B.U. Apr. 2007**

Give any two reasons for which a court may refuse to grant specific performance. (2 Marks) B.U. Apr 2015

Write short note on: Discretion of the court under the specific relief Act. B.U. Apr. 2010, Oct 2011.

State two guidelines for granting specific performance as per Section 20 of specific relief act (2 Marks) B.U. Nov 2015

This Chapter deals with specific performance of contracts. If *A* enters into a contract with *B* to sell him 100 bales of cotton, and does *not* deliver the cotton to him, *A* commits a breach of contract. *B* may sue him for such breach and the Court would order *A* to pay damages to *S*. However, if the sale was of a rare antique — and *not* of bales of cotton — receipt of damages by *S* (in the form of monetary compensation) would *not* be of any use. It is in such cases that *B* can sue *A* for specific performance, *i.e.* a direction from the Court that *A* should perform the contract and hand over the antique to *B*.

The following *fifteen* topics are discussed in this Chapter:

- A. Defences available in suits for specific performance of contracts (S. 9)
- B. Specific enforcement of contracts: When *allowed* (S. 10) When *not allowed* (S. 14)
- C. Specific performance of contracts connected with trusts (S. 11)
- D. Specific performance of a part of a contract (S. 12)
- E. Specific performance of contracts of sale or lease of immovable property, where the seller or lessor has no title or an imperfect title (Ss. 13 & 17)
- F. Who *can* obtain specific performance (S. 15)
- G. Who *cannot* obtain specific performance: Personal bars to relief (S. 16)
- H. Against whom specific performance can be enforced (S. 19)
- I. Non-enforcement of a contract - except with a variation (S. 18)
- J. Court's discretion when decreeing specific performance (S. 20)
- K. Court's power to award compensation (S. 21)

- L. Power to grant relief for possession, partition, *etc.* (S. 22)
  - M. Liquidated damages, *not* a bar to specific performance (S. 23)
  - N. No suit allowed for breach of contract if suit for specific performance is dismissed (S. 24)
  - O. Application of Chapter to arbitration awards and testamentary directions (S. 25)
- Each of the above topics is discussed below in necessary details.

### ***Illustrations***

- (a) A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.
- (b) A contracts with S to sell to him a house for Rs 1,000. B is entitled to a decree directing A to convey the house to him, by paying the purchase- money.
- (c) In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contracts with Z to make an archway through its railway to connect lands of Z severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance *cannot* be adequately compensated for by money; and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf.
- (d) A contracts with B to paint a picture for B, who agrees to pay therefor Rs 1,000. The picture is painted. B is entitled to have it delivered to him on payment or tender of Rs 1,000.
- (e) A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C is appointed his assignee. 8 may compel C to endorse the note, for C has succeeded to A's liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless.

### ***(2) When monetary compensation would not afford adequate relief.***

**Where the act agreed to be done is such that compensation in money for its non-performance would *not* afford adequate relief.**

However, *until the contrary is proved*, it is to be *presumed*

- I. that the breach of a contract to transfer *immovable property cannot* be adequately compensated by payment of money; *and*
- II. that the breach of a contract to transfer *movable property* can be so compensated, except in the following cases :
  - a) where the property is *not* an ordinary article of commerce, *or* is of special value *or* interest to the plaintiff, *or* consists of goods which are *not* easily obtainable in the market;
  - b) where the property is held by the defendant as the *agent* or *trustee* of the plaintiff.

Ordinarily the Courts are entitled to presume that, in case of breach of contract to transfer *immovable property* mere compensation is *not* adequate relief and specific performance is so; while in the case of *movables*, compensation is the ordinary relief and specific performance is exceptional. These presumptions are, however, rebuttable.

*Cuddeev. Flutter* (24 E.R. 521) is the leading case on the point that, as a general rule, agreements relating to the sale or purchase of personal chattels will *not* be specifically enforced, for damages

at law would afford an adequate compensation for the breach thereof.

To put it *briefly*, the common law rule is that money is the measure of every loss; but in the case of *land*, damages afford no true compensation and do *not* attain the desired object which they do in case of movables. The exceptional cases are where breach of a contract for the transfer of immovable property can be adequately compensated.

#### *Land*

A piece of land may have a special and peculiar value to the purchaser, because of its locality, easement, vicinity, convenience, soil, *etc.* In such a case the money value of the property does *not* afford an adequate relief to the purchaser. Damages can hardly be a satisfactory relief in such cases. Therefore, specific performance is decreed in such cases. (*Beharilal v. Sawan Singh*, 1975, 77 Punj. L. R. 428)

In one case, there was an agreement for the sale of agricultural land. The buyer had paid the full amount of the consideration to the seller, but the seller kept evading the signing of the Sale Deed as per their agreement. The buyer then filed a suit for specific performance, praying for a direction to the seller to execute the Sale Deed. The Rajasthan High Court *held* that the case fell under this clause of S. 10, and directed the seller to specifically perform the contract by executing the Sale Deed in favour of the buyer. (*Ram Karan v. Govind Lai*, AIR 1999 Raj. 167)

#### *Shares*

Specific performance is *not* generally decreed in the case of shares, because damages would be an adequate remedy. The plaintiff can always purchase shares from the payment of compensation given to him. (*Adams v. Messinger*, 147 Mars. 185)

If shares are freely available in the market, specific performance will *not*, of course, be granted. But, if the shares of a particular company are *not* readily available in the market, *e.g.* shares of a private company, *specific performance* would be granted. (*Bank of India v. Chinoy*, AIR 1949 PC 90)

### ***(3) Suits for enforcement of a contract to execute a mortgage***

Where the suit is for the enforcement of a contract to execute a mortgage or furnish any other security for the repayment of any loan which the borrower is *not* willing to repay at once. However, in such a suit, if only *part* of the loan has been advanced, the lender should be willing to advance the remaining part of the loan.

Thus, for instance, A has taken a loan of Rs 10 lakhs from S, of which Rs 9 lakhs have already been advanced. As a security for the loan, A has agreed to mortgage his house to B. Here, B can sue A for enforcement of A's promise to execute the mortgage. However, in such a case, B also should be ready and willing to advance the remaining portion of the loan to A, namely, Rs 1 lakh. He who seeks equity must do equity.

Although a contract to lend money *cannot* be specifically enforced, if the loan has been already advanced (in whole or in part) and the mortgage has *not* been executed, this clause becomes applicable.

### ***(4) Contracts for the purchase of debentures of a company***

Where the suit is for the enforcement of a contract to take and pay for any *debentures* of a

company.

Thus, A and S enter into a contract for the sale and purchase of 100 Debentures of X Ltd., at the rate of Rs 110 per Debenture. This contract is specifically enforceable.

**(5) Suits for execution of a formal deed of partnership**

Where the suit is for the execution of a *formal deed of partnership*, in cases where the parties have already started the business of the partnership.

Thus, A, B and C enter into an oral agreement to do some business in partnership, and start such business, the formal deed to be drawn up within three months. Later, if A refuses to execute the deed, B and C can sue him for specific performance.

**(6) Suits for purchase of a partner's share**

Where the suit is for the purchase of a *share of a partner of a firm*

Thus, X has agreed, with the permission of his partners, to sell his 10% share in a firm to A. On default, A can sue X for specific performance.

**(7) Suits for enforcement of a building construction contract**

Where the suit is for the enforcement of a contract for the *construction of any building* or the execution of any other work on land, *provided* the following *three conditions* are fulfilled:

- I. the building or other work is described in the contract in a sufficiently precise manner, so as to enable the Court to determine the exact nature of the building or work;
- II. the plaintiff has a substantial interest in the performance of the contract, *and* the interest is of such a nature that compensation in money for non-performance of the contract is *not* an adequate relief; *and*
- III. the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

It is to be remembered that specific performance, being an equitable remedy, is always at the discretion of the Court. No person *can claim it as of right*. This section states the circumstances under which the Court *may* exercise its discretion to enforce specific performance of a contract.

It is *not* imperative upon a Court to decree specific performance of a contract, merely because the case falls within Section 10. Section 20, which should be read with Section 10, provides : The jurisdiction to decree specific performance is *discretionary*, and the Court is *not* bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is *not* arbitrary *but* sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.”

The *general principles* regarding specific performance of a contract may be noted:

- I. Specific performance will *not* be granted where damages are an adequate remedy.
- II. To grant specific performance of a contract is at the discretion of the Court.
- III. The plaintiff must prove the following:
  - a) that there was a concluded and valid contract between himself and the defendant;
  - b) that he had performed, or was ready and willing to perform, the terms of the contract on his part; *and*

- c) that he was ready and willing to do all matters and things on his part thereafter to be done.

## II) Which Contracts *cannot* be Specifically Enforced (S. 14)

The following *five* types of contracts *cannot* be specifically enforced:

- (1) a contract for the non-performance of which compensation in money is an adequate relief;
- (2) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the Court *cannot* enforce specific performance of its material terms;
- (3) a contract which is, in its nature, determinable;
- (4) a contract the performance of which involves the performance of a continuous duty which the Court *cannot* supervise.
- (5) a contract to refer present or future disputes to arbitration.

S. 14 of the Specific Relief Act deals with *contracts* which *cannot* be specifically enforced. The main grounds on which contracts may be refused to be enforced are adequacy of compensation, futility of enforcement or impossibility of enforcement. It may be noted that specific relief under English law developed to make good the deficiencies of common law reliefs. Where the remedy available under the common law, namely, compensation, was adequate, the Courts of Equity would *not* intervene. The same principle is contained in S. 14.

Further, it must be noted that specific performance is a *discretionary relief*, and the Court may refuse to grant the specific performance of a contract *even though* such contract does *not* fall under S. 14.

The *five* types of contracts referred to above are discussed below in necessary details.

### ***(1) Contracts where compensation is adequate relief***

If compensation is ordered to be paid by the guilty party to the innocent party, and further if such compensation gives adequate relief to the latter, specific performance would *not* serve any purpose. Hence, specific performance *is not* decreed in such cases.

It may be noted that it is for the court to decide *whether or not* compensation would be an adequate relief for the breach of a contract in a particular case. If the court is of the view that it is, the opinion of the plaintiff that it is *not* so, makes no difference. (*Brij Ballav v. Mahabir*, 78 IC 167)

In one case, *X* agreed to sell *coal* to *Y*. Later, *Y* refused to take delivery of the coal. When *X* sued for specific relief, the Court refused him the relief, on the ground that compensation in money would be an adequate relief in such a case. (*Bhowra K. Collieries Ltd. v. Sunil Kumar*, 1968 Pat. L. J. 486)

If, in the above example, the agreement was *not* for local, but for a bungalow on a hill station, the court would have allowed specific performance, as compensation may *not* be an adequate relief in such a case - as, even if compensation is received by the innocent party, no bungalow may be available for sale in that location.

The following are instances of contracts where compensation in money has been *held* to provide adequate relief:

- a contract to lend money (*Hiturdhak Cotton Mills v. Sorabji*, ILR 33 Born 426);
- a contracts to pay money in installments (*Hukum Singh v. Khunilal*, 8 All. L. J. 1282);
- a contract of mortgage of immovable property (*Rambai v. Khimji*, AIR 1950 Kutch 86)
- a contract to repair certain premises (*Bansi Shah v. Krishna Chandra*, AIR 1951 Pat. 318);
- a contract for the sale of buffaloes (*Bharat v. Nisardi*, 20 Cal. W. N., 1020).

## (2) *Contracts which run Into minute or numerous details*

Contracts running into minute details will *not* be enforced, because the Court *cannot* be required to watch and supervise the performance in detail of such acts. Contracts like contracts of personal service *cannot* be specifically enforced, as such contracts depend on the personal volition of the parties. (*Mustafa v. District Board*, 56 Alla. 73)

The bar under this clause is applicable to both affirmative and negative covenants and whether the employer is a private person or a company : *Ramchandra v. Chinubhai*, AIR 1944 Born. 76; *Hindustan Steel v. Verghese*, I.L.R. 1968 I Pat. 13.

Where the contract runs into minute and numerous details, the Courts normally leave the party to seek his remedy for damages. The *reason* is that continuous acts of watching and supervision would unnecessarily waste the time, attention and resources of the Court at the cost and expenses of the other litigants. (*Nagar Mahapalika, Kanpur v. Punjab Association*, 1980, ALJ 869)

In one case, a consumer of electricity filed a suit in respect of a contract where the Electricity Board had agreed to supply uninterrupted electricity every day for twenty-four hours in all the three phases. The Allahabad High Court *held* that supply of electricity is a technical matter containing several details. The nature of the contract is such that the court *cannot* enforce performance of its material terms. Hence, there can be no specific performance of the contract. (*Geeta Pump Pvt. Ltd. V. Dis Judge, Saharanpur*, AIR 2000 All. 58)

A contract to marry would fall under the category of such contracts for which the Court *cannot* enforce specific performance of material terms : *Purshottam v. Purshottam*, 21 Born. 33.

The following are examples of contracts covered by this clause:

- a) A contracts to render personal service to B.
- b) X, an author, contracts with a publisher to complete a literary work.
- c) A lets out land to B under a contract where B agrees to cultivate it in a particular manner for the next three years.
- d) X and Y contract that, in consideration of an annual advance by X to Y, Y will, for the next two years, grow particular crops on his land and deliver them to X when cut and ready for delivery.
- e) An artist agrees to paint a portrait of A in consideration of Rs 5,000.

## (3) *A contract which is, in its nature, determinable (i.e. terminable)*

A contract is said to be 'determinable' when it can be terminated by a party to the contract. The word is thus synonymous with 'terminable'.

For example, it is futile to enforce the specific performance of a partnership at will. This would be so, because such a partnership can be terminated by any partner at any time.



When a contract is determinable, as for instance, a *tenancy-at-will* or a *partnership at will*, even if the Court grants a decree, the defendant can always render it infructuous.

In one case, a contract of sale was made between *A* and *B*. However, within a certain period, the seller, *A*, had the right to cancel the contract, by refunding the consideration amount to *B*, the buyer. In the circumstances, *B cannot* ask for specific performance, because, despite such order, *A* could still free himself by repaying the consideration within the specified period. (*Jawahir Saov. S. Sonar*, AIR 1961 Pat. 482)

#### (4) *A contract which involves performance of a continuous duty*

The sole test under this clause is whether the contract is such that the Court *cannot* supervise its performance, inasmuch as it involves the performance of a continuous duty. (*Central Bank v. Vyankatesh*, I.L.R. 1949 Nag. 106.)

The duty referred to here is a positive duty to do something and *not* a negative duty *not* to do something, because in the latter case there is no question of the Court being called upon to supervise. (*Lallubhai v. Chittaranjan*, A.I.R. 1966 Guj. 189).

However, in one case, the House of Lords allowed specific performance enforcing the defendant to pay a weekly sum of £ 5 on the ground that otherwise it would lead to multiplicity of actions. (*Beswick v. Beswick*, 1968 A.C. 58.)

If there is an agreement to construct a building, following a particular scheme in all its details, specific performance will be refused, as it would require continuous supervision of the Court. (*HHM Shantidevi v. Sabjibhai*, AIR 2001 SC 1462)

Likewise, an agreement to supply electricity for 24 hours a day *cannot* be specifically enforced, as it would require continuous supervision. (*Geeta Pump v. Asst. Judge*, AIR 2000 All. 58)

#### (5) *Arbitration agreements*

Arbitration agreements *cannot* be specifically enforced. However, in such cases, *i.e.*, where there is an arbitration clause in a contract, if a person files a suit instead of filing arbitration proceedings, the existence of the arbitration clause would bar such a suit.

Thus, *A* enters into a contract with *B* to develop *B*'s property. The contract contains a clause that all disputes between *A* and *B* arising out of the contract shall be referred *for* arbitration to Mr. *X*. Later on, when disputes arise, *A* files a suit against *B* in the Court. The Court would *not* entertain the suit, leaving *A* to resolve his dispute with *B*, following the agreed mode of dispute resolution, *i.e.*, arbitration.

#### *Contracts of personal service*

Several authors on the law of specific relief are of the opinion that contracts of personal service should *not* be specifically enforced. Several reasons are given for *not* granting specific performance of contracts of personal service. *Firstly*, it is said that contracts of personal service are based on *personal faith and confidence*. *Further*, it is said that enforcement of such contracts would involve detailed supervision. It is *also considered that* enforcement of such contracts of

personal service would be *opposed to public policy*

In the case of personal service (like that of a *dancer, artist, musician*, etc.), the efficiency and personal qualities of the person are involved, and therefore, specific performance is *not* granted. Even if such a person is forced by the Court to honour the commitments, the quality of his service can never be procured.

It has been *held* that a dismissed employee of a private college is *not* entitled to enforce a service contract, even if the college is affiliated to a statutory university. (*J. Tiwari v. Jawala Devi Vidhya Mandir*, AIR 1981 SC 122)

Similarly, no injunction can be granted to restrain the management from terminating the services of the Head Priest of a temple, as such a contract is a personal contract. (*Sanatan Dharam Sabha v. John Mai*, AIR 1983 NOC 50 Del.)

These reasons for hesitation in granting specific performance of contracts of personal service might have been valid at a time when it was considered that there was complete freedom of contract between the master and the servant. However, the concept of freedom of contract has been progressively curtailed by constitutional law and labour legislation. Under Article 311 of the Constitution, the civil servant has a right to claim reinstatement if his services are illegally or irregularly terminated. Further, under labour legislation, the industrial worker has been given ample protection against arbitrary breach of contract of personal service. In view of these developments, it may *not* be proper to consider that specific enforcement of contracts of personal service is opposed to public policy in *all* cases.

On the other hand Lord Denning in *Hill v. C.A. Parsons & Co. Ltd.* (1971) 3 All. E.R. 1345, has made a categorical observation that, in certain cases, declaring termination of service to be invalid is consistent with the needs of the time. He would *not* hesitate to grant such a declaration, even though it virtually amounted to specific enforcement of personal service.

The Supreme Court has *held* in *U.P. Warehouse Corporation Case* (1970, I. S. C. J. 793) that no declaration to enforce a contract of personal service will be normally permitted; but the Supreme Court has laid down *three exceptions* to the above rule:

- (1) Contracts of personal service of civil servants under Article 311 of the Constitution.
- (2) Services of workmen under Labour or Industrial Laws.
- (3) Services under a statutory body which is governed by statutory instructions in connection with the services.

### **C. Specific performance of contracts connected with trusts (S. 11)**

S. 11 confers discretion on a Court to allow specific performance of a contract, when the act agreed to be done is in the performance, wholly or partly, of a *trust*.

Under this section, it is provided that if the contract in question creates an obligation in the nature of a trust, the specific performance of such a contract *may* be enforced. The requirement for the application of this section is that the relief claimed must partake of the nature of *both* the specific performance of a *contract* and the enforcement of an obligation in the nature of a *trust*.

For example in *Chattokv. Muller*, 8 CH.D. 177, the facts were as under:



The plaintiff agreed *not to* compete with the defendant in the purchase of a certain property. In turn, the defendant promised the plaintiff that he would convey part of such property to the plaintiff. In this case, specific performance of the contract was allowed, and it was observed that the defendant must be deemed to be a trustee for the plaintiff.

S. 11 also clarifies that if a contract is made by a trustee in excess of his powers or in breach of trust, *such a contract cannot be specifically enforced*.

#### **D. Specific performance of a part of a contract (S. 12)**

As normally, a contract should be performed as a *whole*, S. 12 lays down, subject to what is stated below, the general rule is that a Court must *not* direct performance of a *part* of a contract.

However, there may be circumstances in which it would be in the interests of justice to enforce specific performance of even a *part* of a contract. The main consideration, in such cases, is whether the part of the contract which needs to be left unperformed is only a *small* part of the contract, or a considerably *large* portion thereof.

S. 12 deals with the following *three possibilities*:

- (1) When the unperformed part is only a *small part* of the contract (in value) and *can be compensated* by payment of monetary compensation.
- (2) When the unperformed part forms a *considerable* part of the whole contract and *can be compensated* in money.
- (3) When the unperformed part *cannot be compensated* in monetary terms.
  - a) If a party to a contract is unable to perform *all* his obligations under a contract, and the part which is unperformed is *only a small proportion of the whole in value*, and admits of monetary compensation, the Court *may* direct specific performance of the part which can be performed, and at the same time, award compensation in money for the smaller part which *cannot* be performed.
  - b) If, however, the part of the contract which must be left unperformed forms a considerable part of the whole, though admitting of compensation in money, the Court may direct the party to specifically perform that part of the contract which he can perform, *provided* the other party
    - I. pays, or has paid, the agreed consideration for the *whole* contract, reduced proportionately for the unperformed part of the contract; *and*
    - II. relinquishes all his claims in respect of the performance of the remaining part of the contract and all his rights to compensation (for the deficiency or for the loss or damage).
  - c) However, if the part of the contract which must be left unperformed does *not* admit of compensation in money, the Court may direct the party to specifically perform that part of the contract which he can perform, *provided* the other party
    - I. pays, or has paid, the consideration for the whole contract, without any proportionate reduction; *and*
    - II. relinquishes all his claims in respect of the performance of the remaining part of the contract, and all his rights to compensation (for the deficiency or for the loss or damage).

#### ***Principle underlying S. 12***

This clause is based on the simple principle that a mere difference in quantity can never be held to be a bar to specific performance. The Court of Chancery always drew a distinction between the

essential and non-essential terms to be made the subject of compensation.

S. 12 also clarifies that a person is deemed to be unable to perform the whole of the contract, if a portion of the subject-matter existing at the date of the contract has ceased to exist at the time of performance. This would be so when, for instance, a man contracts to sell two of his race horses to another, and before the agreed date of delivery, one of the horses dies.

However, if in a given case, the part of the contract which can, and ought to be, specifically enforced, stands on a *separate and independent footing* from another part of the same contract which *cannot*, or ought *not* to be, specifically enforced, the Court *may* direct specific performance of the former part of the contract. This would cover cases where one consolidated contract has two *or more independent and divisible parts*, which, of course, is a question of fact in each case.

Thus, if a contract contains alternative promises, one part is mutually exclusive of the other. In such a case, the plaintiff can ask for specific performance of *one* of the parts and the Court may treat this as independent of the other part. (*Green v. Law*, 2 Beau, 925)

When an agent, without authority, contracted to sell to the plaintiff the shares of five co-sharers, three of whom ratified the contract and the others refused, and it was clear that each party treated his share as separate and distinct, it was *held* that there was no impediment in law to a decree being granted to the plaintiff in respect of the shares of such of the co-sharers who ratified the agent's contract, because after ratification, the contract was divided and a separate concluded contract was made in regard to the shares of the ratifying co-sharers. (*Harendra v. Nandalal*, A.I.R. 1933 Cal. 98).

### **Cases and Illustrations**

- (a) In a case decided by the Bombay High Court, where the vendor had contracted to sell four plots of land without apportionment of the price of each plot, and it was found that the vendor was unable to carry out the contract regarding one out of four plots, which was *held* to form a considerable portion of the whole and not a small portion, it was *held* that the purchaser was entitled to relief only on his agreeing to buy the remaining property for the stipulated price. (*Hiralal v. Janardan*, 39 Born. L.R. 1299).
- (b) A contracts to sell B a piece of land consisting of 100 *bighas*. It turns out that 98 *bighas* of the land belong to A, and the two remaining *bighas* to a stranger, who refuses to part with them. The 2 *bighas* are *not* necessary for the use or enjoyment of the 98 *bighas* nor so important for use or enjoyment that the loss of them may not be made good in money. A may be directed, at the suit of B to convey to B the 98 *bighas*, and to make compensation to him for *not* conveying the two remaining *bighas*; or B may be directed, at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.
- (c) In a contract for the sale and purchase of a house and lands, for 2 lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The Court may direct specific performance of the contract, notwithstanding that the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance or may confine its decree to the house.
- (d) *Tata Industrial Bank Ltd. v. Rustomjee*, (1920) 22 Born. L.R. 489. - The facts of the case are as under:

The defendants offered to sell to plaintiffs their property situated at Meadows Street, Bombay, for Rs 741000 The plaintiffs accepted the offer and paid Rs 25,000, by way of earnest money.

Subsequently, it was found that the area of the land amounted to 1,281 sq. yards and *not* 1,482 sq. yds as stated in the letter of offer. Plaintiffs informed the defendants that they had agreed to purchase the property on the representation that it comprised 1,482 sq. yds. and the purchase-price was calculated on that area and if the land measured 1,281 sq. yds they were no longer bound by their agreement to purchase, as the discrepancy in area was so great as to entitle them to refuse to carry out the agreement., Subsequently, the plaintiffs informed the defendants that they desired to complete the purchase subject to a proportionate reduction in the purchase-money. The plaintiffs thereupon sued the defendants for specific performance of the contract with compensation of Rs 1 lakh for the deficiency of 201 sq. yds. It was *held*, dismissing the suit, -

- (1) That the defendants were *not unable* to perform the whole of their contract as the property was described in every possible and conceivable manner as their property at Meadows Street.
- (2) That even if there had been failure on the part of defendants to perform the whole of their part of the contract, the plaintiffs were *not*, under Section 14 of the Specific Relief Act, entitled to compensation in money for the deficiency, because the part left unperformed was *one-seventh* in area of the whole of the property.
- (3) That the plaintiffs were entitled to specific performance under Section 15 of the Act only upon relinquishing all claims to further performance and all rights to compensation, *either* for the deficiency *or* for loss or damages sustained by them through the default of the defendants.
- (e) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A, and the other 50 bighas to a stranger who refuses to part with them. A *cannot* obtain a decree against B for the specific performance of the contract, but if B is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase-money.
- (f) A contracts to sell to B an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden. A *cannot* obtain a decree against B for the specific performance of the contract, but if B is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey the house to him on payment of the purchase-money.

#### **E. Specific performance of contracts of Sale or Lease of immovable property where the Seller or the Lessor has *no title* or an *imperfect title* (Ss. 13 & 17)**

Sections 13 and 17 cover cases of *sale* or *lease* of *immovable property* where either the seller (or the lessor) has *no title at all* or he has an *imperfect title*. Not having any title at all is, of course, quite different from having an imperfect title. Thus, X would have *no title* to the property belonging to Y. However, if A and B are joint owners of property, it *cannot* be said that A has no title at all to such property. In such a case, if A purports to sell such property without the consent of B, his title would be *imperfect*.

In all such cases, the purchaser or the lessee, as the case may be, has the following *five* rights:

- (a) If, subsequent to the contract, the vendor or the lessor acquires any interest in such property, the purchaser or the lessee can compel him to make good the contract.
- Clause (a) covers a period of time subsequent to the contract and upto the date of the decree.

However, one interesting point needs to be considered. If on the day of the professed transfer, the transferor was forbidden by law and subsequently if the vendor acquires a transferable right, can

the promisee enforce his right under this clause? A distinction must be made between a transaction forbidden by law and an interest *not* transferable under law. If the interest was *not* transferable under law at the time of the contract and subsequently, if it becomes transferable, relief can be obtained under this clause. (*Katialv. Madden*, A.I.R. 1963, Punj. 136)

In one case, X agreed to sell property which belonged jointly to him and his mother, the condition being that the mother would also join in executing the document of sale. X's mother died, and X became entitled to the *whole property*. In the circumstances, the Court granted specific performance of the *whole property*. (*Silla Chandrasekharam v. Ramchandra Sahu*, AIR 1964 SC 1789)

As observed by the Madras High Court, in normal circumstances, it is the buyer's duty to inquire into any encumbrance or other defect concerning the property, before he enters into the transaction. But, if the seller actively conceals a material fact, and if this fraud induces the buyer to purchase the property, the seller *cannot* argue that the buyer ought to have ascertained the facts. In such circumstances, the buyer is entitled to rescind the contract. (*Morgan v. Govf. of Hyderabad*, ILR 11 Mad. 419)

- (b) If the concurrence of other persons is necessary for validating the vendor's (or lessor's) title, and such persons are bound to concur at his request, the purchaser (or lessee) can compel him to procure such concurrence.

Clause (b) applies to those cases where a person having only an imperfect title has contracted to sell or lease certain property, and in order to make the title of the transferee valid, the concurrence of other persons is necessary, and such persons are bound to give their consent at the request of the vendor or lessor and such transferor is in a position to enforce specific performance in respect of that obligation to give the consent. In such circumstances, the transferee has a corresponding right to compel the vendor or lessor to procure such concurrence.

In *Moti Lai v. Name Lai* (I.A. 333) an appeal before the Privy Council, the facts were as follows:

There was an agreement between the parties for the sale of certain land. The nature of the land was such that its transfer was subject to the sanction of the Revenue Officer. It was *held* that in such a case there was an implied covenant in the agreement that the contractor would do all things necessary to affect such transfer, including an application to the Revenue Officer for sanction to the said transfer, and therefore, the Court had jurisdiction to pass a decree for specific performance directing the transferor to apply for sanction and convey the property on receipt of such sanction.

Where the concurrence of the third party *cannot* be procured or is impossible to be procured in law or in fact, specific performance *cannot* be decreed and the case can be only for damages. (*Sadwell v. Webster*, (1980) 29 L.J. CH. 73)

- (c) If a conveyance by some other persons is necessary to validate the title, and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance.
- (d) If the vendor professes to sell unencumbered property but if, in fact, the property is mortgaged for an amount *not* exceeding the purchase money, and the vendor has only a right to redeem it, the purchaser may compel him to redeem the mortgage, obtain a valid discharge

and then hand over such property to the purchaser.

- (e) If the vendor's (or lessor's) suit for specific performance is dismissed by the Court (on the ground of his want of title or imperfect title), the purchaser (or lessee) has a right to get back his deposit amount (if any) with interest thereon, as well as the costs of such a suit. In the meanwhile, he can exercise a *lien* on the property for this amount due to him.

S. 17 then lays down that a contract to sell or let (*i.e.* lease) immovable property *cannot* be specifically enforced in favour of a vendor or a lessor -

- a) who, knowing himself *not* to have any title to the property, has contracted to sell or let the property; *or*
- b) who though he entered into the contract believing that he had a good title to the property, *cannot* at the time fixed by the parties or by the Court for completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

It may be noted that the provisions of both S. 13 and S. 17 also apply to contracts for the *sale* or *hire* of *movable property*.

#### **F. Who can obtain specific performance (S. 15)**

The following *eight* categories of persons can obtain specific performance under S. 15 of the Act:

- (a) Parties to a contract are obviously bound by their contract. Logically, it follows that any party to a contract can enforce it.

( The clauses which follow deal with cases where parties *other than* the parties to the contract can enforce specific performance.)

- (b) (i) The representative in interest, or (ii) the principal of any party to a contract, can also apply for specific performance, except in two *cases*, namely, —

- where the learning, skill, solvency or any personal quality of the party is a material ingredient of the contract; *and*

- where the contract itself provides that the party's interest shall *not* be assigned, *unless*

(i) such a party has already performed his part of the contract; or

(ii) the performance of the contract by his representative in interest or by his principal has been accepted by the other party.

- (c) Where the contract is a marriage settlement or a compromise of doubtful rights between members of the same family, any person beneficially entitled under such a contract can sue for specific performance.

**Problem:** S, the widow of A, brought suit against A's brother, B, for possession of certain lands. A compromise decree was passed where under B undertook to pay maintenance at a certain rate to S during her lifetime and after her death to her daughter-in-law P, P who was *not* a party to the compromise, brought a suit for recovery of arrears of maintenance. Will P succeed?

**Ans.:** P is entitled to the benefits of a compromise of doubtful rights between members of the same family. It is *not* clear from the facts given in the problem whether P brought the suit for maintenance during the lifetime of S or after her death. Presuming that the suit for arrears was filed after the death of S, P can obtain specific performance and claim for arrears of maintenance accrued to her.

- (d) Where a contract is entered into by a tenant for life in due exercise of a power, the remainder

man (*i.e.* the person entitled to the property after the death of the tenant for life) can sue for specific performance.

- (e) When the agreement is a covenant entered into with the predecessor in title of a reversioner in possession, and the reversioner is entitled to the benefit of such a covenant, such reversioner can sue for specific performance.

[*Reversion* is the interest in land of a person (called the “*reversioner*”) who has granted to another, a lesser interest than his own. Thus, a person who creates a lease of his land in favour of another retains an interest in reversion. ]

- (f) A reversioner in remainder can also claim specific performance, if the agreement is a covenant referred to in clause (e) and the reversioner is entitled to the benefit thereof and would sustain material injury by reason of its breach.
- (g) When a *company* has entered into a contract, and subsequently, becomes *amalgamated* with another company, the *new company* which arises out of the amalgamation can sue for specific performance of the contract.

Thus, *X Ltd.* enters into a contract with Mr. A. Subsequently, *X Ltd.* is amalgamated with *Y Ltd.*, and a new company *Z Ltd.* comes into existence. In these circumstances, *Z Ltd.* can enforce the contract against Mr. A.

- (h) When the *promoters of a company* have entered into a contract on its behalf *before its incorporation*, and such a contract is warranted by the terms of its incorporation, - the company can apply for specific performance of such a pre-incorporation contract, *provided*

- (i) the company has accepted the contract; *and*
- (ii) it has communicated such acceptance to the other party to the contract.

Normally, such a *pre-incorporation contract* is *not binding on the company*, as the company did *not* exist at the time it was entered into. It *cannot* also be said that the promoters were acting as agents of the company, as there *cannot* be any agent of a non-existing person. This clause, however, allows the company to sue for specific performance of the pre-incorporation contract *if the two conditions specified above are fulfilled*

### **G. Who *cannot* obtain specific performance: Personal bars to relief (S. 16)**

Specific performance of a contract *cannot* be enforced in favour of the following *five* classes of persons:

- (a) If a person would *not* be entitled to recover compensation for the breach of the contract, he would likewise *not* be entitled to its specific performance.
- (b) Specific performance *cannot* be enforced in favour of a person who has become incapable of performing the contract.
- (c) Likewise, specific performance will *not* be enforced in favour of a person who violates any essential term of the contract that remains to be performed on his part.
- (d) Specific performance will also *not* be allowed in favour of a person who -
  - (i) acts in fraud of the contract, *or*
  - (ii) willfully acts at variance with, *or* in subversion of, the relation intended to be established by the contract.
- (e) Lastly, specific performance will *not* be allowed in favour of a party who fails to aver and prove that he has performed, or has always been *ready and willing to perform*, his part of the contract, - *unless* this was prevented or waived by the defendant. However, where the contract involves payment of money, it is *not necessary* that the plaintiff should actually tender such money to the defendant or deposit the same, except when so directed by the Court.



The Plaintiff's averment that he is ready and willing to perform his part of the contract *need not in specific words*. It is in order if a reading of the plaint as a whole indicates such readiness and willingness. (*Motilal v. Ramdasi*, AIR 2000 SC 2408)

A agrees to sell his house to his tenant, S, the consideration to be paid in installments. When paying one of the installments, B deducts an amount for expenditure incurred by him for repairing the house. It *cannot* be said that A is ready and willing to perform his part of the contract.

### Cases

1. A, obtained a mortgage decree against B for sale of Whiteacre and Blackacre. Thereafter, Whiteacre was sold under a prior mortgage. C, being desirous of purchasing Whiteacre cheap, agreed to purchase A's decree for Rs 19,000 and thereby prevented A's executors from bidding and getting Whiteacre cheap. Owing to causes for which C was *not* responsible, there was a great delay in assigning A's decree to him, and eventually it became time-barred, and C thereupon refused to take an assignment or to pay Rs 19,000. In a suit by A's executors for specific performance, it was *held* that the contract could *not* be specifically enforced, the plaintiffs being unable to perform their part of the contract.

2. Where the vendor sells an estate of which he is *not* in possession, in consideration of advances, to enable him to sue for its recovery, it is *not* open to the purchaser, after failing to complete his part of the contract, to claim specific performance and delivery of the estate on tendering the balance of the purchase money.

3. A mortgagor mortgaged his property for 15 years on condition that the mortgagee would make certain instalment payments towards a decree against the mortgagor. It was *held* that the *failure of the mortgagee to make payments* exonerated the mortgagor and entitled him to rescind his part of the contract.

4. Where there was an agreement of sale, the purchaser wanting to buy through a society, the application for the necessary government sanction having been made accordingly, the vendor refused to execute the sale deed through the society. It was *held* that the contract was *not incapable* of being performed, as the mere insertion of the words did *not* show that A had undertaken to get the sanction in favour of the purchaser through the society.

**Problem:** A pledges certain jewels to B to secure a loan. B disposes of the jewels before he is entitled to do so. A without having paid or tendered the amount of the loan sues B for possession of the jewels. Will A succeed?

**Ans.:** The basic principle involved here is "He who wants equity must do equity." A, without having paid or tendered the amount of loan, sues B for possession of the jewels. Therefore, A will *not* succeed.

### H. Against whom specific performance can be enforced (S. 19)

S. 19 lays down *five* categories of persons against whom specific performance of a contract may be enforced, as follows:

1. Specific performance can be enforced against either party to the contract. Needless to mention, the parties who enter into a contract are bound by such a contract.
2. Specific performance can also be enforced against any other person claiming under him by a title arising subsequently to the contract, *except* a transferee for value who has paid his money

*in good faith and without notice of the original contract.*

*Illustrations*

- (a) A contracts to convey certain land to B by a particular day. A dies intestate before that day without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically.
  - (b) A contracts to sell certain lands to B for Rs 5,000. A afterwards conveys the land for Rs 6,000 to C, who has notice of the original contract. B may enforce specific performance of the contract as against C.
  - (c) A contracts to sell land to B for Rs 5,000. B takes possession of the land. Afterwards A sells it to C for Rs 6,000. C makes no inquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C.
  - (d) A contracts, in consideration of Rs 1,000, to bequeath certain land to B. Immediately after the contract, A dies intestate and C takes out administration to his estate. B may enforce specific performance of the contract against C.
  - (e) A contracts to sell certain land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his committee. B may specifically enforce the contract against C.
3. Specific performance can also be enforced against any person claiming under a title which, though, prior to the contract, and known to the Plaintiff, might have been displaced by the Defendant.

*Illustrations*

- (a) A, the tenant for life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed, A dies. C may enforce specific performance of the contract against B.
  - (b) A and B are joint tenants of land, his undivided moiety of which either may alienate in his lifetime, but which subject to that right, devolves on the survivor. A contracts to sell his moiety to C and dies. C may enforce specific performance of the contract against B.
4. When a company has entered into a contract, and it subsequently becomes amalgamated with another company, specific performance can be enforced against the new company which arises out of the amalgamation.
- Thus, X Ltd. enters into a contract with Mr. A. Subsequently the company is amalgamated with Y Ltd., and a new company, Z Ltd., comes into existence. In the circumstances, Mr. A can enforce the contract against Z Ltd.
5. When the promoters of a company have, before incorporation, entered into a contract for the purpose of the company, and such a contract is warranted by the terms of its incorporation, specific performance can be enforced against the company, *provided* —
- (i) the company has accepted the contract; *and*
  - (ii) it has communicated such acceptance to the other party to the contract.

**I. Non-enforcement of a contract - except with a variation (S. 18)**

If one party to a contract seeks specific performance of a written contract, and the other party sets up a variation to such a contract, specific performance will *not* be granted, *except* with such variation in the following *three cases*:

- (a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought, is, in its terms or effect, different from what the parties agreed to, or



- does *not* contain all the terms agreed to between the parties, on the basis of which the defendant entered into the contract;
- (b) where the object of the parties was to produce a certain legal result, which the contract as framed is *not* calculated to produce;
  - (c) where the parties have, subsequently to the execution of the contract, varied its terms.

#### *Illustrations*

1. A, B and C sign a writing by which they purport to contract each to enter into a bond to D for Rs 1,000. In a suit by D to make A, B and C separately liable each to the extent of Rs 1,000, they prove that the word "each" was inserted by mistake; that the intention was that they should give a joint bond for Rs 1,000. D can obtain the performance sought only with the variation thus set up.
2. A sues B to compel specific performance of a contract in writing to buy a dwelling-house. B proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by B.
3. A contracts in writing to let to S a wharf, together with a strip of A's land delineated in the map. Before signing the contract, B proposed *orally* that he should be at liberty to substitute for the strip mentioned in the contract, another strip of A's land of the same dimensions, and to this A expressly assented. B then signed the written contract. A *cannot* obtain specific performance of the written contract except with the variation set by B.
4. A contracts in writing to let a house to B, for a certain term, at the rent of Rs 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing; so, with B's consent, A pulls it down and erects a new house in its place, B contracting *orally* to pay rent at Rs 120 per mensem. B then sues to enforce specific performance of the contract in writing. He *cannot* enforce it except with the variation made by the subsequent oral contract.

S. 18 embodies the result of many English cases of which *Woolam v. Heam* is the leading one and which recognises the distinction between a *plaintiff seeking* and a *defendant resisting* specific performance. It is quite clear from Ss. 91 and 92 of the Indian Evidence Act that when the terms of a contract are reduced to writing, a *plaintiff cannot* give oral evidence to make out a variation; but then that does *not* debar a *defendant* from showing that by reason of fraud or misrepresentation, the writing does *not* contain the true contract; he can, under S. 92, give oral evidence to prove this. Thus, it is that proof of the variation which is permitted to the defendant, and a plaintiff in that case *cannot* have a decree *unless* he submits to the variation. The plaintiff is put on his election *either* to have his action for specific performance dismissed *or* have it subject to the variation.

In other words, the benefit of S. 18 is available only to the defendant, and *not* to the plaintiff.

The scope and principle of this section is discussed at length by Tottenham, J. in *Narain Patro v. Aukhery Narain* thus: "S. 18 does *not* apply unless there is a complete contract; it sets out cases in which contracts *cannot* be enforced except with a variation, and there are particular cases set out in which a contract may be enforced subject to variation, such variation being in favour of the defendant, and the section in our opinion assumes that the parties are agreed as to the existence of the contract but *not* agreed as to specific terms. The section provides that, when fraud or mistake of fact or misrepresentation has induced the *defendant* to sign an agreement, that agreement can only be enforced on the terms which the defendant intended to agree to. There is no provision of law of which we are aware which entitles the *plaintiff* to claim a variation in the terms of his contract when he finds that the contract itself *cannot* be carried out."

#### J. Court's discretion when decreeing specific performance (S. 20)

Specific performance, being an *equitable remedy*, is totally a matter of the Court's discretion, to be exercised in the facts and circumstances of the case. The Court is *not* bound to grant specific performance *only because it is lawful to do so*.

As observed by the Supreme Court, grant of a decree for specific performance is *not automatic*, but is one of discretion of the Court. The Court must consider what would be *just, fair and equitable*. (*Gobind Ram v. Gian Chand*, AIR 2000 SC 3106)

However, this discretion vested in the Court is *not arbitrary*, but *sound and reasonable*, to be guided by judicial principles. Such discretion is always capable of being corrected by a higher court (*i.e.* a Court of Appeal). (*Sardar Singh v. Krishna Devi*, (1994) 2 SC. 237)

It is to be noted that *no litigant can claim specific performance as a matter of right*. For instance, even if the plaintiff satisfies all the requirements of S. 10, the Court is *not* bound to grant specific performance of a contract, *just because it is lawful to do so*.

In every suit for specific performance of a contract the Court has to consider whether, in the exercise of its discretion, the agreement is one which ought to be specifically enforced, having regard to the fact whether the enforcing of the contract would *not* inflict more injury upon the defendant than confer benefit upon the plaintiff. The conduct of the party applying for the relief is always an important element for consideration.

There are, however, *three* cases in which the Court may properly exercise jurisdiction *not* to decree specific performance, namely, -

- (a) where the terms of the contract *or* the conduct of the parties at the time of entering into the contract *or* the other circumstances under which the contract was entered into are such that the contract, *though not voidable*, gives the plaintiff an *unfair advantage* over the defendant;
- (b) where the performance of the contract would involve *some hardship* on the defendant which he did *not* foresee, whereas its nonperformance would involve *no such hardship* on the plaintiff; *or*
- (c) where the defendant entered into the contract under circumstances which, *though not rendering the contract voidable*, makes it *inequitable* to enforce specific performance.

It is clarified that mere inadequacy of consideration, *or* the mere fact that the contract is onerous (*i.e.* burdensome) to the defendant, or improvident (*i.e.* unwise) in its nature, shall *not* be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Moreover, the question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b), (except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract), is to be determined with reference to the circumstances existing *at the time of the contract*.

In the matter of exercise of the Court's discretion, S. 20 provides *two further guiding principles*, as under:

- (1) The court may properly exercise discretion to decree specific performance in any case where

the plaintiff has done substantial acts *or* suffered losses in consequence of a contract capable of specific performance.

- (2) The Court shall *not* refuse to any party specific performance of a contract *merely on the ground* that the contract is *not* enforceable at the instance of the other party.

Commenting on the Court's discretion in such cases, the eminent jurist, *Story*, observes as under:

"In truth, the whole exercise of this whole branch of equity jurisprudence is *not* a matter of right in either party but is a matter of discretion in the Court *not* indeed of arbitrary and capricious discretion dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but at the same time, which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will *not* furnish any exact measure of justice between the parties."

In exercising its discretion, the Court would be guided by the following *three* maxims of equity:

- (a) He who seeks equity must do equity.
- (b) He who comes to equity must come with clean hands.
- (c) Delay defeats equity.

The first maxim, "*He who seeks equity must do equity*", has the following implications:

- (1) a party seeking to obtain an equitable remedy must stand in conscientious relations towards his adversary;
- (2) the transaction from which his claim arises must be just and fair in its terms;
- (3) the relief itself must *not* be oppressive or hard upon the defendant;
- (4) the relief must be so modified and shaped as to recognise, protect and enforce the defendant's rights arising from the same subject matter, as well as those of the plaintiff.

The second maxim, "*He who comes to equity must come with clean hands*", implies that the plaintiff must *not only* have a legal claim, *but also* his conduct must be fair and free from blemishes.

As observed by the Supreme Court, if the terms and conditions of an agreement show that the Plaintiff is trying to take unfair advantage over the Defendant, it *cannot* be said that he is coming to the court with clean hands. As granting of a decree for specific relief is discretionary, the court would refuse specific performance. (*A. C. Arulappa v. A. Naik*, AIR 2001 SC 2783)

The third maxim, "*Delay defeats equity*", must be carefully noted. The Law of Limitation, except in very few limited circumstances, does *not* give any discretion and it bars the remedy. But the doctrine of delay or laches in equity means something different.

The third principle that regulates the discretion of the Court in granting specific performance of a contract is reflected in the maxim of equity "Delay defeats equity". Delay, under this maxim, is not delay as understood under the law of limitation. Under the law of limitation, a particular period is prescribed and generally, after the lapse of such time, the remedy is barred. But under the doctrine of delay or laches, the position is different. Laches is *not* mere delay, but it is a delay that works disadvantages to the *defendant*. Generally, so long as the parties are in the same condition, *it matters not* whether one seeks a remedy promptly or after some delay, within the limit allowed by law. But delay on the part of the plaintiff may work to the disadvantage of the defendant for various reasons. It may be that there is loss of evidence; there may be change of

title and intervention of equity. In such cases, negligence on the part of the plaintiff would cause injury to the defendant; therefore, the courts may deny any relief. (*Chase v. Chase*, 37 AD. 804)

It should be noted that the doctrine of delay or laches is *not* an arbitrary or a technical doctrine. It is generally based on the following two considerations:

*Firstly*, such delay on the part of the plaintiff might fairly be regarded as equivalent to a waiver or an abandonment of the right. Such waiver might operate as an estoppel.

*Secondly*, the plaintiff's conduct and neglect may put the other party in a situation in which it may *not* be reasonable to place him if the remedy was asserted in time.

The following factors must be taken into consideration, while deciding as to whether the delay bars the remedy or not:

- (a) the length of the delay, *and*
- (b) the nature of the act done during the interval which might affect either party and cause a balance of justice or injustice in taking one course or the other. (*Lindsay Petroleum Co. v. Hurd* (1873) 5 P.C. 221)

*Illustrations of the exercise of the Court's discretion*

- a) A, a tenant for life of a certain property, assigns his interest therein to B. C contracts to buy, and B contracts to sell, that interest. Before the contract is completed, A receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact and C did *not*, specific performance of the contract should be refused to B.
- b) A contracts to sell to B the interest of C in certain stock-in-trade; it is stipulated that the sale shall stand good even though it should turn out the C's interest is worth nothing. In fact, the value of C's interest depends on the results of certain partnership accounts on which he is heavily in debt to his partners. This indebtedness is known to A, but *not* to B. Specific performance of the contract should be refused to A.
- c) A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary, for its owner, to maintain an expensive embankment. B does *not* know of this, and A conceals it from him. Specific performance of the contract should be refused to A.
- d) A's property is put up to auction. S requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere "puffer" and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.
- e) A is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase money shall go to B. A, forgetting the condition contracts, before the expiration of the twenty-five years, to sell the land to C. Here, the enforcement of the contract would operate so harshly on A that the Court will *not* compel its specific performance in favour of C.
- f) A and B trustees, join their beneficiary, C, in a contract to sell the trust estate to D, and personally agree to exonerate the estate from heavy encumbrances to which it is subject. The purchase money is *not* nearly enough to discharge those encumbrances, though at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.
- g) A, the owner of an estate, contracts to sell it to S, and stipulates that he (A) shall *not* be

- obliged to define its boundary. The estate really comprises a valuable property *not* known to either to be part of it. Specific performance of the contract should be refused to *B*, unless he waives claim to the unknown property.
- h) *A* contracts with *B* to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that *A cannot* make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to *B*, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.
  - i) *A*, a lessee of mines, contracts with *B*, his lessor, that at any time during the continuance of the lease, *B* may give notice of the desire to take the machinery and plant used in and about the mines and that he shall have the articles specified in the notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to *B*.
  - j) *A* contracts to buy certain land from *B*. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to *B*.
  - k) *A* contracts with *B* to buy from *B's* factory, and *not* elsewhere, *all* the goods of a certain class used by *A* in his trade. The Court *cannot* compel *B* to supply the goods, but if he does *not* supply them, *A* may be ruined unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to *B*.

#### Cases

In one case, it was found that the house agreed to be sold was the only house of an aged couple, and the husband had died a few months after the agreement; thus, it was the only property left with the widow with which she *could eke* out her livelihood. The plaintiff (buyer) was a businessman who owned another house and a shop. It was *held* that in view of the hardship involved to the widow, the suit for specific performance should be dismissed, and the purchase money already paid was directed to be refunded. (*Ranganayakamma v. Govinda Narayan* AIR 1983 Kant. 264)

*Cohen v. Nossdale Ltd.*, (1981) All E.R. 118. - In this case, it was *held* that no order for specific performance can be given where the contract is a conditional one, as for instance, where it is "subject to contract".

*A* sells land to a Railway Company, which contracts to execute certain work for his convenience. The company takes the land and uses it for their Railway. Specific performance of the contract should be decreed in favour of *A*.

#### K. Court's power to award compensation (S. 21)

When a person sues for specific performance of a contract, he may, in the same suit, also claim compensation for the breach of that contract, *either in addition to, or in substitution of*, such specific performance.

Even in cases where the Court feels that specific performance of a particular contract *cannot* be granted, but that the defendant has committed a breach thereof, it may award *compensation* to the plaintiff, if the latter is entitled to such compensation.

Even in cases where specific relief is granted, the Court may award compensation if it is of the view that awarding only specific performance would *not* do justice in the facts and circumstances

of the case.

In all such cases, the grant of compensation is to be governed by the principles contained in S. 73 of the Indian Contract Act, 1872 (which incorporates the rule in the famous English case, *Hadley v. Baxendale*).

However, before compensation can be awarded under S. 21, it is necessary that the plaintiff should have claimed compensation in his plaint. If he has *not*, the Court should allow him to *amend* the plaint (to include such a claim) at any stage of the proceedings, on such terms as may be deemed just.

It is further clarified that, if for any reason, the contract has become incapable of specific performance this fact would *not* prevent the Court from granting compensation under S. 21.

The Punjab High Court has observed that just because the Plaintiff has asked for an alternate relief by way of a decree for money, this is no ground to refuse the principal relief by way of specific performance. (*Baldev v. Chhota*, AIR 2002 Pun. 47)

The above line of thinking is also reflected in a decision of the Supreme Court, where it was observed that specific performance is *not* to be denied even if the Plaintiff asks for damages as an alternative to specific performance. (*Motilal v. Ramdasi*, AIR 2000 SC 2408)

#### *Illustrations*

- (1) A contracts with B to sell him a house for Rs 500000, the price to be paid and the possession given on the 1st January, 2008. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 2009. The decree may, besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.
- (2) A, a purchaser, sues B, his vendor, for specific performance of a contract for sale of a patent. Before the hearing of the suit, the patent expires. The court may award A compensation for the nonperformance of the contract and may, if necessary, allow him to amend the plaint for that purpose.
- (3) A sues for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award A compensation for the non-performance.

#### *Legal position in England*

It is interesting to note that, in England, before the passing of the Judicature Acts, an Equity Court could *not* grant compensation to a plaintiff, if it refused to decree specific performance in his favour. After the Judicature Acts, this anomaly has been removed, and the Court can, today, grant damages either in addition to, or in substitution of, specific performance, as under S. 21 of the Indian Act.

L. Power to grant specific relief for possession, partition, *etc.* (S. 22)

Three rules are laid down in this connection, as under:

- (1) Notwithstanding anything to the contrary contained in the Code of Civil

Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for -



- (a) possession or partition and separate possession, of the property, *in addition to* such performance; *or*
  - (b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.
- (2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed.

*Provided that*, where the plaintiff has *not* claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim- for such relief.

Stretching S. 22 to the furthest, it has been *held* that an amendment for inclusion of relief of possession can also be asked for during the pendency of an execution of a decree for specific performance. (*Zorawar v. Rohtas*, AIR 2002 NOC 361, Punj.)

- (3) The power of the Court to grant relief under clause (b) above, is without prejudice to its powers to-award compensation under Section 21.

#### **M. Liquidated damages, *not* a bar to specific performance (S. 23)**

A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in the case of its breach and the party in default is willing to pay the same, if the Court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named *only for* the purpose of securing performance of the contract, *and not for* the purpose of giving to the party in default an option of paying money in lieu of specific performance.

When enforcing specific performance as above, the Court shall *not* also decree payment of the sum so named in the contract.

Even if a sum is named in a contract for the sale of immovable property as the amount to be paid in case of breach and the purchaser is willing to pay it, the vendor can, nevertheless, insist on the specific performance of the contract *provided that* the contract is otherwise proper to be specifically enforced.

*The principle of this section applies to injunction as well.* Thus, it was decided in *Madras Rly. Co. v. Rust*, (1891, 14 Mad. 18) that if a case is a proper one for an injunction, the fact that the contract contains a provision for a penalty for its non-performance is no bar to the granting of an injunction.

#### ***Illustrations***

- (1) A contracts to grant B an under-lease of property held by A under C, and that he will apply to C for a licence necessary to the validity of the under-lease, and that, if the licence is *not* produced, A will pay B Rs 10,000. A refuses to apply for the licence and offers to pay B the RS 10,000 B is nevertheless entitled to have the contract specially enforced, if C consents to give the licence.
- (2) The elder of two brothers, acting with the authority of the younger, agreed to sell a land, stipulating that the younger brother was to join in the conveyance, and in the case of default by him, the advance of Rs 200 should be paid as damages. Subsequently, the brothers sold the

property to a stranger, who purchased with notice of the agreement. It was *held* that the mere fact that there was a provision for damages did *not* disentitle the plaintiff to claim specific performance. (*Sanyali Solagan v. Nagamutha*, 84 I.C. 612)

#### **N. No suit allowed for breach of contract if suit for specific performance is dismissed (S. 24)**

S. 24 lays down that if a suit for specific performance of a contract (or part thereof) is dismissed, the plaintiff *cannot* sue for compensation for breach of that contract (or part thereof, as the case may be). However, he does *not* lose his right to sue for any other relief to which he may be entitled, by reason of such breach. In other words, if the plaintiff had any desire to recover compensation, he should have asked for it (as an alternate remedy) in the same suit as the one wherein he claimed specific performance of that contract.

The object of S. 24 is to avoid multiplicity of legal proceedings.

#### *Cases*

1. Where, in an agreement it is stipulated that if the transaction falls through for default of the vendor (defendant), the vendee (plaintiff) would be free to enforce specific performance, and if it falls through owing to the vendee's default, he will be entitled to a refund of the deposit. The Court, if it denies specific performance, can order the vendor to deposit the amount of the purchase money, in the same suit, in order to stop fresh litigation. The vendee can, notwithstanding the dismissal of his suit for specific performance, bring a suit for recovery of the deposit. (*Raghunath v. Chandra*, 17 C.W.N. 100)
2. Where the plaintiff has paid the defendant's money on a contract under which the latter undertook to renew a *kanom*, and his suit for specific performance was dismissed, it was *held* that a suit for recovery of renewal fees can be filed. (*Parangodan v. Perumtoduka*, 27 Mad. 380)
3. Where a suit by a minor plaintiff for specific performance of a contract entered into by him is dismissed on the ground of want of mutuality for the contract, the minor can nevertheless sue for refund of the earnest money paid by him. (*Abdul Rahman v. Rahim Baksh*, A.I.R. 1929 Lah. 332)

#### **O. Application of Chapter to arbitration awards and testamentary directions (S. 25)**

The provisions of this Chapter (*i.e.* all the above sections) relating to contracts also apply to awards to which the Arbitration Act does *not* apply, as also to directions in a will or codicil to execute a particular settlement.

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## Chapter - III

### RECTIFICATION OF INSTRUMENTS (Section 26)

Questions:

Explain in detail the provisions regarding rectification of instruments under the Specific Relief Act. B.U. Nov. 2015

Write a short note on : Rectification of Instruments. B.U. Apr. 2008 Apr. 2013 Apr. 2015

What is rectification of an instrument? (2 marks) B.U. Nov. 2008 Nov. 2010 Nov. 2013

When can an instrument be rectified? Who can claim the remedy of Rectification? B.U. Apr. 2016

When can instrument be rectified under the Specific Relief Act? (2 marks) B.U. Apr. 2009 May 2012

What is rectification of an instrument? When can an instrument be rectified? B.U. Nov. 2012 May 2017

When can one apply for rectification of an instrument? (2 marks) B.U. Nov. 2014

At times, a document does *not* reflect the *actual intent* of the parties. Thus, for instance, there might be a mistake on the part of both the parties as a result of which what was intended was *one thing*, and what the document contains is quite *something else*. When a document thus does *not* express the intention of the parties, the Court has jurisdiction to *rectify* such an instrument, so that it may express their actual intent. Thus, for instance, a sale deed may be rectified when more land is included in the written document (for instance, 3.2 acres) than what the vendor intended to sell and the purchaser intended to buy (for instance, 2.3 acres).

- S. 26, therefore, provides that where, due to (i) *fraud* or (ii) *mutual mistake* of the parties, a contract - or any other written instrument does *not* express the *real intention* of the parties,
- (a) *either party*, or his representative in interest, can institute a suit for rectification of the instrument;
  - (b) *the plaintiff* can, in any suit to enforce his right under the contract, claim that such instrument be rectified;
  - (c) *the defendant* can, in any suit, ask for rectification of the instrument, *in addition to* any other defence open to him.

If, in such a suit, the Court finds that, through fraud or mutual mistake, the instrument does *not* express the real intention of the parties, it may, in its discretion, direct *rectification* of the instrument, so as to express such intention. This must, however, be done so far as is possible, without prejudice to any right acquired by third parties (i) in good faith, *and* (ii) for value.

S. 26 covers *not only* a contract, *but* any instrument in writing, *e.g.* a will or a deed or a marriage settlement, the *only exception* being Articles of Association of a company to which the Companies Act, 1956, applies. Thus, Articles of Association of a company *cannot be rectified* by a Court *even if* they do *not* reflect the real intention of the signatories. This exception is based on the ruling of the Court of Appeal in *Scott v. Frank F. Scott (London) Ltd.*, 1940 Ch. 794.

Under S. 26, a written contract may first be rectified, and then specifically enforced, if so prayed for by the party claiming rectification.

However, a Court *cannot* rectify an instrument *unless* the party has specifically claimed such relief. Even if a party has *not* specifically asked for rectification, the Court must allow him to

amend his pleading, at any stage of the proceeding, on such terms as it may deem just.

Before S. 26 can apply, the following *five conditions* should be fulfilled:

- (a) There must be, in fact, a genuine contract between the parties, which is different from the one in writing.
- (b) There must be either *fraud* or *mutual mistake*. Unilateral mistake will *not* suffice; it must be a mutual mistake, *i.e.* mistake on the part of *both* the parties.
- (c) Such mutual mistake must be in the *expression* of the contract, and *not* in its *formation*.
- (d) The rights of *bona fide* purchasers for value without notice should *not* be affected as far as possible.
- (e) S. 26 covers *not only* written contracts, *but* all written documents like deeds, marriage settlements *etc.*

The underlying principle of S. 26 was stated by *Story*, thus:

"Sometimes, the written agreement contains more, sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by entirely satisfactory proof, equity reforms the written instrument so as to make it conformable to the precise intent of the parties. A court of equity would be of little value if it could suppress only positive frauds, and leave initial mistakes innocently made to work intolerable mischief, contrary to the intention of the parties."

Before the doctrine of rectification can apply, there must be a *complete and perfectly unobjectionable contract* between the parties. Only the writing purporting to embody such a contract is either *incorrect* or *imperfect*, and the Court is called upon to rectify that writing, so as to bring it in conformity with the *true intention of the parties*. In such cases, "to enforce the instrument as it stands would be *to injure at least one party* to it; to rescind it altogether would be *to injure both*; but to rectify it and then enforce it, would be *to injure neither* and carry out the intention of both".

### ***Rectification of marriage settlements***

As regards marriage settlements, the following guiding principles have been laid down by the Courts:

- (1) If the settlement was made *after* marriage, it will always be rectified, so as to conform to the ante-nuptial articles of agreement.
- (2) If the settlement was made *before* marriage, it will be rectified *only if*-
  - (a) it is expressed to be made in pursuance of the articles of agreement; *or*
  - (b) there is evidence to prove that it was intended to conform to such articles.

**Problem 1 :** By a marriage settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators and assigns, during A's life, an annuity of Rs 5,000. C dies insolvent, and the Official Assignee claims the annuity from A. Can the marriage settlement be rectified by the Court?

**Ans.:** *Yes*; if it is clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, the Court may rectify the settlement, and declare that the Official Assignee will have *no right* to any part of the annuity.

**Problem 2:** A intending to sell to B, his house and *one* of the three godowns adjacent to it, executes a conveyance prepared by B, in which, through B's fraud, *all the three godowns* are included. Of the two godowns which were fraudulently included, B gifts one to C, and lets the

other to D for a rent, neither C nor D having any knowledge of the fraud. Can the conveyance be rectified?

Ans.: The conveyance may be rectified as against B and C, so as to exclude from it the godown gifted to C. But, it *cannot* be rectified so as to affect the lease to D, as D is a *bona ride* lessee for value without notice of B's fraud.

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## Chapter - IV

### RESCISSION OF CONTRACTS (Sections 27 to 30)

Questions:

Write short notes on: Rescission of contracts. B.U. Npn 2007, Nov. 2008, Apr 2014, Apr 2015.

What is rescission of contract? ( 2 Marks) B.U. Apr 2010, Nov 2012, Apr 2013.

When can one apply for rescission of a contract? (2 marks) B.U. Nov. 2015

What is rescission of a contract? When can rescission of a contract be granted or refused by the court? B.U. Apr. 2009 Apr. 2011 Nov. 2013

When can rescission of a contract be allowed? B.U. Nov. 2009

What are the circumstances in which a contract can be rescinded? (2 marks) B.U. Nov. 2010

Under the Specific Relief Act, what is the alternate relief in a suit for specific performance? (2 marks) B.U. Nov. 2009 Jan. 2017

Write a short note on: Alternate relief for rescission in a suit for specific performance.

B.U. Apr. 2011

Chapter IV of the Act (Ss. 27 to 30) deals with the power of the Court to *rescind* a contract in appropriate cases, as for instance, where consent to the contract has been brought about by *coercion, fraud etc.* This Chapter is discussed under the following *four heads*:

- a) Cases in which a contract can be rescinded (S. 27)
- b) Special provisions for *sale* and *lease* of *immovable* property (S. 28)
- c) Alternate prayer for rescission in suits for specific performance (S. 29)
- d) Power of the Court to adjust equities in cases of rescission (S. 30)

Each of these is discussed below in necessary details.

#### A. Cases in which a contract can be rescinded (S. 27)

Under S. 27, any person interested in a contract may sue to have it rescinded, and the Court may do so in the following *two* cases:

- (a) Where the contract is *voidable* or *terminable* by the plaintiff, as for instance, when his consent has been obtained by fraud, misrepresentation, *etc.*; *or*
- (b) (i) Where the contract is *unlawful* for causes which are not apparent on its face; *and*  
(ii) the defendant is more to blame than the plaintiff.

The term “contract” refers to a contract in writing, in relation to those territories to which the Transfer of Property Act, 1882, does *not* extend.

For the purposes of *clause (a)* above, whenever consent of a party to the contract has been brought about by any of the factors that make a contract *voidable* under the Indian Contract Act, 1872, such a party can avoid the contract by filing an appropriate suit for this purpose. Thus, if he can show that his contract is covered by S. 19 or S. 19-A of the Indian Contract Act, he would be entitled to rescind the contract under S. 27 of the Specific Relief Act.

Thus, A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. In the circumstances, B is entitled to have the contract rescinded.

Clause (b) above, applies where the contract is unlawful, but it is *not* apparent on the face of the contract. In such cases, however the defendant should be more to be blamed than the plaintiff. If both the parties are equally guilty (*in pan delicto*), the Court would refuse to pass any order.

Thus A, an attorney, induces his client S, a Hindu widow, to transfer property to him for the purpose of defrauding S's creditors. Here, the parties are *not* equally guilty, and B is entitled to have the instrument of transfer rescinded. (*Hari v. Naro*, (1894) 18 Born. 342). But, if both parties in this case are *in pan delicto*, rescission would *not* be allowed.

Or, take the following example: A agreed to let to B, a set of rooms for delivering lectures on certain subjects forbidden by law. But, A did *not* know the subjects on which the lectures were to be held. On coming to know it, A wants to rescind the contract. Here, he can do so, because B is more to blame than A. If the contract is *not* rescinded, the result will be that an act which is forbidden by law would have to be enforced.

### ***When rescission will not be allowed***

- S. 27 lays down *four cases* in which the Court may refuse to rescind the contract, namely,
- (i) where the plaintiff has - expressly or impliedly - ratified the contract; *or*
  - (ii) where, owing to a change of circumstances which has taken place since the making of the contract (*not* brought about by the defendant himself), the parties *cannot* be substantially restored to the position in which they stood when the contract was made; *or*
  - (iii) where, during the subsistence of the contract, third parties have acquired rights (a) in good faith, (b) without notice, *and* (c) for value; *or*
  - (iv) where only *a part* of the contract is sought to be rescinded, and such part is *not severable* (*i.e.*, it *cannot* be separated) from the rest of the contract.

Thus, A purchases a house from B, and B's consent was brought about by a misrepresentation on A's part. This contract is *voidable* at B's option. However, before the contract is avoided by B, A sells the house to C, who buys it in good faith and without notice of the voidable nature of the contract between A and B. Now, B *cannot* rescind the contract, as the case falls under clause (iii) above.

Likewise, X agrees to sell 5 horses and 3 donkeys to Y for a lump sum price of Rs 30,000. X alleges that, as far as the *horses* are concerned, his consent was brought about by Y's fraud, although there was no such fraud in respect of the *donkeys*. Now, this is *not* a contract which is severable, and the Court may refuse to rescind the entire contract (under clause (iv) above).

The Supreme Court has observed that if the vendor is guilty of a long and unexplained delay of *three years* for filing a suit for rescission of the contract after service of notice, he would *not* be entitled to the equitable relief under S.27 of the Act. (*Lalit Kumar v. Jaipur Traders*, 2002 5 SEE 383)

### **B. Special provisions for sale and lease of immovable property (S. 28)**

if specific performance has been ordered in the case of a sale or a *lease* of immovable property and the purchaser (or lessee) does *not* pay the purchase (or lease) money within the time stipulated by the Court, the vendor (or the lessor) may ask for a rescission of the contract, and the Court may rescind the contract, either altogether, or as regards the party in default, as may be

deemed just by the Court.

In such cases, the Court can direct the purchaser or the lessee to restore possession of the immovable property, in cases where he has already obtained possession of such property. It may further direct the purchaser or lessee to pay to the vendor or the lessor, all the rents and profits which have accrued from the date of possession until restoration of the property.

If, on the other hand, the purchaser or lessee has paid the money which he is directed to pay within the stipulated time, the Court may give the appropriate relief to such purchaser or lessee, as for instance, execution of a proper conveyance or lease in his favour, and delivery or possession of the property in question.

### **C. Alternate prayer for rescission in suits for specific performance (S. 29)**

Whenever a plaintiff sues for specific performance of a contract in writing, he can pray, *in the alternative*, that if the contract *cannot* be specifically enforced, it may be rescinded and delivered up to be cancelled, and the Court may order accordingly.

Such a prayer in the Complaint would run as under:

*The Plaintiff prays that this Hon'ble Court may be pleased to direct the Defendant to specifically perform the said contract dated 1st April, 2012, and in the event of this prayer not being granted, it is prayed that this Hon'ble Court may direct that the said contract be rescinded and delivered up to be cancelled.*

### **D. Power of the Court to adjust equities in case of rescission (S. 30)**

Whenever a Court rescinds a contract, it may require the party to whom such relief is granted, to restore, so far as may be, - any benefit which he may have received from the other party, and to compensate the other party, if justice so requires. *Any person who seeks equity must also do equity.*

Thus, A agrees to sell his house to B, in circumstances which show that A's consent was caused by fraud or misrepresentation. A has also received 10% of the consideration from B as an advance. When A discovers the fraud or misrepresentation, he may approach the Court to have the contract rescinded. However, in such a case, when ordering rescission of the contract, the Court may also direct A to refund the advance amount paid to him.

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## Chapter - V

### CANCELLATION OF INSTRUMENTS (Sections 31 to 36)

Questions:

Explain in detail the provisions regarding cancellation of instruments under the Specific Relief Act. B.U. Nov. 2015

Write a short note on: Cancellation of instruments B.U. Nov. 2007 Apr. 2009 May 2012

Under what circumstances can a person sue for cancellation of an instrument? How is cancellation of an instrument different from rescission of a contract? B.U. Apr. 2010 May 2017

Under the circumstances can a court order cancellation of an instrument? B.U. Nov. 2008 Apr. 2010 Apr. 2011 Apr. 2016 May 2017

When can a court order cancellation of an instrument? (2 marks) B.U. Apr. 2011 Oct. 2011 Nov. 2012 Nov. 2013 Apr. 2014 Apr. 2015

This Chapter is discussed under following *three* heads:

- A. When can a Court direct cancellation of an instrument (S. 31)
- B. Partial cancellation of instruments (S. 32)
- C. Power of the Court to adjust equities in cases of cancellation of instruments (S. 33)

Each of these is discussed below in necessary details.

#### A. When can a Court direct cancellation of an instrument (S. 31)

Under S. 31, any person against whom a written instrument is either *void* or *voidable*, may sue to have it adjudged void or voidable, if he has *reasonable apprehension* that such an instrument may cause serious injury if left outstanding. Thereupon, the Court may, *in its discretion*, adjudge such instrument as void or voidable and order it to be When can a court order cancellation of an instrument? (2 marks) B.U. Apr. 2011 Oct. 2011 Nov. 2012 Nov. 2013 Apr. 2014 Apr. 2015 *delivered up and cancelled*.

If such an instrument has been registered under the Indian Registration Act, the Court also sends a copy of its order to the Registering Officer, who must note the fact of its cancellation in his records.

It is clear that S. 31 comes into play only in the case of *written instruments* which are either *void* or *voidable*. The further ingredient to be satisfied is that if an instrument is left uncanceled there is a *reasonable apprehension* that it would cause *serious injury* to the plaintiff.

#### Illustrations

- (a) A, the owner of a ship, by fraudulently representing it to be seaworthy, induces B, an underwriter, to insure it. B may obtain the cancellation of the policy.
- (b) A conveys land to B, who bequeaths it to C and dies. Thereupon, D gets possession of the land, and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.
- (c) A, representing to B that the tenants in his land were all at will, sells it to B, and conveys it to him by an instrument dated 1st January, 2012. Soon after that day, A fraudulently grants to C, a lease of parts of the lands, dated 1st October, 2011, and procures the lease to be registered

under the Indian Registration Act. 8 may obtain the cancellation of this lease.

- (d) A agrees to sell and deliver a ship to B, to be paid for by B's acceptance of four bills of exchange for sums amounting to ₹ 30,000 to be drawn by A on C. The bills are drawn and accepted, but the ship is *not* delivered according to the agreement. A sues B on one of the Bills. B may obtain the cancellation of *all* the bills.

S. 31 is based on the principle of *quia timet*, i.e., *protective or preventive justice*. The Court will exercise its discretion to cancel an instrument when it is apprehended that such an instrument may *vexatiously* or *injuriouly* be used against the plaintiff in the future. If there is no such apprehension, no suit will lie under S. 31. In such cases, relief is granted *before* any violation of the plaintiff's rights has taken place, *and before* actual injury has been sustained by him. In such cases, the Court intervenes to prevent irreparable mischief and multiplicity of suits *before* it actually takes place, on the principle of *quia timet*. The foundation of the Court's jurisdiction in such cases is the *administration of protective justice*.

However, like other reliefs under the Specific Relief Act, the Court will exercise *sound judicial discretion* in passing an order, and *no party can claim to be entitled to it as a matter of right*.

The Delhi High Court has *held* that it is a well-established principle of law that if a document or decree is void, the person affected by it can ignore the same, and sue for substantive relief, without seeking any declaration that it is void or any consequential relief for its cancellation. (*Sanjay Kaushik v. D. C. Kaushik*, AIR 1992 Del. 118)

It is to be noted that if a particular document is void in the eyes of law, it is a nullity, and it does *not* bind the parties, *even if* A is not cancelled. However, if such a document is allowed to remain in existence for a long time, it is capable of misleading several persons, and may give rise to several transactions and consequential litigation. In this process, it may cause substantial injury to the person whose rights are affected by it, resulting in protracted and avoidable litigation. In such cases, if the document is delivered up and cancelled, a lot of potential mischief and confusion can be thereby avoided.

The relief under S. 31 can be obtained by *any person* against whom the written instrument is *void* or *voidable*. Such a person need not even be a party to that instrument. Thus, a creditor can sue under S. 31 in respect of a document executed by his debtor with another party. (*Ishwarv. Dewar*, (1903) 27 Born. 146)

### ***Difference between cancellation and rescission***

Rescission of a contract is also a relief available (under S. 27) to a person who is *not a* party to the contract. However, there are *four* material points of difference between the two, as under:

- (i) S. 27 is limited to contracts, whereas S. 31 applies to *all written instruments*.
- (ii) Whereas S. 31 applies only to instruments in writing, S. 27 covers all contracts (except as regards territories to which the Transfer of Property Act does *not* apply).
- (iii) Under S. 27, there is no requirement of reasonable apprehension of serious injury to the plaintiff, - which is an essential ingredient of S. 31.
- (iv) Whereas S. 27 covers *voidable* contracts, S. 31 covers written instruments which are *void* or *voidable*.

**Problem:** On 12th March, 2012, C sued D to recover on a bond passed by D to C. To this suit, the defence was that the bond was void, being passed for the balance due on wagering transactions.

While this suit was pending, *D* brought a suit on 10th December, 2012, to have the abovementioned bond cancelled and delivered up to him under S. 39 of the Act. Would this suit succeed?

**Ans.:** The form of specific relief under S. 39 of the Act is founded upon the administration of protective justice for fear. In the present case, there could be no fear that *D* would suffer serious injury if he did *not* bring the second suit, for the plea which is the foundation of the second suit was actually raised by him as a defence in the first suit. Thus, there was no necessity to file the second suit. The suit will *not succeed*. (*Chhaganlalv. Dhondu*, (1903) 27 Born. 607)

### **B. Partial cancellation of instruments (S. 32)**

In some cases, it may be *neither just nor equitable* to cancel the entire instrument. S. 32, therefore, provides that where an instrument is evidence of different rights or of different obligations, the Court may, in a proper case, cancel it in part - and allow it to stand as far as the residue is concerned.

Thus, *A* draws a bill of exchange on *B*, who endorses it to *C*, by whom it appears to be endorsed to *D*, who endorses it to *E*. It turns out that *C*'s endorsement is forged. *C* is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

*A* agrees to grow indigo for *B* on 20 acres of land for 9 years. Of these, 16 acres are situated in village *R* and are held by *A* under a sublease from *X*, *Y* being the superior landlord. The remaining 4 acres are in village *K*, and belong to *A*. *X* fails to pay the rent to *Y*, and / resumes possession of the land. The contract being impossible of performance, *A* may obtain cancellation of the agreement only as regards the 16 acres in village *R*. (*InderPershadv. Campbell*, (1881) 7 Cal. 474)

*A* executes a deed of mortgage in favour of *B*. *A* gets back the deed from *B* by fraud, and endorses on it a receipt for Rs 20,000, purporting to be signed by *B*, the signature of *B* being forged. *B* is entitled to have the endorsement cancelled, leaving the deed to stand in other respects.

### **C. Power of the Court to adjust equities in cases of cancellation of instruments (S. 33)**

S. 33 provides that when adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

It is provided that where a defendant successfully resists any suit on the ground that the instrument sought to be enforced against him is *voidable*, the Court may, if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party, or to make compensation for the same.

Likewise, where a defendant successfully resists any suit on the ground that the agreement sought to be enforced-against him is *void* under S. 11 of the Indian Contract Act (by reason of his *not* having been competent to contract), the Court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefitted thereby.

It may be noted that, whilst S. 28 provides for compensation at the time of passing a decree for the rescission of a contract, this section makes a provision for payment of compensation at the time of cancelling an instrument.

The principles underlying S. 33 can be stated as follows:

- (a) Although the Court has ample discretion to restore the consideration in a given case, there must be strong circumstances in that case, showing that there is an equity in favour of the defendant.
- (b) No compensation should be paid where the contract is without consideration.
- (c) The discretion enjoyed by the Court under S. 33 should be so exercised as only to impose on a plaintiff seeking cancellation, such conditions as the law would have imposed if the position of the parties was reversed, and if he was the defendant in a suit brought to enforce the instrument according to its terms.

### Cases

1. Where a minor had entered into a contract, and there was no fraud or misrepresentation on his part, and *the other party knew* that the minor had a certified guardian, it was *held* that the Court rightly exercised its discretion *not* to grant compensation to the other party. (*Bachalv. Hayat*, AIR 1937, Oudh, 521)
2. The Calcutta High Court has *held* that a mortgagor who employs an attorney who also acts for the mortgagee in the mortgage transaction, must be taken to have notice of *all* the facts brought to his knowledge. Therefore, when the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy, it was *held* that the mortgagor was *not* entitled to compensation under Ss. 30 and 33 of the Act. (*Brahmo Dutt v. Dharmo Das*, 26 Cal. 381)

Where a bond executed by a minor was subsequently incorporated as a consideration for another bond executed by him on attaining majority, and the other party brought a suit on the basis of the second bond, it was *held* that *no compensation* was payable, as there was no consideration for the second bond, the bond executed during his minority being void *ab initio*. (*Ram Sarup v. Brij Mohan*, AIR 1938 Oudh, 14)

Where the plaintiff brought a suit for setting aside a mortgage deed executed by him (when he was a minor) and his mother, who was his certified guardian, and a decree was passed, conditional on his paying the full consideration of the deed, it was *held* that, as a minor's agreement is void *ab initio*, the plaintiff's suit should be decreed. (*Gaya Prasad v. Sarfaroz*, 29 IC, 972)

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## Chapter - VI

### DECLARATORY DECREES (Sections 34 & 35)

Questions:

Write a short note on : Declaratory Decrees. B.U. Apr. 2008 Nov. 2012 Apr. 2014 Apr. 2016

What is a declaratory decree under the Specific Relief Act? (2 marks) B.U. Nov. 2008 Nov. 2014

What is the purpose of a declaratory decree? (2 marks) B.U. Oct. 2011 May 2012

What is declaratory decree? When does a court grant such a decree? On whom is it binding? B.U. Apr 2013

Upon whom is a declaratory decree binding? (2 marks) B.U. Apr. 2009 Nov. 2010 Nov. 2015

What is a declaratory decree? What are the effects of a declaratory decree?

B.U. Apr. 2010

S. 34 deals with the equitable relief of passing declaratory decrees, and provides that if any person is entitled to

- (a) any *legal character*, or
- (b) any *right to any property*,

He may institute a suit against any person who denies, or is interested in denying, such character or right. The Court *may* then, in its discretion, make a *declaration* in such a suit that the plaintiff is so entitled.

It is *not necessary*, in such cases, that the plaintiff should ask for any other relief. In other words, *the only prayer* in such a suit can be for a declaratory decree. *However*, if the plaintiff is able to seek further relief than a mere declaration of title, and he omits to do so, the Court will *not* pass the declaratory decree prayed for, as this would only result in *multiplicity of legal proceedings*, as such a person might file one suit for the declaration, and one more for the other relief.

The *main object* of S. 34 is to dispel a cloud cast upon the title or legal character of the plaintiff. Though there may *not* be any immediate danger which threatens such title or legal character, yet it is equitable that such a person should be able to seek the assistance of the Court to get a declaration, so that he can peacefully enjoy the title or legal character without fear of future disturbance.

#### *Illustrations*

- (a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are *not* entitled to the right so claimed.
- (b) A bequeaths his property to B, C and D, “to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.” No such children are in existence. In a suit against A’s executor, the Court may declare whether B, C and D took the property, absolutely, *or* only for their lives, and it may also declare the interests of the children before their rights are vested.
- (c) A covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.
- (d) A alienates to B property in which A has merely a life-interest. The alienation is invalid as against C, who is entitled as reversioner. The Court may, in a suit by C, against A and S, declare that C is so entitled.
- (e) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.
- (f) A bequeaths property to B for his life, with remainder to B’s wife and her children, if any, by S; but if B dies without any wife or children, to C. B has a putative wife, D, and children, but C denies that B and D were ever lawfully married. D and her children may, in B’s lifetime, institute a suit against C, and obtain therein a declaration that they are truly the wife and children of B.

#### **Requisites of a Declaratory Decree**

Before a Declaratory Decree is passed by the Court under S. 34 of the Act, the following *six*

conditions should be satisfied:

1. *The plaintiff must prove that he is entitled to (a) any legal character or (b) a right to any property.*

The right or character claimed must be of a *legal nature*. Thus, the plaintiff can ask for a declaration that he is the legitimate child of his parents, or that he is the adopted child of a couple, or that he is legally married to a particular woman, or that he has been validly divorced from his wife. Equally, a litigant may ask for a declaration that he has a right to vote, or that he has a right to be elected as a Municipal Councilor. Likewise, a declaration may be granted that the plaintiff is entitled to remain in service, despite an illegal order of dismissal. (*State of Bihar v. Abdul Majid*, 1954 S.C.R. 786)

However, a suit *cannot* be filed for a declaration that a person has the right to receive alms, as the right to beg is *not* a legal right. (*Bansi v. Kanhiya*, (1921) 43 All. 159)

2. *The defendant should have denied or should be interested in denying the character of the plaintiff.*

A suit lies under S. 34 of the Act when there is some present threat or danger to the interest of the plaintiff. If there is no such threat or danger, and the declaration has been asked merely on speculative grounds, the suit would be *dismissed*.

Thus, a suit for a mere declaration that the plaintiff is the legitimate son of the defendant and entitled to the father's property, is *not maintainable* where the son has no present interest in the father's property, and the father can dispose it according to his wishes in his life-time. The mere fact that the father once stated that the plaintiff was his illegitimate son would make no difference. (*Mahomed Shah v. Pir Shah*, AIR 1936 Lah. 858)

It is also clarified that a trustee of a property *is* a person who would be interested to deny a title adverse to the title of someone who is *not* in existence, and for whom, if such a person was in existence, he would be a trustee.

3. *The plaintiff should not be in a position to claim any further relief, other than the declaratory relief, in the suit. If, at such time, he is able to seek further relief, he will not be granted a declaratory decree, unless he has claimed such further relief also in the same suit.*

Thus, a plaintiff who is dispossessed, and sues for a declaration of title to land, ought to pray for possession also, if the defendant is in possession of the property. Thus, it has been *held* that a suit for a declaration of a right to preemption would *not* lie if *not* followed by a prayer for consequential relief. (*Charandas v. Amirkhan*, (1921) 48 Cal. 110). Injunction and cancellation of a document have been *held* to be sufficient consequential relief.

4. *Declaratory relief cannot be availed of by a plaintiff who is himself guilty of fraudulent conduct. He who comes to equity must come with clean hands.*
5. *The Court would refuse to make a declaration which, if made, would be useless or infructuous.*

Thus, after a one-time election is over, a declaratory suit in respect of the electoral roll would be *useless* and *futile*.



6. Lastly, a bare declaration, declaring the inability of a person to do an act will not be granted if the Court has declined to restrain the very same act by an injunction.

### Effect of Declaratory Decree

S. 35 lays down the *three* classes of persons on whom a declaratory decree is binding. Such a decree is binding on:

- (a) parties to the suit in which the declaratory decree was passed;
- (b) persons claiming through such parties; *and*
- (c) if any such party is a trustee, - on the persons for whom, if such persons were in existence at the date of the declaration, such a party would be a trustee.

Thus, a declaratory decree is *not* binding on third parties. It is a *judgment in personam*, and *not in rem*, i.e., *not* of binding efficacy against the world at large.

Thus, A files a suit against B, alleging that B is his wife, and B's mother, seeking a declaration that A and B are legally married, and an order for restitution of conjugal rights. The Court makes the declaration and the order. Thereafter, C files a suit against A, claiming that B is C's wife, and that she should come back to C. Here, the declaration made in the earlier suit is *not binding* on C, as he does *not* fall within any of the three categories of persons mentioned above.

The Bombay High Court has held that a declaration given under S. 34 of the Act is a decree *in personam* and *not* a decree *in rem*. Hence, the decree binds only the parties to the litigation. (*SNP Shipping v. World Tanker*, AIR 2000 Bom. 34)

The Madras High Court has held that if the Plaintiff fails to establish the identity of the property, his suit for declaration of title and possession should *not* be allowed. (*John Sylem v. Chanthanamuthi*, AIR 2003 Mad. 374)

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## Chapter - VII

### INJUNCTIONS: TEMPORARY & PERPETUAL (Sections 36 to 42)

The following *six* topics are considered in this Chapter:

- a) Temporary and Permanent Injunctions : General principles (Ss. 36 & 37)
- b) Perpetual Injunctions: When granted (S. 38)
- c) Perpetual Injunctions: When refused (S. 41)
- d) Mandatory Injunctions (S. 39)
- e) Damages in lieu of, or in addition to, injunction (S. 40)
- f) Injunction to perform a negative covenant (S. 42)

Question:

What are the different types of injunctions under Specific Relief Act? When can an injunction be refused? B.U. Jan. 2017

What is a temporary injunction? (2 marks) B.U. Oct. 2011 Nov. 2013 Apr. 2015

What is an injunction? What is the difference between temporary and permanent injunctions?

B.U. Apr. 2014

What are injunctions? When are perpetual injunctions granted? Differentiate between temporary and permanent injunctions B.U. Nov. 2014

What is meant by injunction? When can a court grant a permanent injunction to the plaintiff?

B.U. Apr. 2008 Nov. 2012

Write a short note on perpetual injunction. B.U. May 2012 Nov. 2015

What is a perpetual injunction? (2 marks) B.U. Apr. 2013

Under what circumstances can a court refuse to grant an injunction under the Specific Relief Act?

B.U. Nov. 2008

What is an injunction? State the circumstances in which a perpetual injunction cannot be granted by the court. B.U. Nov. 2010

What is a mandatory injunction? (2 marks) B.U. Apr. 2010 Apr. 2011 May 2017

Write a short note on : Mandatory Injunction. B.U. Nov. 2007 Nov. 2008 Nov. 2013 Apr. 2014

Nov. 2014 Jan. 2017

What is a mandatory injunction? When will a court refuse to grant an injunction? B.U. Apr. 2015

Write a short note on: Damage in lieu of, or in addition to, injunction. B.U. Nov. 2010

#### A. Temporary and Permanent Injunctions: General Principles (Ss. 36 & 37)

An injunction is an Order of competent Court which

- (i) forbids the commission of a threatened wrong, or
- (ii) forbids the continuation of a wrong already begun, *or*
- (iii) commands the restoration of *status quo* (*i.e.* the former course of things).

Clauses (i) and (ii) deal with *preventive relief*, whereas clause (iii) refers to a *mandatory injunction*, which seeks to rectify (rather than prevent) the defendant's wrongful conduct.

Like all other remedies under the Act, this remedy of preventive relief is also *totally at the discretion of the Court* (S. 36), which discretion is *not arbitrary*, but is guided by *sound and reasonable judicial principles*. (S. 20)

Two types of injunctions are envisaged by Ss. 36 and 37: temporary and perpetual.

*Temporary or interim injunctions* are those which remain in force until a specified time *e.g.*, for 10 days, or till the date of the next hearing of the case, or until further orders of the Court. Such injunctions can be granted *at any stage of the suit*, and are governed by Order 39 of the Code of Civil Procedure (CPC), 1908, and *not by the Specific Relief Act*.

*Permanent injunctions*, on the other hand, are contained in the decree passed by the Court after fully hearing the merits of the case. Such an injunction perpetually prohibits the defendant from asserting a right or committing an act which would be contrary to the plaintiff's rights. Detailed provisions are made about permanent injunctions in Ss. 38 to 42 of the Specific Relief Act.

Lord Halsbury defined an injunction as “a judicial process whereby a party is ordered (i) to restrain from doing, or (ii) to do a particular act or thing.”

The *three* features of an injunction are:

1. It is a judicial process contained in an Order or Decree passed by a competent Court.
2. Normally, it restrains or prevents a person from doing a particular act or acts. In the case of an mandatory injunction, however, it commands him to do a particular act or acts and to restore *status quo*.
3. The act which is restrained or prevented is a wrongful act, which violates the legal rights of the plaintiff.

### **Difference between temporary and perpetual injunctions**

A *temporary injunction* is provisional in its nature, and continues until a specified time or until the further orders of the Court; but it does *not* conclude a right. It can be granted *at any stage of the suit*, even *ex parte*, *i.e.*, without notice to the other party. It remains in force till a specified date or until the next date of hearing, if *not* dissolved before that date. In India, the grant of temporary injunctions is regulated by 0.39 of the CPC. The *object and effect* of a temporary injunction is to preserve the property in dispute in *status quo* until the final disposal of the case.

A *perpetual injunction*, on the other hand, can only be granted by a decree made at the hearing and upon the merits of the case. It is granted when a right is established, and it then follows that no obstruction can be made or repeated in the future by the other party claiming under an adverse title. The defendant is, by such an injunction, perpetually restrained from the assertion of a right or from the commission of an act which would be contrary to the rights of the plaintiff.

The main points of difference between the two can be summarised as under:

1. A temporary injunction is passed by an order during the pendency of a suit: A *perpetual injunction* can be granted only by the decree made at the hearing and upon the merits of the case.
2. A *temporary injunction* continues only until a specified time, or until the further orders of the Court: A *perpetual injunction* finally settles the mutual rights of the parties and directs a party for all time to do, or abstain from doing, something.
3. The effect and object of a *temporary injunction* is to preserve the property in dispute in *status quo*; it does *not* conclude a right: The effect and object of a *perpetual injunction* is to give effect to and protect the plaintiff's right.

4. *Temporary injunctions* are regulated by Order 39 of the CPC:

The above points of difference may be stated in a Tabular form as under:

Temporary Injunction	Permanent Injunction
1. It is passed during the pendency of the suit.	1. It is passed at the end of the suit.
2. It continues till a time specified by the Court.	2. It remains in force for all time to come.
3. Its effect is to preserve <i>status quo</i> .	3. Its effect is to protect the rights of the plaintiff.
4. It is governed by Order 39 of the Civil Procedure Code.	4. It is governed by Ss. 38-42 of the Specific Relief Act.

B. Perpetual Injunctions: When granted (S. 38)

Subject to the other provisions of the Act, a perpetual injunction may be granted, *at the discretion of the Court*, to prevent the breach of an obligation existing in the plaintiff's favour - whether expressly or by implication. When such an obligation is contractual in nature, the rules contained in Chapter II of the Act (relating to specific performance of contracts) are also to be kept in mind.

Whenever the defendant *invades, or even threatens to invade*, the plaintiff's right to property or the enjoyment thereof, the Court may grant a *perpetual injunction* to the plaintiff in the following *four cases*:

- where the defendant is a trustee of the property for the plaintiff;
- where there is no standard for ascertaining the actual damage caused, *or* likely to be caused, to the plaintiff, by the invasion of his rights;
- where the invasion of the plaintiff's right is such that compensation in money would *not* afford adequate relief; *and*
- where the injunction is necessary to prevent *multiplicity of judicial proceedings*.

*Illustrations*

- A lets certain land to B, and B contracts *not* to dig sand or gravel there out. A may sue for an injunction to restrain B from digging in violation of his contract.
- A trustee threatens a breach of trust. His co-trustees, if any, *should*, and the beneficial owners *may*, sue for an injunction to prevent the breach.
- The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.
- The directors of a fire and life insurance company are about to engage in marine insurance. Any of the shareholders may sue for an injunction to restrain them. (It is presumed in this illustration, that the Memorandum of Association of the company does *not* allow the company to engage in the business of marine insurance.)
- A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting the assets.
- A, a trustee for B, is about to make an important sale of a small part of the trust property; B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.
- A makes a settlement (*not* founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.
- In the course of A's employment, as *Vakil*, certain papers belonging to his client B, came into

- his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from doing so.
- (i) A is B's medical adviser. He demands money of B, which B declines to pay. A then threatens to make known the effect of B's communication to him as a patient. This is contrary to A's duty and B may sue for an injunction to restrain A from so doing.
  - (j) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C began to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.
  - (k) A lets certain arable land to B for the purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the land with seeds injurious thereto, and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husband like manner.
  - (l) A, B and C are partners, the partnership being determinable at will. A threatens to do an act, tending to the destruction of the partnership. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.
  - (m) A, B and C are members of an undivided Hindu family. A cuts timber growing on the family property, and threatens to destroy part of the family house, and to sell some of the family utensils. B and C may sue for an injunction to restrain him.
  - (n) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the Official Assignee and enters into possession. A persists in trespassing and on damaging the houses, and B is thereby compelled at a considerable expense to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.
  - (o) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that this land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.
  - (p) A, in an administration suit to which a creditor B is *not* a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.
  - (q) A and B are in possession of contiguous lands of the mines underneath them. A works his mine so as to extend under B's mine, and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction restraining A from so doing.
  - (r) A rings bells, or makes some other unnecessary noise, so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise.
  - (s) A pollutes the air with smoke, so as to interfere materially with the physical comfort of B and C who carry, on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.
  - (t) A infringes B's patent. If the Court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.
  - (u) A improperly uses the trade mark of B. B may obtain an injunction to restrain the user, *provided that B's use of the trade mark is honest.*
  - (v) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.
  - (w) A, a very eminent man writes letters on family topics to B. After the death of A and B, C, who is a residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters and may sue for an injunction to restrain C from publishing them.
  - (x) A carries on a manufacturing business, and B is his assistant. In the course of his business A

imparts to B a secret process of value. B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.

### **Scope and object of S. 38: Preventive Relief**

S. 38 lays down the general principles which govern the grant of perpetual injunctions in cases of contracts and torts. *This section does not introduce any new principle of law into India*; it merely expresses, in general terms, the rules acted upon by the Court of Equity in England, and also followed in India since many years, as being in accordance with *principles of equity and good conscience*.

The remedy by way of injunction is based on the principle of *quia timet*. The plaintiff seeks the assistance of the Court *because* he fears (*quia timet*) some *future injury* to his rights or interests, *and not because* any injury has already been suffered and which requires any compensation or relief.

Under S. 38, the grant of an injunction is in the Court's discretion. As with other matters this discretion is *not arbitrary but sound and reasonable* guided by *judicial principles*. In all cases, it is capable of being corrected by a Court of Appeal. As a general rule, the Court must consider -

- (i) whether the action to be restrained is likely to cause an injury;
- (ii) whether such injury could be compensated for by damages; *and*
- (iii) whether successive suits may have to be filed for such damages.

If the payment of damages will *not* adequately compensate the plaintiff, the Court will grant an injunction, *unless* there is special reason against it. The Court may refuse an injunction and award damages instead, if the injury is (i) small, and (ii) capable of being estimated in money and of being adequately compensated by a sum of money, and to grant an injunction would be oppressive. An injunction may also be refused on the ground of the plaintiff's acquiescence and delay. Similarly, injunctions should *not* be granted where they inflict more injury on the person sought to be enjoined than advantage on the applicant. (*Tituram v. Cohen*, 32 I.A. 185)

In *Dorab Cawasjee Warden v. Cooni Sorab Warden* (AIR 1990 SC 867), a family dwelling house was jointly owned by the plaintiff and X who was his brother's wife. X later sold her undivided share to a stranger. In a suit for partition by the plaintiff, he was *held* entitled to restrain the vendee from possessing his share in the dwelling house, as irreparable injury was likely to result if a stranger transferee is allowed to possess the undivided family dwelling house.

In *Modi Threads Ltd. v. Som Sool Gola Factory* {AIR 1992 Del. 1} where X, the owner of a registered trade mark, had transferred it to M and while M's application for transfer in its name was pending in the office of the Registration of Trade Marks, the trade mark was violated by certain unscrupulous persons. M filed an action in a Court of Law for injunction. It was *held* that, although M's application for transfer was still pending, it was *prima facie* clear to the Court that during the pendency of the application, the dishonest persons *cannot* be allowed to make use of the said Trade Mark to illegally enrich themselves and thereby earn upon the reputation built up by that trade mark by the predecessor-in-interest of M.

A, a professor, who delivers, or dictates to students, lectures or notes which are his own literary composition, does *not* communicate such lectures or notes to the whole world, so as to entitle any one to republish them without the permission of the professor; they are the property of the professor and *not* of the students. A is entitled to restrain the student, by injunction, from



publishing the notes without his consent. (*Cardy. Sime*)

In *Purshottam Das v. Hari Krishna* (2003 All. H. C. 3398), a permanent injunction was sought against a co-owner to restrain him from repairing a wall, beam and roof. The walls, *etc.* were found to be in a very bad state, and the *injunction was refused*.

### **Rule in *Tulk v. Moxhay***

If A and B enter into a contract, as a general rule, C *cannot* sue A or B to restrain a breach of this contract. However, the rule in *Tulk v. Moxhay* is an exception to this rule. The rule lays down that a restrictive covenant entered into by the owner or lessee of immovable property is enforceable in equity against any subsequent owner, occupier or tenant of that property in certain cases. Thus, A agrees with B, the owner of adjoining property that he shall not dig on his (A's) property, as this would cause damage to B's property. A then gifts his property to X. In such a case, X is bound by the covenant, and B can restrain him (by an injunction) from digging on X's property (which was formerly A's property).

However, before the Rule in *Tulk v. Moxhay* can apply, the following *three conditions must be satisfied*:

- (i) The covenant must be *negative* in nature, *i.e.*, a covenant *not to do something*, and *not* a covenant to do some positive act.
- (ii) The covenant must be such as *simply restricts the use of land*.
- (iii) The covenant must bind the land of the covenantor for the *beneficial use of the land of the covenantee*.

The *only exception* to the rule is the case of a *purchaser for value*, who obtains the *legal estate* in the land *without notice of the covenant*. Thus, if in the above example, if X paid consideration to A, and bought the legal estate in A's land, without any knowledge of the agreement between A and B, he *would not be bound by the covenant*.

The above rule was also applied in *Re Nisbet and Potts*, where it was *held* that a covenant restricting the user of land will be enforced by injunction, at the suit of the owner of the land to which the benefit of the restriction is attached, against all persons who subsequently own or occupy the land, *unless* they obtain a legal estate for value without actual or constructive notice of the covenant.

### **Problems**

1. In a residential locality, where there were restaurants, snack bars and residential houses, X purchased a dress shop, and later converted it into a "Sex Centre and Cinema Club", where blue films were regularly shown. The residents of the locality brought an action for injunction, on the ground that the opening of the shop would be embarrassing to the residents, and a source of danger to the young people, particularly girls, who might be exposed to indecent suggestions. Will the suit succeed?

Ans.: Yes, the suit will succeed. Cases of nuisance are *not* confined to physical discomfort, *but also* extend to interference with reasonable domestic enjoyment of one's property. (*Laws v. Florinplace Ltd.* -1981 1 All E. R. 659)

2. The defendants had published defamatory statements in their newspapers about a sugar mill, accusing the mill of *over-charging, cheating and forgery*. The mill filed a suit for damages and

perpetual injunction. The defendants plead justification, and produced a receipt showing a lesser amount charged, whereas a higher price was actually received. The mill admits the same, and pleads that it was entitled to a higher price, and that it had given a separate receipt for the excess price, which was also reflected in its accounts. Will the injunction be granted?

Ans.: Yes, the mill will be entitled to an injunction, as a *prima facie* case has been made out in its favour. (*National Sugar Mills v. Asutosh Mukherjee* AIR 1962 Cal. 27)

3. A group of Muslims was prevented from saying the word “Ameen” when entering a mosque by another group of Muslims. Can the former sue the latter for an injunction?

Ans.: Yes, every Muslim, when entering a mosque, has the right to utter aloud the word “Ameen”, which is done, *not with* any *mala ride* intention or to disturb the others. Therefore, the Court will restrain the group which prevents the others from doing so. (*FarzandAli v. Nasir Beg*, 1980 AA 342)

### ***Injunctions in matrimonial matters***

An interesting question arises as to whether injunctions can be granted in matrimonial matters, for instance, to restrain one of the spouses from entering the matrimonial house. The Calcutta High Court has *held* that such injunctions *can* be granted, *but this must be done very sparingly*, and when it could result in the break-up of the matrimonial bond, it should not be granted. (*Vishwanathan v. Vishwanathan*, 2002 (4) IIC 741 Cal.)

### **C. Perpetual Injunctions: When not granted (S. 41)**

S. 41 lays down a list of *ten cases* when perpetual injunctions *cannot* be granted by a Court. Thus, a perpetual injunction *cannot* be granted:

- (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, *unless* such restraint is necessary to prevent a multiplicity of proceedings;
- (b) to restrain any person from instituting or prosecuting any proceeding in a Court *not* subordinate to that from which the injunction is sought;
- (c) to restrain any person from applying to any legislative body;
- (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
- (e) to prevent the breach of a contract, the performance of which would *not* be specifically enforced;
- (f) to prevent, on the ground of nuisance, an act of which it is *not* reasonably clear that it will be a nuisance;
- (g) to prevent a continuing breach in which the plaintiff acquiesced;
- (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, *except* in case of breach of trust;
- (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court;
- (j) when the plaintiff has no personal interest in the matter.

It may be noted that S. 41 is *not* exhaustive as to the circumstances where injunction *cannot* be granted by the court. It is to be remembered that the grant of an injunction is *discretionary*, and different considerations are to be weighed on a case-by-case basis - before an injunction is

*granted or refused.* Therefore, a litigant cannot argue that since his case is *not* covered by clauses (a) to (j) above, an injunction *cannot* be refused to him, and that he is entitled thereto as matter of right.

Each of the above 10 clauses is considered below in necessary details.

#### **Clause (a)**

Under this clause, the Court will *not* grant an injunction to restrain a person from prosecuting a pending judicial proceeding. Thus *pendency of the judicial proceeding* is an important requirement of this clause. The provisions will *not* apply if such proceeding is merely threatened. (*Appu v. Raman*, ILR 14 Mad. 425)

Thus, the Madras High Court has *held* that an injunction *cannot* be granted to a person restraining a threatened suit on a promissory note. (*State Bank of India v. J. S. Ramamoorthy*, AIR 1982 Mad. 197)

The *only exception* made to the rule contained in clause (a) is multiplicity of legal proceedings. Therefore, a litigant can avoid the bar laid down in this clause, by showing that if an injunction is *not granted*, several other persons will file suits, resulting in a multiplicity of legal proceedings.

#### **Clause (b)**

In normal circumstances, a Court does *not* grant an injunction restraining a person from instituting a legal proceeding. *The only exception* is that a superior court can issue such an injunction with a view to regulating the proceeding itself. As explained by the Supreme Court, what is prohibited is an injunction restraining a person from instituting a proceedings in a court of coordinate or superior jurisdiction. (*Cotton Corp, of India v. United Industrial Bank*. AIR 1983 SC 1272)

The Kerala High Court has *held* that a Court which passed a decree can, however, grant an injunction in a suit against the decree-holder, restraining him for executing the decree granted by that Court. (*Raghavan v. Sankaran*, AIR 1993 Ker. 178)

It has been *held* that —

- (a) a Court of the Munsif is *not subordinate* to the Court of the Subordinate Judge;
- (b) an Officer on Special Duty under the Maharashtra Co-operative Societies Act is *not subordinate* to the Small Causes Court;
- (c) an Authority under the Bombay Rent Act (now, the Maharashtra Rent Act) is *not subordinate* to the Small Causes Court.

#### **Clause (c)**

Under this clause, the Court *cannot* restrain anyone from applying to a legislative body. Thus, A, B and C prepare a Representation which they intend to present to the *Lok Sabha*. No injunction will be issued restraining them from doing so.

#### **Clause (d)**

This clause affirms the principle that a civil court would have no jurisdiction to stay a criminal

proceeding. (*Kerv. Corporation of Preston*, 1877 6 Ch D 466)

**Clause (e)**

Under this clause, the Court will *not* issue an injunction to prevent the breach of a contract which it would *not* specifically enforce. Thus, any defence available to the defendant in a suit for specific performance of a contract, would be available to him under S. 41 also, as for instance, that the terms of the agreement are *ambiguous* or *uncertain*. (*S. A. Mills v. The Custodian*, AIR 1957 Born. 119)

Likewise, an injunction *cannot* be granted if the contract is determinable (that is, terminable) at the option of one of the parties. Thus, a lease is entered into for a period of five years, but the lessee has an option to terminate it before such period, by giving one month's notice to the lessor. Here, the lessor *cannot* get an injunction against the lessee (*Ghulam Ahmad v. J&K Bank Ltd.*, 1996 AIHC 2018)

Again, an injunction is granted when the threatened injury is irreparable. Therefore, an injunction *cannot* be granted to prevent a breach of contract which can be compensated by damages. (*Dewan Chandv. Union of India*, AIR 1951 Pun. 426)

**Clause (f)**

The term "*public nuisance*" is defined in S. 268 of the Indian Penal Code. If a person complains of a nuisance in the enjoyment of his dwelling house or a place of business, such discomfort must be *real* and *substantial*. It must *not* be fanciful discomfort of a fastidious person. (*Walters. Selfe*, 1851-4-De G & S, 315)

Noise in an industrial town is *not*, by *itself* actionable. But, if a violent hammering noise comes from a neighbouring room, it *would* constitute actionable nuisance. (*Hulasv. Sohanlal*, AIR 1923All. 443)

Likewise, excessive noise and smoke discharged by a factory may constitute nuisance and an injunction may properly be granted. (*Land Mortgage Bankv. Ahmedbhoy Habibbhoy*, ILR 8 Born. 35)

**Clause (g)**

An injunction *cannot* be granted to prevent a continuing breach in cases where the plaintiff has acquiesced. If such breach is a continuing one, extending over a long period of time with the full knowledge and consent of the plaintiff, he *cannot* complain at a later stage.

To constitute acquiescence, the plaintiff must have knowledge of his rights, and the defendant must have done the act in the mistaken belief that he was entitled to do so, having been deceived by the inaction of a plaintiff. If the plaintiff himself has encouraged the defendant to spend money or do any other act, directly or indirectly, he *cannot* complain. (*Jagmohandas v. Pallonjee* ILR 22 Born. 1)

**Clause (h)**

An injunction is generally refused if any other remedy is open to the plaintiff. Thus, for a breach of contract, if compensation by way of damages would be good reparation, the Court would be inclined to grant damages rather than an injunction.

If a defendant sets up the plea of an alternative remedy, he would have to prove *three things*:

- (a) that the alternate remedy is equally efficacious;
- (b) that the plaintiff would be able to get that relief; *and*
- (c) that the remedy is available by a usual mode of legal proceedings.

Thus, it has been *held* that relief before an Income Tax Tribunal is *not* as efficacious as a relief available in a civil court. (*Kamakhya v. Union of India*, AIR 1966 Pat. 305)

Likewise, relief under the Calcutta Municipal Act would *not* be as efficacious as a remedy in a civil suit. (*Gotham Construction Co. v. Amulya*, AIR 1969 Cal. 92)

However, an injunction would *not* be issued against an assessment order under the tax statutes, as the assessee has an efficacious remedy by way of appeal under the statute. (*Delhi Municipal Corp. v. Suresh*, AIR 1876 SC 2621)

#### **Clause (i)**

It is imperative that the plaintiff must come with clean hands, and must show to the Court that his acts were *fair* and *equitable*. He who asks for an injunction must show that his own acts and dealing were *honest* and *free from any fraud or illegality*. (*Bashesharv. Municipal Committee*, AIR 1940 Lah. 69)

#### **Illustrations**

- (a) A seeks an injunction to restrain his partner S, from receiving the partnership-debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B access to them. The Court will refuse the injunction.
- (b) A manufactures and sells crucibles, designating them as “patent plumbago crucibles” though, in fact, they have never been patented. B pirates the designation. A *cannot* obtain an injunction to restrain the piracy.

#### **Clause (j)**

*Unless* the plaintiff has a personal interest in the subject-matter of the suit, the Court will *not* issue an injunction. He must have a *locus standi* to sue. That some person might get hurt by the wrongful act of the railway authority does *not* confer *locus standi* on the plaintiff to sue the railway company. (*N. W. Rly. Adm. v. N. W. Rly. Union*, AIR 1933 Lah. 203).

However, an individual tax-payer or a shareholder of a company can restrain the municipal corporation or the company, as the case may be, from misapplying its funds. A tax-payer or a shareholder can be said to be personally interested in ensuring that the funds are duly applied. Likewise, a minority shareholder can obtain an injunction against the Directors of a company if they are about to indulge in *ultra vires* activities.

### **D. Mandatory Injunctions (S. 39)**

At times, it so happens that, in order to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing. In such cases, the Court may, in its discretion, grant an injunction (i) to prevent such breach, *and also* (ii) to compel the performance of the requisite acts.

### *Illustrations*

1. A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act. B may obtain an injunction, *not only* to restrain A from going on with the buildings, *but also* to pull down so much of them as obstruct S's light.
2. A builds a house with eaves projecting over S's land. B may sue for an injunction to pull down so much of the eaves as so project.
3. A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown *not* to be injurious to S's property.
4. A, being S's medical adviser, threatens to publish S's written communication with him, showing that 6 had led an immoral life. 6 may obtain an injunction to restrain the publication.

### **NATURE OF MANDATORY INJUNCTION**

This relief is applicable to the breach of any obligation, whether arising out of contract or tort. It may be perpetual or temporary, though it is in rare cases that a temporary injunction of this nature is issued. An injunction is, in its nature, prohibitory. The defendant is first called upon to restore the place to the position in which it was before the act was done, and then he is restrained, when he has so restored it, from doing anything in respect of it which would be a breach of obligation on his part. The *object* in every case is to compel the defendant to restore things to their former condition.

The jurisdiction to make such an order has to be exercised with great caution, and to be resorted to only where the remedy is inadequate for the purpose of justice, and the restoring things to their former condition is the only remedy which would meet the requirements of the case. Where compensation is possible or there has been an undue delay, the Court will grant a mandatory injunction only to prevent extreme or very serious injury.

### **Cases**

*Lane v. Newdgate*, 10 Ves. 192. - A leased his land to B for erecting mills and bound himself to supply water thereto from canals and reservoirs on his own land. A impeded the enjoyment of water by B, by keeping works out of repair by the use of locks, and by removing the stop-gate. B asked for an injunction which was granted. In this case, even 'affirmative covenants' were enforced.

*Joychandro v. Reprochum*, 14 Cal. 136. - A and B were co-sharers and owners of certain property. B excavated a tank on a part of the land. A sued for an order that the land on which the tank was excavated without A's consent should be restored to its former position. The injunction was refused on the ground that A had *not* shown an injury by B's act which materially affected his position. The mere fact that the land out of which it has been excavated was fit for cultivation is *not* an injury of a substantial nature necessitating a mandatory injunction.

*Krehlv. Burrell*, 7 CH.D. 55.-A, despite repeated warnings from the plaintiff S, persisted in building a court-yard over which B had right of way to his shop and had refused terms and compensation which it had agreed to *accept*. Though the building was built at enormous cost, it was ordered to be removed.

*R.S.M. Gounderv. Annamalai* (1981) AIR Mad. 237. The defendant put up a structure on the plaintiff's land. The plaintiff, who was living only a mile away, stood by and waited for the



structure to be completed. Then he sued for possession of the land as owner and for a mandatory injunction to demolish the structure. In the circumstances, the plaintiff was *held not* entitled to injunction on the ground of delay and acquiescence, but was instead awarded only compensation equivalent to the market price of the land.

*Assam State Electricity Board v. N. W. Cacher Tea Co. Ltd.* (AIR 2000 Gau., 176).

The court *held* that, in an appropriate case, even a mandatory injunction can be granted *ex parte*, that is, without notice to the other side, if the dispensing with such notice is in the interests of justice.

In the above case, a tea company (the Respondent) had been resorting to the *mala ride* practice of theft of electricity. When arrears of the electric bills were *not* paid and the Electricity Board threatened to disconnect the supply, the tea company applied for a mandatory injunction against the Board. The court *held* that a mandatory injunction can never be granted to perpetuate a wrongful state of affairs.

### **Difference between perpetual injunctions and mandatory injunctions**

A perpetual injunction is granted by the Court to prevent the breach of an obligation existing in favour of the plaintiff, whether expressly or by implication. The guiding principle here is that the party has come to the Court because he fears, *at some time in the future*, probable injury to his rights or interests. On the other hand, a mandatory injunction is one which compels performance of certain acts. In a perpetual injunction, the duty imposed on the defendant is *to abstain from doing something*. In this case of a mandatory injunction, however, the Court orders the performance of a *positive duty*.

Both forms of injunctions are, however, granted at the *discretion of the Court*, and this discretion is to be exercised in a *sound and reasonable manner*.

### **E. Damages in lieu of, or in addition to, injunction (S. 40)**

When a plaintiff sues for a perpetual injunction (S. 38) or a mandatory injunction (S. 39), he may also claim damages, either in addition to, or in substitution for, the injunction, and the Court may, if it thinks fit, award such damages. (S. 40)

In other words, damages and injunction are *not alternate remedies*. Both may be allowed at the discretion of the Court.

However, damages *cannot* be granted, *unless* the plaintiff has claimed damages in the plaint. If he has *not*, he should be allowed to amend the plaint, at any stage of the proceedings, on such terms as may be just in the circumstances of the case.

S. 40 also lays down that if the plaintiff sues for preventing the breach of an obligation in his favour, and such a suit is dismissed, he *cannot* then sue for damages for the *same* breach.

In other words, if the main suit for an injunction is dismissed by the court, the suit to claim damages stands barred automatically.

### **F. Injunction to perform a negative covenant (S. 42)**

In a given contract, there may be an *affirmative agreement* to do a certain act, coupled with a *negative covenant*, express or implied, *not* to do a certain other act. Now, the fact that the Court is unable to compel specific performance of the affirmative part does *not* mean that it *cannot* grant an injunction in respect of the negative part. However, in such cases, the plaintiff should have performed the contract, so far as it is binding on him.

Thus, in the leading case, *Lumley v. Wagner* (1852 1 D.M. 604), A, a singer, agreed that she would sing for 12 months at B's theatre, and that she would *not* sing elsewhere in public during that period. Here, B *cannot* obtain specific performance of the first part of the contract (*i.e.* to sing at his theatre), but he is entitled to an injunction, restraining A from singing at other public places during that period.

It will be seen that, in a case like *Lumley v. Wagner* (above), although there is only one contract, it clearly consists of *two parts*, - one *positive* and the other, *negative*. In such cases, the two parts are treated by law as *independent contracts*, and the fact that one is *not* capable of specific performance does *not* disable the Court from issuing an injunction in respect of the second part. In such cases, it is, of course, presumed that B, the theatre owner, has performed his part of the contract.

Likewise, A agrees that he will serve B as B's clerk faithfully for 12 months. When he commits a breach of the agreement, B *cannot* get a decree for specific performance of the contract, but he can get an injunction restraining A from serving as a clerk at a rival establishment. In this case, the negative covenant (*not to serve elsewhere*) is *not* express, but *implied*.

Or, take the following example: A agrees to sell to B for Rs 2 lakhs, the goodwill of a certain business unconnected with business premises and further agrees *not* to carry on that business in Mumbai. Spays 2 lakhs, but A carries on the business in Mumbai. The Court *cannot* compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Mumbai.

Likewise, A contracts to sell to B the goodwill of his business, agreeing *not* to compete with him and *not* to entice his old customers. A then sets up a similar business close to B's shop, and solicits his old customers to deal with him. This is contrary to the contract, and B may obtain an injunction restraining A from soliciting the customers, and from any act whereby their goodwill may be withdrawn from B.

It is clear that S. 42 contains an *exception to the principle contained in S. 41 (e)*, to the effect that there can be no injunction where there can be no specific performance. If the ingredients of S. 42 (which applies only to contracts) are satisfied, the negative part of the contract *can* be enforced, despite the fact that the positive part is incapable of specific performance. The *reason* underlying this rule is, as stated above, that the contract is looked upon as *two separate contracts*.

The *principle underlying S. 42* is the same as the one on which S. 12 of the Act is based. Under S. 12, if a contract is divisible, the Court *can* enforce specific performance of one part of the contract, although the other part is *not* capable of specific performance. Thus, S. 42 *is to injunctions what S. 12 is to specific performance*.

### **Court's discretion in the matter**

As in the case of all other reliefs under the Act, the Court has *ample discretion* in the matter, and may refuse to grant an injunction, *even if all* the requirements of S. 42 are satisfied. (*Tituram v. Cohen*, 1905 32 1 A, 185)

Thus, where it was shown that the circumstances in which the contract was entered into were such that the plaintiff had an unfair advantage over the defendant (in terms of S. 20) the Court refused to grant an injunction in the plaintiff's favour. (*Callianjiv. Narsi Tricum*, 1895 18 Born. 764)

The Supreme Court has also observed that the jurisdiction to grant an injunction under the Act is discretionary and must be exercised according to sound principles of law, and *ex debito justitio*. The plaintiff *cannot* claim this relief as a matter of right. Before refusing or granting the injunction, the Court must weigh the *pros* and *cons* in each case, consider the facts and circumstances in their proper perspective, and then exercise its discretion *in the best interests of justice*. (*American Express Bank Ltd. v. Calcutta Steel Co.*, 1993 1 SCJ, 269)

#### Cases

A agrees to take from B the whole of the electric energy required for his premises. But though B's supply is regular, A takes some of the energy required from C. B may obtain injunction to prevent A from taking any electric energy from C; for in substance the agreement means that A will *not* take any electric energy required for his premises from anyone except B. (*Metropolitan Electric Supply Co. Ltd. v. Ginder*, (1901) 2 Ch. 799) (Note: Today, such contracts may come within the purview of the Competition Act, 2002.)

*Madras Rly. Co. v. Rust*, (1891) 14 Mad. 18 - The defendant signed an agreement with the plaintiff company whereby he contracted to serve the Company for 4 years in India under a penalty of £ 100. After two years, the defendant left the service for that of another employer. It was *held* that though the Court *cannot* compel the defendant to specifically perform his contract of personal service, the plaintiff could obtain an injunction restraining the defendant from serving elsewhere.

*Charlesworth v. MacDonald*, (1898) 23 Born. 103. - A agreed on certain terms to become assistant for 3 years to B who was a physician practising in Zanzibar. At the end of the first year, A ceased to act as B's assistant and began to practise in Zanzibar. B sued A for an injunction. It was *held* that B was entitled to an injunction restraining A from practising on his account in Zanzibar for 3 years.

*Sabba Naidu v. Haji Badsha*, (1907) 26 Mad. 168. - A agreed to sell to B all the mica produced from A's mine and *not* to sell it to any other purchaser. Here, though the Court *cannot* compel A to sell all his mica to B (for compensation to B would be adequate relief), it may restrain A by an injunction from selling the mica to any person. (Note : Today, such contracts may come within the purview of the Competition Act, 2002.)

*Bum & Co. v. MacDonald*, (1909) 36 Cal. 354. - The defendant covenantee under an agreement "diligently and to the best of his ability to devote himself to the duties of a draftsman and general assistant" to the plaintiff for five years. The defendant having left the plaintiff company, the company sued the defendant under this section. The Court *held* that the agreement implied that he would *not* give his services during that period to any other person, and in such a case, an injunction (under S. 42) is not only the effective, but the only, remedy left to the plaintiff company.

In *Fletcher v. Montgomery*, A engaged B, who was a provincial actor, to act at his theatre in London for a certain period; B came to London and was willing to act for A. But though A paid B his salary, he kept him idle for five months and then B engaged himself to act elsewhere. A sued for an injunction. It was refused on the ground that A had failed to perform his part of the contract; mere payment of salary would *not* be a sufficient performance.

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## Appendix -1

### SUMMARY OF THE SPECIFIC RELIEF ACT

#### Definitions

"Obligation" includes any duty enforceable by law.

"Settlement" means an instrument, other than a will or codicil as defined by the Indian Succession Act, whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of.

"Trust" has the same meaning as in S. 3 of the Indian Trusts Act, and includes an obligation in the nature of a trust within the meaning of Chapter IX of that Act.

"Trustee" includes every person holding property in trust.

All other words and expressions used in the Specific Relief Act, but not defined above, but defined in the Indian Contract Act, have the meanings respectively assigned to them in the Indian Contract Act.

#### Specific relief only for enforcing individual civil rights

Specific relief is granted only for the purpose of enforcing individual civil rights -and *not* for the mere purpose of enforcing a penal law.

#### Recovery of specific immovable property

The owner of specific immovable property can recover possession of such property in the manner provided by the CPC.

But, if any person is forcibly dispossessed of immovable property (- whether such person *is or is not* the owner thereof -), he can recover possession thereof under the Specific Relief Act, if the following *six* conditions are satisfied:

- (1) He should have been in possession of the immovable property.
- (2) Thereafter, he should have been dispossessed of such property.
- (3) Such dispossession should have been without his consent.
- (4) Such dispossession should have been otherwise than in due course of law.
- (5) The dispossession should *not* have been by the Government.
- (6) He must file the suit within *six months* from the date of dispossession.

In such cases, the question of title is irrelevant, and the court does *not* go into that question.

#### Recovery of specific movable property

A person entitled to the possession of specific movable property may recover it in the manner provided in the Civil Procedure Code.

Any person who has the possession or control of specific movable property of which he is *not* the owner may be compelled to deliver it to the person entitled to its immediate possession:

- (a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;
- (b) when compensation in money would *not* afford the plaintiff adequate relief for the loss of the

- thing;
- (c) when it would be extremely difficult to ascertain the actual damage caused by its loss;
- (d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

### **Defences available when a suit under the Act is filed for a relief based on contract**

When a relief claimed under the Act is in respect of a contract, the defendant can plead any defence which is available to him under the Indian Contract Act, as for instance, absence of consent, absence of consideration, unlawful consideration or object, *etc.*

### **Cases in which a contract can be specifically enforced**

There are *seven* cases in which specific performance of a contract may be allowed by the court in its discretion, namely,

1. Where there exists no standard for ascertaining the actual damage caused by the nonperformance of the act agreed to be done.
2. Where the act agreed to be done is such that compensation in money for its nonperformance would *not* afford adequate relief.

However, until the contrary is proved, it is to be presumed —

- (a) that the breach of a contract to transfer movable property *cannot* be adequately compensated for in money; and
- (b) that the breach of a contract to transfer immovable” property can be adequately compensated for in money, except where :

-the property is *not* an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

- where the property is held by the defendant as the agent or trustee of the plaintiff.

3. When the suit is for the enforcement of a contract to execute a mortgage or furnish any other security for the repayment of any loan, which the borrower is *not* willing to repay at once. But, if only part of the loan has been advanced, the lender should be ready and willing to advance the remaining part of the loan.
4. Where the suit is for the enforcement of a contract to take and pay for any debentures of a company.
5. Where the suit is for the execution of a formal deed of partnership in cases where the parties have already started the business of the partnership.
6. Where the suit is for the purchase of a share of a partner of a firm.
7. Where the suit is for the enforcement of a contract for the construction of any building or any work on land, provided:
  - (a) the building or other work is precisely described in the contract;
  - (b) the plaintiff has a substantial interest in the performance of the contract; and
  - (c) the defendant has obtained possession of the whole or any part of the land in question.

### **Cases in which a contract *cannot* be specifically enforced**

The following *five* types of contracts *cannot* be specifically enforced:

1. A contract for the non-performance of which compensation in money is an adequate relief.
2. A contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the court cannot specific performance of its material terms.
3. A contract which is, in its nature, determinable (*i.e.* terminable).
4. A contract whose performance involves the performance of a continuous duty, which the



- court *cannot* supervise.
5. A contract to refer present or future disputes to arbitration.

### **Who can obtain specific performance**

The following *eight* categories of persons can obtain specific performance of a contract:

1. The parties to the contract can sue for specific performance.
2. The representative in interest or the principal of a part to the contract can sue for specific performance, except:
  - where the learning, skill, solvency or any personal quality of the party is a material ingredient of the contract; and
  - where the contract itself provides that the party's interest shall not be assigned, unless:
    - (a) such party has already performed his part of the contract, or
    - (b) the performance of the contract by his representative in interest or by his principal has been accepted by the other party.
3. Where the contract is a marriage settlement or a compromise of doubtful rights between member of the same family, any person beneficially entitled under such a contract can sue for specific performance.
4. Where a contract is entered into by a tenant for life in due exercise of a power, the remainderman can sue for specific performance.
5. When the agreement is a covenant entered into with the predecessor in title of a reversioner possession and the reversionary is entitled to the benefit of such a covenant, such reversioner can sue for specific performance.
6. A reversioner in remainder can sue for specific performance if the agreement is a covenant referred to above (clause 5) and the reversioner is entitled to the benefit thereof and would sustain material injury by reason of its breach.
7. When a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation can sue for specific performance of the contract.
8. When the promoters of a company have entered into a contract on its behalf before incorporation and such a contract is warranted by the terms of its incorporation, the company can sue for specific performance of such a pre-incorporation contract, provided –
  - (a) The company has accepted the contract, and
  - (b) the company has communicated such acceptance to the other party to the contract.

### **Who cannot obtain specific performance**

Specific performance of a contract *cannot* be enforced in favour of the following *five* classes persons:

1. If a person would *not* be entitled to recover compensation for the breach of a contract, he would likewise not be entitled to its specific performance.
2. Specific performance *cannot* be enforced in favour of a person who has become incapable of performing the contract.
3. Specific performance will *not* be enforced in favour of a person who violates any essential term of the contract that remains to be performed on his part.
4. Specific performance will *not* be allowed in favour of a person who
  - (a) acts in fraud of the contract, or
  - (b) willfully acts at variance with, or in subversion of, the relation intended to be established by the contract.
5. Specific performance will *not* be allowed in favour of party who fails to aver and prove that he has performed, or has always been ready and willing to perform his part of the contract,

unless this was prevented or waived by the other side. However, if the contract involves payment of money, it is *not necessary* that the plaintiff should actually tender such money to the defendant or deposit the same, except when so directed by the court.

### **Against whom specific performance can be enforced**

Specific performance may be enforced against the following *five* categories of persons:

1. Specific performance can be enforced against the parties to the contract.
2. Specific performance can be enforced against any other person claiming under a party to a contract by a title arising subsequent to the contract, *except* a transferee for value who has paid money in good faith and without notice of the original contract.
3. Specific performance can be enforced against any person claiming under a title which thought prior to the contract and known to the plaintiff, might have been displaced by the defendant.
4. When a company has entered into a contract and it subsequently becomes amalgamated with another company, specific performance can be enforced against the new company which arises out of the amalgamation.
5. When the promoters of a company have entered into a contract on its behalf before incorporation and such a contract is warranted by the terms of its incorporation, specific performance can be enforced against the company, provided
  - (a) the company has accepted the contract, and
  - (b) the company has communicated such acceptance to the other party to the contract.

### **Non-enforcement of a contract except with a variation**

If one party to a contract seeks specific performance of a written contract and the other party sets up a variation to such a contract, specific performance will *not* be granted, except with such a variation in the following *three* cases:

- (a) where, by fraud, mistake of fact or misrepresentation, the written contract is, its terms or effect, different from what the parties agreed to, or does not contain all the terms agreed to between the parties;
- (b) where the object of the parties was to produce a certain legal result, which the contract, as framed, is not calculated to produce;
- (c) where the parties have varied the terms of the contract subsequent to its execution.

### **Court's discretion when decreeing specific performance**

The jurisdiction to decree specific performance is always discretionary and the court is *not* bound to grant the relief merely because it is lawful to do so. However, this discretion is *not* arbitrary but sound and reasonable, guided by juridical principles and is capable of correction by a Court of Appeal.

In the following cases, the court may properly exercise discretion *not* to decree specific performance:

- (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though *not* voidable, gives the plaintiff an unfair advantage over the defendant;  
or
- (b) where the performance of the contract would involve some hardship on the defendant which he did *not* foresee, whereas its non-performance would involve no such hardship on the plaintiff;
- (c) where the defendant entered into the contract under circumstances which, though *not*

rendering the contract voidable, makes it inequitable to enforce specific performance.

The court may properly exercise its discretion to decree specific performance in a case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Lastly, the court shall *not* refuse to any party, specific performance of a contract merely on the ground that the contract is *not* enforceable at the instance of the other party to the contract.

### **Power to award compensation**

When a person sues for specific performance of a contract, he may, in the same suit, also claim compensation for the breach of that contract, either in addition to, or in substitution of, such specific performance.

### **Liquidated damages, not a bar to specific performance**

A contract, otherwise proper to be specifically enforced, may be so enforced, although a sum is named in it as liquidated damages and the defaulting party is willing to pay the same, if the court is satisfied that such damages were named only for the purpose of securing performance of the contract, and *not* for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

### **No suit for breach of contract if suit for specific performance is dismissed**

If a suit for specific performance of a contract is dismissed, the plaintiff *cannot* sue *for* compensation for breach of that contract. However, he does not lose his right to sue for any other relief to which he may be entitled by reason of such breach.

### **Rectification of instruments**

Where due to fraud or mutual mistake of the parties, a contract or any other written instrument does not express the real intention of the parties

- (a) either party or his representative in interest can institute a suit for rectification of the instrument;
- (b) the plaintiff can, in any suit to enforce his right under the contract, claim that such instrument be rectified;
- (c) the defendant can, in any suit, ask for rectification of the instrument in addition to any other defence open to him.

### **Rescission of contracts**

Any person interested in a contract may sue to have it rescinded and the court may do so in the following cases:

- (a) Where the contract is voidable or terminable by the plaintiff; or
- (b) Where the contract is unlawful for causes which are, not apparent on its face and the defendant is more to blame than the plaintiff.

The court may, however, refuse to rescind the contract:

- (i) where the plaintiff has - expressly or impliedly - ratified the contract;
- (ii) where, owing to a change of circumstances which has taken place since the making of the contract (not brought about by the defendant), the parties cannot be substantially restored to the position in which they stood when the contract was made;
- (iii) where, during the subsistence of the contract, third parties have acquired rights in good faith,

- without notice and for value;
- (iv) where only a part of the contract is sought to be rescinded and such part cannot be separated from the rest of the contract.

When a plaintiff sues for specific performance of a contract in writing, he can pray, in the alternative, that if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled, and the court may do so.

When a court rescinds a contract, it may require the party to whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to compensate the other party if justice so requires.

### **Cancellation of documents**

Any person against whom a written instrument is void or voidable may sue to have it adjudged void or voidable, if he has reasonable apprehension that such an instrument may cause serious injury if left outstanding. The court may, in its discretion, adjudge such instrument as void or voidable and order it to be delivered up and cancelled.

Where an instrument is evidence of different rights or of different obligations, the court may, in a proper case, cancel it in part and allow it to stand as far as the residue is concerned.

In such cases, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

### **Declaratory decrees**

If any person is entitled to any legal character or any right to any property, he may institute a suit against any person who denies, or is interested in denying, such character or right. The court may, in its discretion, make a declaration in such suit that the plaintiff is so entitled.

In such cases, it is not necessary that the plaintiff should ask for any other relief. However, if he is able to seek further relief and he omits to do so, the court will not pass the declaratory decree as this could result in multiplicity of legal proceedings.

Such a declaratory decree is binding on:

- (a) parties to the suit in which the decree was passed;
- (b) person claiming through such parties; and
- (c) if any such party is a trustee - on the persons for whom, if such persons were in existence at the date of the declaration, such a party would be a trustee.

#### **Injunctions**

Temporary injunctions, which continue until a specific time or until further orders of the court, can be granted at any stage of the suit and are regulated by the Civil Procedure Code.

Perpetual injunctions are granted under the Specific Relief Act, and can be granted in the following cases:

- (a) where the defendant is a trustee of the property for the plaintiff;
- (b) where there exists no standard for ascertaining the actual damage caused, or likely to be

caused, by the invasion;

- (c) where the invasion is such that compensation in money would not afford adequate relief;
- (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings. However, an injunction *cannot* be granted:
  - (a) to restrain a person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
  - (b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;
  - (c) to restrain any person from applying to any legislative body;
  - (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
  - (e) to prevent the breach of a contract, the performance of which would not be specifically enforced;
  - (f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
  - (g) to prevent a continuing breach in which the plaintiff has acquiesced;
  - (h) when equally efficacious relief can be obtained by any other usual mode of proceeding, except in case of breach of trust;
  - (i) when the conduct of the plaintiff or his agent has been such as to disentitle him to the assistance of the court;
  - (j) when the plaintiff has no personal interest in the matter.

When, to prevent the breach of any obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts. (Mandatory injunction)

Where a contract consists of an affirmative agreement to do a certain act, coupled with a negative agreement not to do a certain act, the circumstance that the court is not able to compel specific performance of the affirmative agreement does not preclude from granting an injunction to perform the negative agreement.

In a suit for a perpetual injunction or for a mandatory injunction, the plaintiff may claim damages, either in addition to or in substitution for such injunction, and the court may award such damages if it thinks fit to do so.

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## **Appendix - II**

### **THE SPECIFIC RELIEF ACT, 1963 (NO. 47 OF 1963)**

[13th December, 1963]

An Act to define and amend the law relating to certain kinds of specific relief be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows:

## **PART I**

### **PRELIMINARY**

## **1. SHORT TITLE, EXTENT AND COMMENCEMENT -**

- (1) This Act may be called the Specific Relief Act, 1963.
- (2) It extends to the whole of India *except* the State of Jammu and Kashmir.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

### **Note**

The Act came into force on 1st March, 1964.

## **2. DEFINITIONS** — In this Act, *unless* the context otherwise requires, -

- (a) “*obligation*” includes every duty enforceable by law;
- (b) “*settlement*” means an instrument (*other than* a will or codicil as defined by the Indian Succession Act, 1925), whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of;
- (c) “*trust*” has the same meaning as in Sec. 3 of the Indian Trusts Act, 1882, and *includes* an obligation in the nature of a trust within the meaning of Chapter IX of the Act;
- (d) “*trustee*” *includes* every person holding property in trust;
- (e) *all other words and expressions* used herein, but *not* defined, and defined in the Indian Contract Act, 1872, have the meanings respectively assigned to them in that Act.

## **3. SAVINGS** — Except as otherwise provided herein, nothing in this Act shall be deemed -

- (a) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; *or*
- (b) to affect the operation of the Indian Registration Act, 1908, on documents.

## **4. SPECIFIC RELIEF TO BE GRANTED ONLY FOR ENFORCING INDIVIDUAL CIVIL RIGHTS AND NOT FOR ENFORCING PENAL LAWS** — Specific relief can be granted *only for* the purpose of enforcing individual civil rights *and not* for the *mere* purpose of enforcing a penal law.

### **Note**

The use of the word "mere" is important. It implies that specific relief is *not* available when the sole object is to enforce criminal law. However, if enforcement of criminal law is only incidental, specific relief can be granted.

## **PART II**

### **SPECIFIC RELIEF**

#### **CHAPTER I**

#### **RECOVERING POSSESSION OF PROPERTY**

### **5. RECOVERY OF SPECIFIC IMMOVABLE PROPERTY** - A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

### **6. SUIT BY PERSON DISPOSSESSED OF IMMOVABLE PROPERTY -**

- (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.



- (2) No suit under this section shall be brought -
  - (a) after the expiry of *six months* from the date of dispossession; *or*
  - (b) against the Government.
- (3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.
- (4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

#### **Note**

Whereas a suit under S. 5 is based on *title*, a suit under S. 6 is based on *possession*.

- 7. **RECOVERY OF SPECIFIC MOVABLE PROPERTY** - A person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

**Explanation 1:** A trustee may sue under this section for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled.

**Explanation 2 :** A special *or* temporary right to the present possession of movable property is sufficient to support a suit under this section.

- 8. **LIABILITY OF THE PERSON IN POSSESSION, NOT AS OWNER, TO DELIVER TO PERSONS ENTITLED TO IMMEDIATE POSSESSION** - Any person having the possession or control of a particular article of movable property, of which he is *not* the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:
  - (a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;
  - (b) when compensation in money would *not* afford the plaintiff adequate relief for the loss of the thing claimed;
  - (c) when it would be extremely difficult to ascertain the actual damage caused by its loss;
  - (d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

**Explanation:** Unless and until the contrary is proved, the Court shall, in respect of any article of movable property claimed under Cl. (b) or Cl. (c) of this section, presume -

- (a) that compensation in money would *not* afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;
- (b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

## **CHAPTER II**

### **SPECIFIC PERFORMANCE OF CONTRACTS**

- 9. **DEFENCES RESPECTING SUITS FOR RELIEF BASED ON CONTRACT** - Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts.

### **CONTRACTS WHICH CAN BE SPECIFICALLY ENFORCED**

- 10. **CASES IN WHICH SPECIFIC PERFORMANCE OF CONTRACT ENFORCEABLE** - Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced -

- (a) when there exists no standard for ascertaining the actual damage caused by the nonperformance of the act agreed to be done; *or*
- (b) when the act agreed to be done is such that compensation in money for its nonperformance would not afford adequate relief.

**Explanation :** Unless and until the contrary is proved, the Court *shall presume* -

- (i) that the breach of a contract to transfer immovable property *cannot* be adequately relieved by compensation in money; *and*
- (ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases :
  - (a) where the property is *not* an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are *not* easily obtainable in the market;
  - (b) where property is held by the defendant as the agent or trustee of the plaintiff.

#### 11. CASES IN WHICH SPECIFIC PERFORMANCE OF CONTRACTS CONNECTED WITH TRUSTS ENFORCEABLE -

- (1) Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.
- (2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

#### 12. SPECIFIC PERFORMANCE OF PART OF CONTRACT - Except as otherwise hereinafter provided in this section, the Court shall *not* direct the specific performance of a part of a contract.

- (1) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.
- (2) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either -
  - (a) forms a considerable part of the whole, though admitting of compensation in money; *or*
  - (b) does *not* admit of compensation in money;
 he is *not* entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party -
  - (i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), pays or has paid the consideration for the whole of the contract without any abatement; *and*
  - (ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.
- (3) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which *cannot* or ought *not* to be specifically performed, the Court may direct specific performance of the former part.

**Explanation ;** For the purposes of this section, a party to a contract shall be deemed to be unable

to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.

### **13. RIGHTS OF PURCHASER OR LESSEE AGAINST PERSON WITH NO TITLE OR IMPERFECT TITLE -**

- (1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely:
  - (a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;
  - (b) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;
  - (c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount *not* exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;
  - (d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs, on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.
- (2) The provisions of sub-section (1) shall also apply, as far as may be, to contract of the sale or hire of movable property.

### **CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED**

#### **14. CONTRACTS NOT SPECIFICALLY ENFORCEABLE -**

- (1) The following contracts *cannot* be specifically enforced, namely:
  - (a) a contract for the non-performance of which compensation in money is an adequate relief;
  - (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualification or volition of the parties, or otherwise from its nature is such, that the Court *cannot* enforce specific performance of its material terms;
  - (c) a contract which is in its nature determinable;
  - (d) a contract, the performance of which involves the performance of a continuous duty which the Court cannot supervise.
- (2) Save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.
- (3) Notwithstanding anything contained in Cl. (a) or Cl. (c) or Cl. (d) of subsection (1), the Court may enforce specific performance in the following cases:
  - (a) where the suit is for the enforcement of a contract -
    - (i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once:

*Provided that*, where only a part of the loan has been advanced, the lender is willing to advance

the remaining part of the loan in terms of the contract; *or*

- (ii) to take up and pay for any debentures of a company;
- (b) where the suit is for -
  - (i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; *or*
  - (ii) the purchase of a share of a partner in a firm;
- (c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land;

*Provided that*, the following conditions are fulfilled, namely:

- (i) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work;
- (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is *not* an adequate relief; *and*
- (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

## **PERSONS FOR OR AGAINST WHOM CONTRACTS MAY BE SPECIFICALLY ENFORCED**

**15. WHO MAY OBTAIN SPECIFIC PERFORMANCE** - Except as otherwise provided by this

Chapter, the specific performance of a contract may be obtained by -

- (a) any party thereto;
- (b) the representative-in-interest or the principal, of any party thereto;

*Provided that*, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall *not* be assigned, his representative-in-interest or his principal shall *not* be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative-in-interest, or his principal, has been accepted" by the other party;

- (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;
- (d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;
- (e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor-in-title and the reversioner is entitled to the benefit of such covenant;
- (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;
- (g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
- (h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company;

*Provided that* the company has accepted the contract and has communicated such acceptance to other party to the contract.

**16. PERSONAL BARS TO RELIEF** - Specific performance of a contract *cannot* be enforced in favour of a person

- (a) who would not be entitled to recover compensation for its breach; *or*
- (b) who has become incapable of performing, or violates any essential term of the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; *or*
- (c) who fails to aver and prove that he has performed, or has always been ready and willing to perform, the essential terms of the contract which are to be performed by him other than terms the performance of which has been prevented or waived by the defendant.

*Explanation :* For the purposes of C.I. (c),

- (i) where a contract involves the payment of money, it is *not* essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;
- (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

**17. CONTRACT TO SELL OR LET PROPERTY BY ONE WHO HAS NO TITLE, NOT SPECIFICALLY ENFORCEABLE**

- (1) A contract to sell or let any immovable property *cannot* be specifically enforced in favour of a vendor or lessor
  - (a) who, knowing himself to have any title to the property, has contracted to sell or let the property;
  - (b) who, though he entered into the contract believing that he had a good title to the property, *cannot* at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.
- (2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

**18. NON-ENFORCEMENT EXCEPT WITH VARIATION** - Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff *cannot* obtain the performance sought, except with the variation to set up, in the following case, namely:

- (a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, *or* does *not* contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;
- (b) where the object of the parties was to produce a certain legal result which the contract as framed is *not* calculated to produce;
- (c) where the parties have, subsequently to the execution of the contract, varied its terms.

**19. RELIEF AGAINST PARTIES AND PERSONS CLAIMING UNDER THEM BY SUBSEQUENT TITLE** - Except as otherwise provided by the Chapter, specific performance of a contract may be enforced against -

- (a) either party thereto;
- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
- (c) any person claiming under a title which, though prior to the contract and known to the

- plaintiff, might have been displaced by the defendant;
- (d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
  - (e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company;

*Provided that*, the company has accepted the contract and communicated such acceptance to the other party to the contract.

## **DISCRETION AND POWERS OF COURT**

### **20. DISCRETION AS TO DECREETING SPECIFIC PERFORMANCE -**

- (1) The jurisdiction to decree specific performance is discretionary, and the Court is *not* bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.
- (2) The following are cases in which the Court may properly exercise discretion *not* to decree specific performance:
  - (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though *not* voidable, gives the plaintiff an unfair advantage over the defendant; *or*
  - (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; *or*
  - (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance,

*Explanation 1* : Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall *not* be deemed to constitute an unfair advantage within the meaning of Cl. (a) or hardship within the meaning of Cl. (b).

*Explanation 2*: The question whether the performance of a contract would involve hardship on the defendant within the meaning of Cl. (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

- (3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.
- (4) The Court shall *not* refuse to any party specific performance of a contract merely on the ground that the contract is *not* enforceable at the instance of the other party.

### **21. POWER TO AWARD COMPENSATION IN CERTAIN CASES -**

- (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.
- (2) If, in any such suit, the Court decides that specific performance ought *not* to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation



accordingly.

- (3) If, in any such suit, the Court decides that specific performance ought to be granted, but that it is *not* sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.
- (4) In determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Sec. 73 of the Indian Contract Act, 1872.
- (5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

*Provided that*, where the plaintiff has not claimed any such compensation in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

*Explanation:* The circumstance that the contract has become incapable of specific performance does *not* preclude the Court from exercising the jurisdiction conferred by this section.

## **22. POWER TO GRANT RELIEF FOR POSSESSION, PARTITION, REFUND OF EARNEST MONEY ETC. -**

- (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for -
  - (a) possession, or partition and separate possession, of the property, in addition to such performance; *or*
  - (b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.
- (2) No relief under Cl. (a) or Cl. (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed;

*Provided that*, where the plaintiff has *not* claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

- (3) The power of the Court to grant relief under Cl. (b) of sub-section (1) shall be without prejudice to its powers to award compensation under Sec. 21.

## **23. LIQUIDATION OF DAMAGES NOT A BAR TO SPECIFIC PERFORMANCE -**

- (1) A contract, otherwise proper to be specifically enforced, may be so enforced though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the Court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purposes of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.
- (2) When enforcing specific performance under the section, the Court shall not also decree payment of the sum so named in the contract.

## **24. BAR OF SUIT FOR COMPENSATION FOR BREACH AFTER DISMISSAL OF SUIT FOR SPECIFIC PERFORMANCE -** The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the

breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach.

## **ENFORCEMENT OF AWARDS AND DIRECTIONS TO EXECUTE SETTLEMENTS**

- 25. APPLICATION OF PRECEDING SECTIONS TO CERTAIN AWARDS AND TESTAMENTARY DIRECTIONS TO EXECUTE SETTLEMENTS** - The provisions of this Chapter as to contracts shall apply awards to which the Arbitration Act, 1940, does not apply and to directions in a will or codicil to execute a particular settlement.

## **CHAPTER III**

### **RECTIFICATION OF INSTRUMENTS**

**26. WHEN INSTRUMENT MAY BE RECTIFIED —**

- (1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (nor being the Articles of Association of a company to which the Companies Act, 1956 applies, does *not* express their real intention, when -
  - (a) either party or his representative-in-interest may institute a suit to have the instrument rectified; *or*
  - (b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; *or*
  - (c) a defendant in any such suit as is referred to in Cl. (b), may in addition to any other defence open to him, ask for rectification of the instrument.
- (2) If, in any suit in which a contract or other instrument is sought to be rectified under subsection (1), the Court finds that the instrument, through fraud or mistake, does *not* express the real intention of the parties, the Court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to the rights acquired by third persons in good faith and for value.
- (3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the Court thinks fit, may be specifically enforced.
- (4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed :

*Provided that*, where a party has *not* claimed any such relief in his pleading, the Court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

## **CHAPTER IV**

### **RESCISSION OF CONTRACTS**

**27. WHEN RESCISSION MAY BE ADJUDGED OR REFUSED —**

- (1) Any person interested in a contract may sue to have it rescinded, and such rescission, may be adjudged by the Court in any of the following cases, namely:
  - (a) where the contract is voidable or terminable by the plaintiff;
  - (b) where the contract is unlawful for causes *not* apparent on its face and the defendant is more to blame than the plaintiff.

- (2) Notwithstanding anything contained in sub-section (1), the Court may refuse to rescind the contract -
- (a) where the plaintiff has expressly or impliedly ratified the contract; *or*
  - (b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; *or*
  - (c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; *or*
  - (d) where only a part of the contract is sought to be rescinded and such part is *not* severable from the rest of the contract.

*Explanation:* In this section “contract”, in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing.

**28. RESCISSION IN CERTAIN CIRCUMSTANCES OF CONTRACTS FOR THE SALE OR LEASE OF IMMOVABLE PROPERTY, THE SPECIFIC PERFORMANCE OF WHICH HAS BEEN DECREED —**

- (1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does *not*, within the period allowed by the decree or such further period as the Court may allow, pay the purchase-money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.
- (2) Where a contract is rescinded under sub-section (1), the Court -
  - (a) shall direct the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, *and*
  - (b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.
- (3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the Court may, on application made in the same suit, award the purchaser or lessee all or any of the following reliefs, namely:
  - (a) the execution of a proper conveyance or lease by the vendor or lessor;
  - (b) the delivery of possession or partition and separate possession, of the property on the execution of such conveyance or lease.
- (4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.
- (5) The costs of any proceedings under this section shall be in the discretion of the Court.

**29. ALTERNATIVE PRAYER FOR RESCISSION IN SUIT FOR SPECIFIC PERFORMANCE —**

A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the *contract cannot* be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

30. **COURT MAY REQUIRE PARTIES RESCINDING TO DO EQUITY** - On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

## **CHAPTER V**

### **CANCELLATION OF INSTRUMENTS**

31. **WHEN CANCELLATION MAY BE ORDERED** —

- (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
- (2) If the instrument has been registered under the Indian Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

32. **WHAT INSTRUMENTS MAY BE PARTIALLY CANCELLED** —

Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

33. **POWER TO REQUIRE BENEFIT TO BE RESTORED OR COMPENSATION TO BE MADE WHEN INSTRUMENT IS CANCELLED OR IS SUCCESSFULLY RESISTED AS BEING VOID OR VOIDABLE** —

- (1) On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.
- (2) Where a defendant successfully resists any suit on the ground
  - (a) that the instrument sought to be enforced against him in the suit is voidable, the Court may, if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;
  - (b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under Sec. 11 of the Indian Contract Act, 1872, the Court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

## **CHAPTER VI**

### **DECLARATORY DECREES**

34. **DISCRETION OF COURT AS TO DECLARATION OF STATUS OR RIGHT** — Any person entitled to any legal character, or to any rights as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff

need *not* in such suit ask for any further relief.

*Provided that* no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so

*Explanation:* A trustee of property is a “person interested to deny” a title adverse to the title of someone who is *not* in existence, and for whom, if in existence, he would be a trustee.

## **PART III**

### **PREVENTIVE RELIEF**

#### **CHAPTER VII**

##### **INJUNCTIONS GENERALLY**

36. **PREVENTIVE RELIEF HOW GRANTED** — Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

37. **TEMPORARY AND PERPETUAL INJUNCTIONS** —

- (1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.
- (2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

#### **CHAPTER VIII**

##### **PERPETUAL INJUNCTIONS**

38. **PERPETUAL INJUNCTION WHEN GRANTED** —

- (1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.
- (2) When any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II.
- (3) When the defendant invades, or threatens to invade, the plaintiff’s right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely:
  - (a) where the defendant is a trustee of the property for the plaintiff;
  - (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
  - (c) where the invasion is such that compensation in money would *not* afford adequate relief;
  - (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

39. **MANDATORY INJUNCTIONS** —

When, to prevent the breach of an obligation, it is necessary to compel the performance of

certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

**40. DAMAGES IN LIEU OF, OR IN ADDITION TO, INJUNCTION —**

- (1) The plaintiff in a suit for perpetual injunction under Sec. 38, or mandatory injunction under Sec. 39, may claim damages either in addition to, or in substitution for, such injunction and the Court may, if it thinks fit, award such damages.
- (2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint;

*Provided that*, where no such damages have been claimed in the plaint, the Court shall, at any stage of the proceeding, allow the plaintiff to amend the plaint on such terms as may be just, for including such claim.

- (3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach.

**41. INJUNCTION WHEN REFUSED -**

An injunction *cannot* be granted -

- (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
- (b) to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought;
- (c) to restrain any person from applying to any legislative body;
- (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
- (e) to prevent the breach of a contract, the performance of which would not be specifically enforced;
- (f) to prevent, on the ground of nuisance, an act of which it is *not* reasonably clear that it will be a nuisance;
- (g) to prevent a continuing breach in which the plaintiff has acquiesced;
- (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;
- (i) when the conduct of the plaintiff or his agent has been such as to disentitle him to the assistance of the Court;
- (j) when the plaintiff has no personal interest in the matter.

**42. INJUNCTION TO PERFORM NEGATIVE AGREEMENT —**

Notwithstanding anything contained in Cl. (e) of Sec. 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, *not* to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall *not* preclude it from granting an injunction to perform the negative agreement.

*Provided that* the plaintiff has *not* failed to perform the contract so far as it is binding on him

END