

Specific relief Act, 1963

Introduction

The Specific Relief Act provides for specific reliefs. Specific relief means relief of certain species, i.e. an exact or particular, a named, fixed or determined relief. The term is generally understood and providing relief of a specific kind rather than a general relief or damages or compensation. It is a remedy which aims at the exact fulfillment of an obligation or specific performance of the contract. For instance if some body unlawfully dispossesses me of my property, the general relief may be requiring the defendant to pay me compensation equivalent to the loss suffered by me due to dispossession. Specific relief may enable me to have the possession of the same property over again by requiring the defendant to restore possession of my property. Specific performance is generally granted when there exist no standard for ascertaining actual damages, for instance the object of the sale is picture by the dead painter, or where compensation in money will not provide adequate relief to the plaintiff.

The Specific Relief Act, 1963 extends to the whole of India, except the State of Jammu and Kashmir. The Specific Relief Act deals only with certain kinds of equitable reliefs and these are now:

- i) Recovery of possession of property
- ii) Specific Performance of contracts
- iii) Rectification of Instruments
- iv) Rescission of Contracts
- v) Cancellation of instruments
- vi) Declaratory decrees
- vii) Injunctions

RECOVERY OF POSSESSION OF PROPERTY

Recovery of Possession is dealt with in Sections 5 to 8 of Chapter II of the Specific Relief Act. Here property may be immovable property or movable property, act provides for the recovery of the property. Section 5 and Section 6 deals with the immovable property and Section 7 and Section 8 deals with the movable property.

RECOVERY OF IMMOVABLE PROPERTY

Section 5. -- Recovery of specific immovable property

Section 5 of the Specific Relief Act deals with the 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 (5 of 1908).”

The section in simple words provides that any person who is lawful owner of immovable property can get the possession of such property by due course of law. It means that when a person is entitled to the possession of specific immovable property he can recover the same by filling the suit as per provisions of CPC. He may file suit for ejectment on the strength of his title and can get a decree for ejectment on the basis of title within 12 years of the date of possession. Section 5 of the Act declares that in a suit for the recovery of immovable property

by person 'entitled to' provisions Order XXI, Rules 35 and 36 of CPC would apply. There are three types of actions which can be brought in law for the recovery of specific immovable property:

- (i). a suit based on title by ownership;
- (ii). a suit based on possessory title; and
- (iii). a suit based merely on the previous possession of the plaintiff, where he has been dispossessed without his consent, otherwise than in due course of law.

The last remedy is provided in Section 6 of the Act. The suits of the first two types can be filed under the provisions of the Civil Procedure Code.

The word 'entitled to possession' means having a legal right to title to possession on the basis of ownership of which the claimant has been dispossessed. Plaintiff must show that he had possession before the alleged trespasser got possession.

Section 6. – Suit by person dispossessed of immovable property.

Section 6 of the act deals with the 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 may, by suit, recover possession.

(2) No suit under this section shall be brought-

- (a) after the expiry of six months from the date of dispossession;**
- (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.

The main object of Section 6 is to discourage forcible dispossession on the principle that disputed rights are to be decided by due process of law and no one should be allowed to take law into his own hands, however good his title may be. The operation of Section is not excluded in cases between landlords and tenants where there is no question of title involved. The Section 6 provide summary and speedy remedy through the medium of Civil Court for the restoration of possession to a party dispossessed by another, within 6 months of its dispossession, leaving them to fight out the question of their respective titles in a competent Court if they are so advised.

Requisites of Section 6:-

- 1. Judicial possession of the plaintiff at the time of dispossession:** The plaintiff must establish his judicial possession at the time of dispossession. The possession must have been 'juridical' i.e. possession recognized by law. It should be neither by force nor by fraud.
- 2. Dispossession of the plaintiff without his consent otherwise than in due course of law:-** For the application of this section the dispossession must be without the consent of plaintiff or against the process of and operation of law invoked by the ordinary method of Civil Court.
- 3. The suit must be instituted within 6 months from the date of dispossession**
- 4. Dispossession must be of 'immovable property': -**
- 5. Dispossession has not been made by the Government, but by any other person**
- 6. Under this Section, an order or decree is final in the sense that it is not open to review or appeal, although it is subject to revision by High Court.**

Distinguish b/w Section 5 and Section 6

	SECTION 5	SECTION 6
1.	The plaintiff has to file a long-drawn regular suit for ejectment.	It gives a summary remedy.
2.	The claim is based on title.	The claim is based on possession and no proof of title is required and even rightful owner may be precluded from showing his title to the land.
3.	The period of limitation is 12 years.	The period of limitation is of only 6 months from the date of dispossession.

RECOVERY OF SPECIFIC MOVABLE PROPERTY

Section 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 (5 of 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.

Section 7 provides for the recovery of movable property in specie i.e. the things itself. The things to be recovered must be specific in the sense they are ascertained and capable of identification. The nature of things must continue without alteration. This section entitles a person to bring a regular suit for the recovery of possession of movable property if he has right to the same at the time of action for detinue. Suit can be filed under CPC

Section 8. -- Liability of 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.

Section 8 of the Specific Relief Act entitles a person to recover the specific movable property itself from the defendant who is not the owner thereof in cases where the property has a peculiar value or association and cannot be adequately compensated in terms of money. The relief under this section can only be granted against a person having the possession control of the particular article claimed by the plaintiff. The object of this section is to provide special remedy so that persons having the possession or control of particular articles of movable property, although not their owners, may be compelled specifically to deliver them to the persons entitled to their immediate possession.

Requisites of Section 8: -

- 1) The defendant has possession or control of the particular article claimed
- 2) Such article is movable property
- 3) The defendant is not the owner of the article

4) The plaintiff is entitled to immediate possession; and

5) Anyone of the condition laid down under clauses (a) to (d) of Section 8 must exist.

Provisions of Section 8 are applicable in the following situations only:

- I. When such property is held as agent or trustee of the property.
- II. When compensation is not an adequate relief for the loss to the plaintiff.
- III. When ascertainment of actual damage is not possible.
- IV. When possession of the property is wrongfully transferred from the plaintiff.

In case of situations under I and II burden of proof is on the plaintiff and under III and IV burden is on the defendant.

SPECIFIC PERFORMANCE OF CONTRACTS

The contract is an agreement upon consideration to do or not to do particular thing, if the person on whom this contractual obligation rests, fails to discharge it, other party has right to either to insist on actual performance of the contract or to obtain compensation for the non-performance of it. The former is called the 'Specific Performance.'

The subject of Specific performance is dealt in Part II, Chapter II of the Specific Relief Act, 1963 which may be classified under the following heads:-

- A. Contracts which may be specifically enforced
- B. Contracts which cannot be specifically enforced
- C. Parties to an action for specific performance
- D. Specific performance with a variation
- E. Discretion of the Court in ordering specific performance

Section 9. -- Defences respecting suits for relief based on contract.

Section 9 simply declares that defendant may raise any ground available in law to him while resisting suit for specific performance. In other words all those pleas as recognized under law of contract like incapacity of parties, the absence of concluded contract, the uncertainty of the contract, coercion, fraud, misrepresentation, mistake, illegality or want of authority, to enter into contract etc are available to defendant in a suit for specific performance.

Contracts which may be specifically enforced

Section 10. -- Cases in which specific performance of contract enforceable

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 non-performance of the act agreed to be done
- (b) when the act agreed to be done is such that compensation in money for its non-performance 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

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

No Standard for ascertaining damages

Section 10 provides for specific performance of contract in those cases where there is no standard for ascertaining damages or where the money cannot form adequate relief for the non-performance. Further enforcement of the specific performance is at discretion of the court and no one claims it as a matter of right.

Pecuniary compensation not adequate relief

The specific performance will also be granted when compensation in money is not adequate relief in facts and circumstances of case. Damages may be considered to be an inadequate remedy if it is difficult to quantify them.

Conditions for applicability of Section 10: -

1. The suit must relate to the specific performance of contract;
2. The case must fall within any of the Clauses (a) and (b);
3. The case must in the discretion of the court, be fit one to warrant specific performance; and
4. The case must not fall within any of the Section of Chapter II which prohibits specific performance.

Explanation to Section 10 carries presumption in favour of plaintiff and declares that it should be presumed that compensation does not afford adequate relief in following cases:

- A. In all cases where the contract is for the transfer of immovable property.
- B. In case of movable property where:
 - a) The property is not an ordinary article but an article of special value or of special interest to plaintiff.
 - b) The article is not easily obtainable in the market.
 - c) The property is held by the defendant as an agent or trustee of the plaintiff.

However these presumptions can be rebutted by the defendant by proving the contrary.

Section 11. Cases in which specific performance of contracts connected with trusts enforceable.-

(1) 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.

According to Section 11(1) when the act agreed to be done is in the performance, wholly or partly, of a trust, specific performance of the same may be granted at the discretion of the court. For instance A holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same quantity of stock to B, and B may enforce specific performance of this obligation.

Specific performance of part of contract

Section 12. Specific performance of part of contract.-

(1) The court shall not direct the specific performance of a part of a contract.

(2) 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.

(3) 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), 1*[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 right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) 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.

The general rule of equity is that the court will not compel specific performance of a contract unless it can enforce the whole contract.

The rule laid in above case is contained in Section 12(1) of the Specific Relief Act which lays court shall not direct the specific performance of a part of contract, except in cases coming under on or other of the three proceeding sections.

To this general rules there are certain exceptions which proceed upon the principle of that 'equity looks to the substance of contract and requires substantial compliance with its conditions rather than its literal fulfillment' and these are embodied in Section 12 (2), (3) and (4).

Section 12(2) becomes applicable when the part of contract which cannot be performed is the conveyance of an item which is only a small portion of the whole in value and admits of compensation in money. The inability to perform the contract may be by reason of deficiency in quantity of the subject-matter, variance in quality, defect in title or of some other legal prohibition or lapse of time. For the applicability of these provisions of this sub-section two conditions must co-exist, namely:

- a) That the part which must be left unperformed bears only a small proportion to the whole value, and
- b) The part which must be left unperformed admits of compensation in money.

Section 12(3) lays down the second exception the general rule under Section 12(1). The equitable principle underlying this section is that specific performance of contract will not be enforced for the benefit of the purchaser and cannot operate to his detriment. Following are the important points in this sub-section:

- a) The part unperformed must be a considerable portion of the whole; or
- b) It does not admit of compensation in money;
- c) Not either of the parties, but party who is not in default may sue for part performance.

- d) Provided the plaintiff relinquishes, (i) claims to further performance and also, (ii) all rights to compensation on account of default of the defendant.

Section 12(3) of the specific relief Act can be invoked only where terms of contract permit segregation of rights and interest of parties in the property. The provision cannot be availed of when the terms of the contract specifically even an intention contrary to segregating interest of the vendor having the interest and *spes successionis* of reversioners. Neither law nor equity is in favour of the vendee to grant specific performance of the contract.^[25]

Section 12(4) is the third exception to the general law provided in sub-section 12(1). The ordinary presumption is that a contract is intended to be dealt with as a whole and not piecemeal. But this section permits the Court in certain cases where this presumption is rebutted to afford relief by way of partial performance. The basic principle of Section 12(4) is that when a contract consists of several parts which are separate from and independent of one another, and some of which cannot or ought not to be performed, such part or parts as can and ought to be performed may alone be specifically enforced. The court must not make a new contract for the parties, nor proceed merely on surmises that the requirements of the section would be satisfied, if further enquiry were allowed.^[26]

Section 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 contracts for the sale or hire of movable property.

This section is based on the extended principle what is known in English Law the doctrine of feeding the grant by estoppels. This doctrine found acceptance in India, in the form of Section 43 of Transfer of property Act. It has been extended in the present Section 13 of the Specific Relief Act. The right of the person of purchaser or lessee against the person with no title or imperfect title has been enumerated in Section 13 of the Specific Relief Act.

A contract may be specifically enforced even though the promisor had no title or imperfect title at the time of the contract. The promisor is bound to comply with the terms of the contract if he subsequently acquires the power of performing the contract. The promisee can compel the promisor to make good the contract out of the interest which the latter acquired subsequent to the contract.^[27] Section 13(a) says about above right of vendee.

There is distinction between Section 43 of T.P Act and Section 13 of Specific Relief Act:-

- Section 13 of the S.R. Act applies only where the matter is still in the stage of contract. It has no application to cases where an actual transfer has been made in respect of the property to which vendor or lessor has no title or has only an imperfect title.]

- Section 13 of S.R. Act applies to contract for sale or lease of immovable property and contracts for sale or hire of movable property which is in existence. It does not apply to those properties which are not in existence. It does not apply to those properties which are not in evidence; on the other hand, Section 43 of T.P. Act applies to transfer of immovable property while it has no application to movable properties.
- Section 13 of S.R. Act applies to contract for sale, lease or hire properties, movable or immovable, while Section 43 of T.P. Act applies to transfer which include within their ambit not only sales and lease but also mortgages, charges or other transfers for valuable consideration.

Contracts not specifically enforceable

Section 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 qualifications 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 (10 of 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 clause (a) or clause (c) or clause (d) of sub-section (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 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.

The effect of the provisions in Section 14 can be stated in terms of certain propositions, namely, that in the case of following contracts the relief of Specific performance cannot be allowed:

1. *Where Compensation is Adequate.*

Courts will not order specific performance of a contract where the aggrieved party can be adequately compensated in terms of money. An ordinary contract to lend or borrow money whether with or without security is an example of a contract which cannot be specifically enforced, though where a loan has been already advanced on the understanding that a security would be provided against it, this can be specifically enforced.

2. *Contracts involving personal skill*

It is not possible for the court to supervise the performance of a contract which runs into minute and numerous details or is dependent upon the personal qualifications of the promisor or is otherwise of volitional nature. Contracts of employment, contracts of personal service, contracts involving performance of artistic skill, like contract to sing, to paint, to act, contract of authorship are ordinary examples of things requiring personal skill and therefore beyond the capacity of the judicial process to enforce their actual performance. The only choice in such cases is to be content with damages.

3. *Contracts of Determinable Nature.*

Specific performance is not ordered of a contract which is in its nature determinable. Thus no order of specific performance is likely to be passed when the contract is revocable at the option of the opposite party. A revocable lease comes under this category. The court will not enforce a contract which is in its nature revocable by the defendant, for its interference in such case would be idle in as much as what it had done might be instantly undone by one of the parties.

4. *Contracts requiring Constant Supervision*

Clause (d) of Section 14(1) says that the contract cannot be specifically enforced where it involves the performance of continuous duty which the court cannot supervise. Contracts requiring the performance of a continuous duty extending over period longer than three years from the date of the contract cannot be specifically enforced.

5. *Construction Contracts*

Subject to certain exceptions, the court will not enforce specific performance to build, repair, or maintain works or building both because:-

- a) Specific performance is decreed only where the party wants the thing in specie and cannot have it in any other way; and
- b) Such contracts are for the most part so uncertain that the court will be unable to enforce its own decree.

Contract for Arbitration

Where an agreement of reference to an arbitration has been acted and determinate in an award a suit for the cancellation of the award on the ground of fraud and collusion is not against the tenor of Section 14(2). This section has no application except where a person having made a contract to refer a controversy to arbitration has refused to perform it and institutes a suit in respect of subject matter in defiance of the contract, where two competent tribunals are available for the determination of a controversy viz :-

- a) The court
- b) The arbitrators

And the plaintiff chooses the latter while he has remedy to the former, it is not open to the defendant to enforce specific performance of the agreement of reference.

Parties to an action for specific performance

Section 15. Who may obtain specific performance.-

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 of 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 remainder-man;

(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 the other party to the contract.

It is a general rule that a contract cannot be got enforced except by a party to the contract. This general rule is embodied in clause (a) of Section 15. But there are certain exceptions to this general rule. These exceptions are contained in clause (b) to (h) of the section and contain list of persons who although not a party to the contract, are entitled to obtain specific performance of contract. These are:

- 1) A representative in interest or the principal thereto.
- 2) Any person beneficially entitled
- 3) The remainder man
- 4) A reversioner in possession
- 5) A reversioner in remainder
- 6) The amalgamated company
- 7) The company

Other situation where contract can be enforced by any person other than the party thereto are where:

- 1) A trust is created in favour of a stranger by the contract.
- 2) The promisor constitutes himself as agent for the stranger.
- 3) It is so provided by a marriage settlement
- 4) The contract itself provides for maintenance

- 5) The contract itself provides for marriage expenses.
- 6) The aim of contract itself is to benefit a stranger.
- 7) A change is created in favour of a stranger by the contract etc.

Section 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
- (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
- (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 clause (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.

In **clause (a)** Court of equity would refuse the specific performance not only for fraud but also for trickness for ‘he who comes for equity must come with clean hands.’ For example: A, in the character of agent for B, enters into agreement with C to buy C’s house. A is in reality acting not as agent for B, but of his own account. A cannot enforce specific performance of contract.

In **clause (b)** the incapacity may be physical or mental or even legal. The insolvency of the Judgement-debtor, however does not render a contract of assignment decree invalid. In

If there is violation of essential terms of contract on his part then also relief is not granted.

In **Clause (c)** when a plaintiff in his suit for specific performance of the contract insists upon the implementation of the terms of the contract but on his own does not disclose his readiness and willingness to perform his own part of term.

Section 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 not 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 this section shall also apply to contracts for the sale or hire of movable property.

Specific Performance with a variation

Section 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 624 cannot obtain the performance sought, except with the variation so set up, in the following cases, namely:-

(a) where by fraud, mistake of fact or mis-representation, 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.

Section 18 deals with cases in which the contract entered into is valid contract. In other words, it is one in respect of which the remedy of damages is available. Section 18 does not apply unless there is complete contract. It sets out the cases in which contracts cannot be enforced except with a variation and there are three particular cases set out in which a contract may be enforced subject to variation, such a variation being in favour of the defendant. But the remedy of specific performance is available when the plaintiff is prepared to accept the variation pleaded by the defendant.

Ingredient :

- a) Contract in writing. The section does not apply unless there is a complete contract.
- b) Defendant sets up a variation.
- c) The plaintiff is put to an election either to have his action for specific performance dismissed or have it subject to such variation.
- d) But if plaintiff does not accept variation, he does not lose ordinary common law remedy of damages.

Section 19. Relief against parties and persons claiming under them by subsequent title.- Except as otherwise provided by this 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.

Clause (a)

In a suit for specific performance the parties to the contract are the sufficient parties. A stranger to the contract is not a proper or necessary party. In

Clause (b)

Four things for the applicability of this clause must be there:

- a) The transfer is for value
- b) The consideration has been paid
- c) The subsequent transferee has taken the transfer in good faith

- d) Both the transfer and the payment of the consideration had been made without notice of the prior contract.

Clause (c)

This clause applies to cases where suit is not brought against the contracting party but against another whose title has been displaced by the former. In

Clause (d)

The principle in this clause is that the amalgamated company is not allowed to exercise powers acquired by means of agreements with its component companies, except upon the terms of complying with those agreements provided they are such as the amalgamated company would itself have been bound by, if it had entered into them.

Clause (e)

This Clause is not intended to apply to contracts to take share but only to contracts for the workings purposes of the company.

Discretion of the Court in ordering Specific Performance

It has been recognized on all hands that to decree specific performance is a matter of discretion of the court. But it does not mean that it is open to the court to do just what it pleases in an individual case without regard to authority or principle.

Section 20. Discretion as to decreeing 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;

(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 clause (a) or hardship within the meaning of clause (b).

Explanation 2.-The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (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.

The section gives to the Court discretion in the matter of decreeing specific performance. This discretion is not arbitrary, but sound and reasonable, guided by the judicial principles. Under no circumstances, the court should exercise its discretion, where it would be improper. Mere on the ground that the contract is unenforceable court can't refuse relief to any party. The discretion of the court is to decide whether enforcement of the contract in the present circumstances is fair and if the contract is fair and reasonable character of the plaintiff has been

good then the discretion of the court has no application. The court would grant specific performance on following general principles:

- 1) Specific performance will not be granted where damages are an adequate remedy.
- 2) To grant a specific performance of a contract is at the discretion of the court.
- 3) The plaintiff must prove the following:
 - a) That there was concluded and valid contract between him and the defendant.
 - b) That he performed or is ready and willing to perform the terms of contract on his part
 - c) That he was ready and willing to do all matters and things on his part thereafter to be done.

Section 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. 626
- (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 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 section 73 of the Indian Contract Act, 1872 (9 of 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.

The plaintiff in a suit for specific performance of contract, under Section 21 may also ask for compensation in case of the breach of the contract, either in addition to or in substitution for such performance but if the plaintiff in a suit for specific performance omits to ask for compensatory relief and his suit for specific performance is dismissed then his subsequent suit for compensation will be barred by the provisions of Section 24.

Section 22. Power to grant relief for possession, partition, refund of earnest money, etc.-

- (1) 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 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.

Section 23. Liquidation of damages not a bar to specific performance.-

- (1) A contract 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 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.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

Section 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.

It is open for the party to a contract to sue for its specific performance and for compensation for its breach in addition to or in substitution for such performance by the defendant. In those cases the plaintiff does not treat the contract to be at an end and asserts that he has been all along willing to performance his part of the contract. If the court grants him the specific performance, he will discharge his obligation. But in an action for damages only for breach of the contract, that cannot be the position there, the contract is taken to be no longer subsisting to be enforced.^[55]

RECTIFICATION OF INSTRUMENTS

Section 26:- When instrument may be rectified.-

(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the articles 628 of association of a company to which the Companies Act, 1956 (1 of 1956), applies) does not express their real intention, then-

- (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 clause (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 sub-section (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 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.

Doctrine of Rectification

Rectification means correction of an error in an instrument in order to give effect to the real intention of the parties. Where a contract has been reduced into writing, in pursuance of a previous engagement and the writing, owing to fraud or mutual mistake, fails to express the real intention of the parties, the court will rectify the writing instrument in accordance with their true intent." Here the fundamental assumption is that there exists in between the parties a complete and perfectly unobjectionable contract but the writing designed to embody it, either from fraud or mutual mistake is incorrect or imperfect and the relief sought is to rectify the writing so as to bring it into conformity with true intent. In such a case to enforce the instrument as its stand must be to injure atleast one party to it; to rescind it all together must be to injure both, but rectify it and then enforce it is to injure neither but to carry out the intention of both.

Who can apply for Rectification

The following persons may apply:-

- a) Either party or his representative in interest.
- b) The plaintiff in any suit.
- c) A defendant in such suit.

Conditions Necessary

The conditions necessary for obtaining rectification are:-

1. There must have been a complete agreement reached prior to the written instrument which is sought to be rectified. There must be two distinct stages:
 - i) an agreement, verbal or written, which clearly expresses the final intention of the parties
 - ii) instrument which purports to embody that intention.
2. Both the parties must have intended, and still intending, that the exact terms of the prior contract should be reduced to writing.
3. Clear evidence of Mistake common to both parties or of fraud.

The principle on which the court acts in correcting instruments is that the parties are to be placed in the position as that in which they would have stood if no error had been committed. It is important that mistake should be from both parties. Mistake of single party cannot be rectified.

DECLARATORY DECREES

Section 34. Discretion of court as to declaration of status or right.-Any person entitled to any legal character, or to any right 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 some one who is not in existence, and for whom, if in existence, he would be a trustee.

A declaratory decree is a mode of relief where there is no specific performance and no award of compensation. There is only a declaration of rights of the parties without any consequential relief which can be enforced by the execution of the decree. In other words, declaratory decrees are those where some right is declared in favour of the plaintiff but nothing is sought to be paid or performed by the defendant. Further, the declaration does not confer any new rights upon the plaintiff; it merely declares what he had before.

Object

The object of such decrees is that where a person's status or legal character has been denied or where a cloud has been cast upon his titles to rights and interests in some property, he may have the cloud removed by having his legal status or rights declared by the court. But it is not a matter of absolute right to obtain a declaratory decree. It is discretion of the Court. The object of Section 34 is to perpetuate and strengthen testimony regarding title and protect it from adverse attacks.

Essential requisites for a declaratory action.

1. The plaintiff must be entitled to any legal character or to any right as to any property.
2. The defendant should have denied or be interested in denying the character or title of the plaintiff. It is this denial which gives a cause of action for declaratory relief.
3. The plaintiff is not in a position to claim further relief than mere declaration of his title.

Section 35. Effect of declaration.-A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

According to this section the declaratory decree is not binding on everybody in the world. It cannot bind strangers and as such a declaration will not operate as a judgement in *rem* and will be binding only between parties to the suit and their representatives. Hence, a declaratory decree is binding between the parties inter se and its effect does not bind persons who are not connected with the suit in question.

INJUNCTIONS

An injunction is a specific order of the court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun, or in some cases, when it is called mandatory injunction commanding active restitution of the former state of things. In Barney's Encyclopedia of Laws of England it is defined as "a judicial process by which one, who has invaded or is threatening to invade the rights (legal or equitable) of another, is restrained from continuing or commencing such wrongful act." Lord Halsbury is most explicit when he says: "An injunction is a judicial process where by a party is ordered to refrain from doing or to

do a particular act or thing.” In former case it is called restrictive injunction and in the latter case it is called mandatory injunction.

Types

Injunctions are of three kinds:

- (i) temporary;
- (ii) permanent
- (iii) mandatory.

Perpetual Injunction

According to Section 53 of the S.R Act, a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is hereby perpetually enjoined from assertion of a right, or from the commission of an act which would be contrary to the rights of the plaintiff.

Perpetual Injunction when granted

A perpetual injunction may be granted to prevent the breach of obligation existing in favour of the applicant, whether expressly or by implication.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunctions in the following cases:-

- a) Where the defendant is trustee of the property for the plaintiff.

Illustration: A trustee threatens a breach of trust. His co-trustees if any should and the beneficial owner may sue for an injunction to prevent the breach.

- b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

Illustration: In the course of A's employment as a vakil, certain papers belonging to his client, B come into his possession. A threatens to make this papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

- c) where the invasion is such that pecuniary compensation would not afford adequate relief;

Illustration: A, is B's medical advisor. He demands money for which B declines to pay. A then threatens to make known effect of B's communications to him as a patient. This is contrary to A's duty and B may sue for an injunction to restrain him from so doing.

- d) where it is provable that pecuniary compensation can not be got for the invasion;

Illustration: A, the owner of certain houses in Dhaka becomes insolvent. B buys them from the official assigned and enters into possession. A persists in trespassing on and damaging the houses and B is thereby compelled, at considerable expenses to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

- e) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Illustration: A pollutes the air with smoke so as to interfere materially with the physically comfort of B and C, who carry on business in a neighboring house. B and C may sue for an injunction to restrain the pollution.

Mandatory Injunction

According to section 55 of the S. R. Act—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 the performance of the requisite act.

Illustration:

A, by new buildings, obstructs lights to the access and use of B. B may obtained an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's light.

Temporary Injunction

Every court is constituted for the purpose of administering justice between the parties and therefore, must be deemed to process all such powers as may be necessary to do full and complete justice to the parties before it.

It is a well stated principle of law that an interim relief can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his rights in a suit or any other proceeding therefore, a court undoubtedly processes the power to grant interim relief during the pendency of the suit.

Definition of Temporary Injunction

According to order 39 of the CPC any order made temporarily prohibiting the defendant not to alienate, or to change or to damage the property in dispute during the pendency of the suit is called temporary injunction.

According to section 53 of the S. R. Act, temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit and are regulated by the Code of Civil Procedure, 1908.

Thus temporary injunction is regulated under the provisions of rules 1-5, order 39 of the Code of Civil Procedure, 1908.

Object of temporary injunction

The purpose of granting interim relief is the preservation of property in dispute till legal rights and conflicting claims of the parties before the court are adjudicated.

When and how a temporary injunction is granted

Grounds:

According to Order 39 Rules 1& 2 of the CPC –

Temporary injunction may be granted by the Court in the following cases-

1. where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or;
2. where the defendants threatens, or intends to remove or dispose of his property with a view to defrauding his creditors; or
3. where the defendants threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit; or
4. where the defendant is about to commit a breach of contract, or other injury of any kind; or
5. where the court is of the opinion that the interest of justice so requires.

Who may apply?

It is not the plaintiff alone who can apply for an interim injunction. A defendant also may make an application for grant of an injunction against the plaintiff.

Against whom injunction may be issued

An injunction may be issued only against a party and not against a stranger or a third party. It also cannot be issued against a court or judicial officer. Normally, injunction can be granted against persons within the jurisdiction of the court concerned.

Grant of Injunction

Grant of injunction on terms

The court has power to impose reasonable terms as a condition when granting injunction.' Thus it may call upon the plaintiff to undertake that he will abide by any order which the court may make as to damages.

Principle of Granting Injunction

Principles governing grant of injunction

The power to grant a temporary injunction is at the discretion of the court. This discretion, however, should be exercised reasonably, judiciously and on sound legal principles. Injunction should not be lightly granted as it adversely affects the other side. The grant of injunction is in the nature of equitable relief, and the court has undoubtedly power to impose such terms and conditions as it thinks fit. Such conditions, however, must be reasonable so as not to make it impossible for the party to comply with the same and thereby virtually denying the relief which he would otherwise be ordinarily entitled to. Generally, before granting the injunction, the court must be satisfied about the following aspect.

A relief of temporary injunction cannot be granted just for the mere asking of it after filing of a suit without adverting to the principles governing the grant of temporary injunction. Before an order of temporary injunction may be passed, the court must be satisfied that the applicant has a

- prima facie in his favour
- applicant shall suffer irreparable injury or loss if the injunction is not granted
- the balance of inconvenience is in favour of the applicant.