

Chapter XX

Obligations in the Nature of Trust

"A constructive trust is the extension of a court's conscience, its foundations are vesting of property in the defendant and the principle of unjust enrichment; absence of confidence has no relevance."

SYNOPSIS

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| 1. Text of Sections 80 to 96 | (i) General |
| 2. (a) Resulting Trusts (Sections 81 to 85) | (ii) Constructive Trust: A Remedy or a Trust ? |
| (b) Constructive Trusts (Sections 86 to 94) | (iii) Instances |

1. TEXT OF SECTIONS 80 TO 96*

80. *Where obligation in nature of trust is created.*—An obligation in the nature of a trust is created in the following cases.

83. *Trust incapable of execution or executed without exhausting trust-property.*—Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Illustrations

- (a) A conveys certain land to B—
"upon trust", and no trust is declared; or
"upon trust to be thereafter declared", and no such declaration is ever made; or
upon trusts that are too vague to be executed; or
upon trusts that become incapable of taking effect; or
"in trust for C", and C renounces his interest under the trust.
In each of these cases B holds that land for the benefit of A.
- (b) A transfers Rs 10,000 in the four per cent to B, in trusts to pay the interest annually accruing due to C for her life. A dies. Then C dies. B holds the fund for the benefit of A's legal representative.
- (c) A conveys land to B upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. B sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. B holds the first moiety and the part unapplied of the second moiety for the benefit of A or his legal representative.
- (d) A bequeaths Rs 10,000 to B, to be laid out, in buying land to be conveyed for purposes which either wholly or partially fail to take effect. B holds for the benefit of A's legal representative the undisposed of interest in the money or land if purchased.

84. *Transfer for illegal purpose.*—Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the

* Ss. 81, 82 and 94 have been repealed by Benami Transactions (Prohibition) Act, 1988—
See Chap. 3, maxim 9, ante.

transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

85. *Bequest for illegal purpose.*—Where a testator bequeaths certain property upon trust and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest of which revocation is prevented by coercion.—Where property is bequeathed and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

86. *Transfer pursuant to rescindable contract.*—Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

87. *Debtor becoming creditor's representative.*—Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

88. *Advantage gained by fiduciary.*—Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances, in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Illustrations

- (a) A, an executor, buys at an undervalue from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit to B the difference between the price and value.
- (b) A, a trustee, uses the trust-property for the purpose of his own business. A holds for the benefit of his beneficiary the profits arising from such user.
- (c) A, a trustee, retires from his trust in consideration of his successor paying him a sum of money. A holds such money for the benefit of his beneficiary.
- (d) A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.
- (e) A, a partner, employed on behalf of himself and his co-partners is negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. A holds the lakh for the benefit of the partnership.
- (f) A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital.
- (g) A, an agent employed to obtain a lease for B, obtains the lease for himself. A holds the lease for the benefit of B.

- (h) A, a guardian, buys up for himself incumbrances on his ward B's estate at an undervalue. A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid.

89. *Advantage gained by exercise of undue influence.*—Where, by the exercise of undue influence, any advantage is gained in derogation of the interest of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

90. *Advantage gained by qualified owner.*—Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

Illustrations

- (a) A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.
- (b) A village belongs to a Hindu family. A, one of its members, pays *Nazrana* to Government and thereby procures his name to be entered as the *inamdar* of the village. A holds the village for the benefit of himself and the other members.
- (c) A mortgages land to B, who enters into possession. B allows the government revenue to fall into arrears with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

91. *Property acquired with notice of existing contract.*—Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

92. *Purchase by person contracting to buy property to be held on trust.*—Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

93. *Advantage secretly gained by one of several compounding creditors.*—Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

95. *Obligor's duties, liabilities and disabilities.*—The person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to

the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Provided that (a) where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment; and (b) where he holds the property by virtue of a contract with the person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof.

96. *Saving of rights of bona fide purchasers.*—Nothing contained in this Chapter shall impair the rights of transferees in good faith for consideration, or create an obligation in evasion of any law for the time being in force.

Sections 81 to 94 in this chapter relate to certain obligations in the nature of trusts. The Indian Trusts Act, 1882 does not use the terms “resulting” and “constructive” trusts but these sections are virtually its examples. Sections 81 to 85 explain the circumstances wherein a *resulting trust* is created and Sections 86 to 94 put forward the instances wherein a *constructive trust* comes into existence.

2. (a) RESULTING TRUSTS (SECTIONS 83–85)

As has been explained before, there is no doctrinal unity to resulting trusts and hence creation of such a trust is not dependent on compliance with formalities and is also not subject to all rules of express trust. In such a trust the beneficial interest in the property results or reverts to its creator. The essential principles regarding this type of trust have been discussed in Chapter 12, para 9. The instances of such trusts collected by the Indian Trusts Act under Sections 83 to 85 may be reproduced as follows:

- (i) Where a trust is incapable of execution or where it is completely executed and some property remains still, the trustee must hold such property in trust called a resulting trust. Illustrations to the section make this clear (Section 83). But a resulting trust cannot arise “only in the absence of a contract to the contrary”.¹
- (ii) Where property is transferred to another for an illegal purpose and the same is not carried² out and the transferor is not as guilty as the transferee, there results a trust as contemplated by the section (Section 84).
- (iii) Where a bequest is made for an illegal purpose, the same must be held in trust by the legatee without any action to carry out the purpose. The same result follows where a bequeath made is prevented by coercion from being revoked (Section 85). This section and Section 84 must be read with Section 4 of the Act.

1. *Sir Fazalbhoy Currimbhoy v. Official Trustee of Maharashtra*, (1979) 3 SCC 189, 195.

2. *Petherperumal v. Muniandy*, 35 IA 98.

(b) CONSTRUCTIVE TRUSTS (SECTIONS 86-94)

(i) *General*.—Such trusts arise by operation of law. In certain circumstances the legal owner of property must hold it in trust for another according to principles of equity. It is not possible in such circumstances to observe formalities. When it would be an abuse of confidence for the owner of property to hold the same for his own benefit, a trust is imposed upon him irrespective of his intention. Such trusts are called constructive trusts and they are enforced on one principle and that is, to prevent unjust enrichment of one person at the expense of another. A somewhat elaborate discussion of this will be found in Chapter 12, para 5, but it would be fruitful to note some important aspects of this type of trust. No satisfactory definition of such trust, as Snell says, has been so far produced; its concept not having assumed a complete form and its limitations being not clear. But one thing is clear that it arises out of an obligation imposed on conscience, says Keeton. We may say that it is an extension of "conscience" of the equity courts. In other words, it is a method of exposing the conscience by equity courts. There are various types of constructive trusts. Where a person is a legal owner of property but according to conscience he is not entitled to its beneficial interest, where property should have been with Y, but it is with X due to a peculiar situation and where a person intermeddles with the trust affairs and either gains or inflicts a loss to the trust, in all such circumstances he is bound by conscience and he is said to be a constructive trustee.

(ii) *Constructive Trust: A Remedy or a Trust?*—On this point the answers differ. According to English law, it is a variety of trusts and fiduciary relations between the parties are necessary for its existence. According to American law, it is a remedy and not an independent trust. Before finding an answer to this question we must note that the area of operation and the limitations or scope of the constructive, resulting and implied trusts are not clear and they may overlap. Now suppose A transfers property to C, a trustee, for B's benefit for B's lifetime. B dies and therefore the property will revert to A, the author, and in his absence to his legal representatives. What is the justification for this position? Is it because of the implied intention of the testator, or because it was a case of a resulting trust, or because it is fair and just to do so? The reason may be any one of these. English law, in such a situation, takes it as a trust in the hands of C. But this solution does not provide answers to the following questions:

- (i) Are fiduciary relations necessary for such a trust to arise?
- (ii) Where such relations do not exist, does a trust arise?
- (iii) By what test would you determine the rights and duties of its parties?
- (iv) Is it not a novel experiment found out by the courts to supply a remedy in cases demanding justice?

American law considers this as a remedy springing from the court's desire to supply one in case of unjust enrichment. Out of the two views, English and American, the latter offers a better and reasonable approach.

Such a trust arises only where a property is vested in or transferred to the defendant and not otherwise. At this juncture one has to note that in a constructive

trust there may not be a position of confidence existing between the parties and yet the law imposes obligations on the parties exactly similar to trust obligations. Why so? Because the situation demands a solution, and a just solution is the answer. Just as a quasi-contract (obligation in the nature of a contract) arises in spite of absence of proposal, acceptance, consent and consideration, so a constructive trust (obligation in the nature of a trust) arises even in the absence of a position of confidence as required by Section 3 of the Trusts Act.

(iii) *Instances.*—The Indian Trusts Act has collected those instances in Sections 86 to 93 wherein such trusts arise and they can be briefly laid down as under:

- (i) Where property is obtained by one under a contract which is liable to rescission, or induced by fraud or mistake, he must hold the same for the transferor's benefit provided the transferor is prepared to do equity and return the consideration actually paid (Section 86). This is on the principle that the transferee has got the legal estate but not the equitable estate.³ One should read with this section Section 19 of the Indian Contract Act and Section 35 of the Specific Relief Act.
- (ii) Where a debtor becomes the creditor's representative there arises a constructive trust because on the principles laid down in *Ingle v. Richards*⁴, a debt which an executor owes to the estate will be considered as an asset in his hands because his debt is not extinguished in equity because of his appointment as such (Section 87).
- (iii) Where a person standing in a fiduciary position with another, instead of protecting the interest of that other, gains as such for himself or enters into dealings whereby he gains for himself and where therefore his duties and interest conflict, he must hold that pecuniary advantage in trust for that other person (Section 88). Illustrations to the section amply explain these situations. A trustee, executor, partner, agent, director of a company, legal adviser, co-decree holder and co-mortgagee are its illustrations.

Whether or not under the situations as above a trust arises and therefore a liability to account is imposed upon such person in fiduciary character, or it is because on the principle of unjust enrichment that a liability to account for the advantages received is imposed, is an interesting question and its elaborate discussion is provided in Hanbury⁵ under the topic "Incidental Profits". *Boardman v. Phipps*⁶ is a leading case on the point wherein trustees were compelled to account for profits gained by their position as trustees. Paragraph 6 of Chapter 16 may be seen in this regard.

3. *Re Rochefoucauld*, (1897) 1 Ch 196.

4. (1860) 28 Bav 366.

5. *Modern Equity*, pp. 369 to 378.

6. (1967) 2 AC 46.

Chapter XX-A

Fiduciary Relationship

Section 88 of the Trust Act requires a fiduciary not to gain an advantage of his position. If he acts in contravention of the provisions of the section and gains or obtains an advantage for himself, he should hold the same for that other person who has reposed confidence in him to protect his interests. The section gives Illustrations of this situation. However, it has to be noted that the section does not define a "fiduciary". Fiduciary relationship arises not from trust only but *ex lege* and *ex conventionione* also.

Definition

As Walker defines it:

"A 'fiduciary' is a person in a position of trust, or occupying a position of power and confidence with respect to another such that he is obliged by various rules of law to act solely in the interest of the other, whose rights he has to protect. He may not make any profit or advantage from the relationship without full disclosure. The category includes trustees, Company promoters and directors, guardians, solicitors and clients and others similarly placed."¹

"A fiduciary relationship", as observed by Anantnarayanan, J., "may arise in the context of a *jural relationship*. Where *confidence is reposed* by one in another and that leads to a transaction in which there is a *conflict of interest and duty* in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence."²

Trust and a Fiduciary Relationship

There are two things in which an analogy exists between fiduciary relationship and a trust. And it is because of this that it is commonly understood that fiduciary relationship is a trust. The first point on which an analogy can be traced is about following the property. In case of a trust the trust property in the hands of trustee can be followed by the beneficiary as against the creditors of a trustee, when the trustee goes bankrupt. This feature is present in case of fiduciary relationship generally. That is, a similar remedy would be available.³ The second similarity is in case of remedy for a wrong. The same remedy as is available against a trustee in respect of a wrong, when it arises in regard to trust property, is available in case of a wrong in case of fiduciary relationship.

Though there is a similarity in these two incidents one cannot say that a fiduciary relation is necessarily a trust. On the contrary the fiduciary relation is a genus, while a trust is one of its species.

1. *Oxford Companion to Law*, 1980, p. 469.

2. *Nellie Wapshare v. Pierce Lasha & Co. Ltd.*, AIR 1960 Mad 410.

3. *See Re West of England South Wales Dt. Bank, Ex p. Dale & Co.*, (1879) 11 Ch D 772.

Its Nature

It is an inflexible and settled rule of equity that a person in a fiduciary position will not be allowed to misuse his office and gain out of it. His interest should not conflict with the interest of those whose interest he is bound to protect. Here self-interest and self-preference are made subordinate to loyalty towards others. In other words such a person should not be *auctor in rem suam*, that is, he should not be an agent for his own advantage.

As said before, this relationship springs into existence out of circumstances; it is a confidential relationship which is the product of equity in the interests of good conscience and justice.

The fiduciary who gains on account of his position against the interests of his confider is bound to account for the same.⁴ This principle is not, as said by Lord Herschell in *Bray v. Ford*⁵, founded upon morality; it is rather based upon consideration of human nature: human beings being selfish by nature, and some rule is required to check that selfishness. If it is not checked one would act as an agent for one's own advantage.⁶

When Arises

Whenever two persons stand in such a situation that confidence is necessarily reposed by one in the other, there arises a presumption as to fiduciary relationship which grows naturally out of that confidence. Such a confidential situation may arise from a contract or by some gratuitous undertaking, or it may be upon previous request or undertaken without any authority.⁷

Important Aspects

Some important aspects of this relationship may be laid down as under:

Office of fiduciary being onerous one the fiduciary has to take care—A fiduciary cannot get remuneration unless so provided. This is so because his office is gratuitous. He has to maintain a reasonable standard of business efficiency—(See the duties of a trustee and compare). The nature of the office of fiduciary is such that he *cannot be a purchaser* of the property under his control. Vishwanath Shastri, J., has explained this principle as: "A transaction by a person occupying a fiduciary position under circumstances in which his own interests are or may be adverse to those of the persons who own the property and whose interests he is bound to protect is always guarded by the courts with utmost jealousy. If such a transaction is impeached. . . The purchaser must show that there has been no fraud or concealment or advantage taken by him of information acquired by him by virtue of his position."⁸ His duty of office is so onerous, demanding and exacting that one may say that he must never think of purchasing the trust property at all. Akin to this the general rule for fiduciary is

4. See *Regal (Hastings) Ltd. v. Gulliver*, (1942) All ER 378.

5. (1896) AC 44.

6. See *Jaya Singh v. Krishna*, AIR 1985 SC 1646.

7. *Lyell v. Kennedy*, (1889) 14 AC 437.

8. *Eswara Gowd v. Samasekhar Gowd*, 1956 Andh WR 911.

that he may not profit at the expense of the beneficiary. If at all he benefits, the profit belongs to the beneficiary. He must therefore account for it and return it to the beneficiary since it is inequitable in him to retain it. Last, but not the least, is good faith. Good faith and honesty lie at the root of all fiduciary relations. Transactions devoid of good faith are quite unfair and therefore liable to be set aside. Personal interest of a fiduciary should not conflict with that of his beneficiary. This is what Viscount Sankey in *Regal (Hastings) Ltd. v. Gulliver*⁹ and Anant Narayanan, J. in *Nellie Wapshare*¹⁰ observed. In short, as observed by the Supreme Court¹¹, honesty and protection of confidence are very very important for a fiduciary. Summing up, it may be said that good faith, honesty, no profit from one's office and position, no purchase of beneficiary's interest and no remuneration for working as a fiduciary are some of the important rules for a fiduciary.

Types

Section 88 applies to a trustee, executor, partner, agent, director of a company, legal adviser or *other persons bound in fiduciary character*. Kinds of these other persons bound by fiduciary character may be enumerated as under:

- (1) Trustee (*see* their duties and liabilities),¹²
- (2) Director of a company,¹³
- (3) Partner,¹⁴
- (4) Agent,¹⁵

In *Sankara Kurup case*¹⁶ an agent was employed to purchase property on behalf of his principal. He does so in his own name. Consequently, upon conveyance or transfer of the property to the agent, he stands as a trustee for the principal. The property in the hands of the agent is for the principal and the agent stands in the fiduciary capacity for the beneficial interest he had for the property as a trustee.

- (5) Executor,¹⁷
- (6) Legal Adviser,
- (7) Manager of a joint family,¹⁸

9. (1942) All ER 378.

10. AIR 1960 Mad 410.

11. *Controller of Estate Duty v. Alok Mitra*, AIR 1981 SC 102.

12. Illustrations (b), (c) to S. 88.

13. *Co-op. Co. Ltd. v. Bhagwandas & Co.*, AIR 1930 All 615; *Commr. of Agricultural Income Tax v. Shree Hanuman Sugar Mills Ltd.*, AIR 1965 Pat 58.

14. Illustrations (d), (e), (f) to S. 88; *Mathura Dutt Bhatt v. Prem Bhallabh Khulba*, AIR 1961 All 19.

15. Illustration (g) to S. 88; *P.V. Sankara Kurup v. Leelavathi Nambiar*, (1994) 6 SCC 68, 70, 71: AIR 1994 SC 2694.

16. *Ibid.*

17. Illustration (a) to S. 88; *Re Mackay v. Gould*, (1906) 1 Ch 25; *Venkatsubramania v. Sivagurunath*, 1938 Mad 64.

18. *N.C.T. Chidambaram v. C.A.C. Subramaniam*, AIR 1982 Mad 228.

- (8) Parent and child,¹⁹
- (9) Religious, medical and other advisers,
- (10) Guardian and Ward,²⁰
- (11) Licensees appointed on remuneration to purchase stocks on behalf of government,²¹
- (12) Confidential Transactions wherein confidence is reposed,²² and which are indicated by—
 - (a) Undue influence,²³
 - (b) Control over property,
 - (c) Cases of unjust enrichment,²⁴
 - (d) Confidential information,²⁵
 - (e) Commitment of job,²⁶
- (13) Tenant for life,²⁷
- (14) Co-owner,²⁸
- (15) Mortgagee,²⁹
- (16) Other qualified owners of property,³⁰
- (17) De facto guardian,³¹
- (18) Receiver,³²
- (19) Insurance Company,³³
- (20) Trustee de son tort,³⁴
- (21) Co-heir,³⁵
- (22) Benamidar,³⁶

19. *Brahma Raj Singh v. B.R. Devi*, AIR 1982 HP 87.

20. Illustration (h) to S. 88.

21. *State of Madras v. Jayalaxmi Rice Mills Contractors*, AIR 1959 AP 352.

22. *Subhas Chandra v. Ganga Prasad*, AIR 1967 SC 878; *Debi Prasad v. Chhote Lal*, AIR 1966 All 438; *Hodgson v. Marks*, (1971) 2 All ER 684.

23. See S. 89.

24. *Boardman v. Phipps*, (1967) 2 AC 46.

25. *Regal Hastings Ltd. v. Gulliver*, (1942) All ER 378.

26. *Reading v. R.*, (1949) KB 232.

27. *Rajendra Prasad v. R.P. Sao*, AIR 1985 Pat 104; See S. 90.

28. *Ibid.*

29. *Ibid.*

30. *Ibid.*

31. *Abdul Wajid v. Oosman Abdul Rubb*, 1943 Mad 154.

32. *Seerangathuni v. Vaithilinga*, 1921 Mad 528.

33. *Ramkrishna Iyer v. S.I. Gen. Assurance Co.*, 1942 Mad 210.

34. *Moosabhai v. Yacob Bhai*, 29 Bom 267.

35. *Kadir Bathummal v. Meera M. Ammal*, (1945) 1 MLJ 338; 1945 Mad 303.

36. In view of Benami Transactions (Prohibition) Act, 1988, the benamidar's position is no longer the same as it was before the Act.

These transactions may fall in various broad categories, like commercial transactions, confidential transactions, domestic transactions, jural transactions, professional transactions, public transactions and trusteeship transactions.

- (iv) Similarly, advantages gained by exercise of undue influence or by a qualified owner³⁷ must be held in trust for the benefit of that other (Sections 89-90). *Huguenin v. Baseley*³⁸ and *Allcard v. Skinner*³⁹ are leading instances on the point. A tenant for life, co-owner,⁴⁰ mortgagee⁴¹ and co-sharer are the instances of this situation and they are illustrated in the examples attached to the section. *Sorabjee v. Dwarkadas*⁴² may be cited as a leading case on this point.⁴³ Section 63 of the Transfer of Property Act, it must be noted, should be read subject to Section 90 of the Trusts Act, i.e., a mortgagor is not only entitled to accession to his property but also entitled to acquisitions made by the mortgagee for his own benefit in circumstances which bring him within Section 90 of the Indian Trusts Act.
- (v) Where property is acquired by a person with notice of an existing contract which is capable of specific performance, he must hold the same in trust under Section 91. One must note that here a contract raises a trust.
- (vi) Where a person buys property which he knows is to be held on trust, he is subjected to a constructive trust under Section 92.
- (vii) Advantage secretly gained by one of co-compounding creditors must also be held in trust under Section 93.

Section 95 fixes the obligee (trustee) holding property in accordance with any of the preceding sections, with duties, liabilities and disabilities as those of the actual trustee. Such a person is entitled to suitable remuneration as the occasion demands. But the rights of a *bona fide* transferee in good faith and for consideration are not impaired by these provisions.

37. *Namdeo Shreepati Nale v. Bapu Ganpati Jagtap*, (1997) 5 SCC 185.

38. (1807) 15 Ves 180.

39. (1887) 36 Ch D 145.

40. *Md. Israfil*, AIR 1971 Pat 350.

41. *Mahabir Singh v. Rameshwar Singh*, AIR 1979 Pat 46.

42. (1932) 36 CWN 947 (PC).

43. See also *Sataded v. Kamal*, AIR 1953 Pat 27 and *Mrutyunjay v. Narmada*, AIR 1961 SC 1353.

PART IV
SPECIFIC RELIEF OR EQUITABLE REMEDIES

Chapter XXI

Equitable Remedies-Nature and Scope

“One of the most striking characteristics of equity has been its inventiveness in providing a diversity of remedies. . .”

“The remedies at law were thus both circumscribed and impersonal. The law acted in pursuance only to a limited extent. . . Equity supplemented the limited range of legal remedies by providing a wide range of new remedies. . . These remedies gradually evolved and became settled in their rules and principles.”

—Snell's Principles of Equity, p. 569

“Throughout these several departments of jurisdiction runs the common principle that the Chancellor addresses himself directly to the conscience of the individual, acting in personam by means of a subpoena and being therefore independent of territorial limits of jurisdiction.”

—C.K. Allen: Law in the Making, p. 413

SYNOPSIS

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|------------------------------|--------------------------------------|
| 1. General | 4. Specific Relief Act, 1963: Scheme |
| 2. Basis of Equitable Relief | 5. Specific Relief |
| 3. Equitable Remedies | 6. Sections 1-4 |

1. GENERAL

Specific relief, as 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 its place as a distinct part or other division of the Civil Procedure Code. This has not happened in India because some centuries ago, the King's ordinary civil courts of law had but limited remedies and in many cases the King's justice was in default. It is now familiar learning to all students of legal history that in the early stages of judicial institutions we constantly find that the power of courts to enforce decisions or even to compel the appearance of parties is rudimentary if not wholly wanting. There is, therefore, nothing to be surprised at in the limited scope of common law remedies in the Middle Ages. The question why it was not enlarged until the latter part of the nineteenth century has its own historical reasons. Meanwhile, the Chancellor, exercising the King's reserved power of doing justice in an extraordinary way where the ordinary means failed, had undertaken to make the defect good. It is only in quite recent times that the courts have acquired power to do without any concurrence of a party in default that which he ought to have done.¹

Hence were derived both the strength and the weakness of the courts of equity. They could do much that a court of common law could not do; but they had to justify their action on the ground that the suitor showed some special cause for seeking a kind of relief which was originally conceived as

1. Pollock & Mulla: *Indian Contract Act and Specific Relief Act*, 9th Edn., 1972, pp. 805-806. See also *Snell's Principles of Equity*, p. 569.

extraordinary. This was especially so in cases where the plaintiff had a legal right, a right for which the Common Law provided some remedy, but was inadequate in the sense of not being capable of doing full justice in the case. The doctrine and practice of specific performance belong to this class.²

The word 'specific' in the expression specific relief implies a precise reference to one particular thing or to certain details among several. It may therefore be said to be a definite or an exact positive remedy.³ It aims consequently at the exact fulfilment of an obligation and is directed straightaway to the obtaining of the very thing which a person is entitled under a contract and of which he had been deprived. In words of Dr Banerjee it is directed to the obtaining of the very thing that a party is under the law entitled to ask for, whether it be an act or a forbearance. Specific relief thus though more exact is very delicate and more difficult to administer and requires more skill and care on the part of a judge; and hence the guidance in the form of this legislation in India.

2. BASIS OF EQUITABLE RELIEF

Inadequacy of the remedies at law and the elastic willingness of equity to use its discretion⁴ directly with reference to the conscience of the individual were the two main foundations of equitable relief. For this purpose the equity courts invented the working principles, called the maxims, and in granting relief it relied on the same, mainly—

- (i) he who comes to equity must come with clean hands;
- (ii) he who seeks equity must do equity; and
- (iii) delay defeats equity.

The Specific Relief Act, 1963⁵ in India relies on the English principles of equity in granting or refusing such relief.

3. EQUITABLE REMEDIES

As said before, equity supplemented the limited range of legal remedies by acting *in personam* and by providing a wide range of new remedies. They were—

- (i) specific performance;
- (ii) delivery up and cancellation of documents;
- (iii) rescission of contracts and rectification of instruments;
- (iv) ordering accounts in proper cases;
- (v) issuing injunctions; and
- (vi) appointment of receivers.

2. *Ibid.*

3. Funk & Wagnalls: *Standard Handbook of Synonyms, Antonyms & Prepositions*, pp. 190-191.

4. See *Ajit Prasad Jain v. N.K. Widhani*, AIR 1990 Del 42.

5. Originally Specific Relief Act, 1877.

Besides, discovery of documents, suits for perpetuation of testimony, *quia timet action* (a remedy granted to the petitioner because "he fears what he will suffer in the future"), bills of peace and new *exeat regno* (whereby a person who owed an equitable claim to the petitioner was restrained from proceeding outside the country without first giving security for the sum claimed) were the main remedies.

4. SPECIFIC RELIEF ACT, 1963: SCHEME

The Specific Relief Act, 1963 in India grants the following remedies, dividing them as specific relief (Sections 5 to 35) and preventive relief (Sections 36 to 42):

- (i) recovering possession of property (Sections 5-8);
- (ii) specific performance of contracts (Sections 9-25);
- (iii) rectification of instruments (Section 26);
- (iv) rescission of contracts (Sections 27-30);
- (v) cancellation of instruments (Sections 31-33);
- (vi) declaratory decrees (Sections 34-35); and
- (vii) injunctions (Sections 36-42)

5. SPECIFIC RELIEF

Common Law relief or legal relief was mainly compensatory while equitable relief was specific. As noted by Woodroffe:⁶ "The remedies for the non-performance of a duty enforceable by law are either compensatory or specific. *Compensatory remedy is by the award of damages which is often useless and inadequate.* Useless where the person ordered to pay them is insolvent, and inadequate where for instance the duty is to transfer particular immovable property or a movable property to which special interest is attached. The specific remedy is enforced by directing the party in default to do or forbear the very thing which he is bound to do or forbear, and in case of disobedience, by imprisonment or attachment of his property, or both.

When no one is in default, it is enforced by making such declarations and orders as the nature of the case may require". Specific performance can be distinguished from injunctions. The former, as noted by Story, is directed to compelling performance of an active duty and is concerned mainly with contracts, whereas the latter is generally directed to preventing the violation of a negative duty and deals not only with contract but also with torts and many other equitable subjects. As Maitland observes, specific performance applies to agreements for sale of land or lease of land as a matter of course; its application outside these lines is somewhat exceptional and discretionary.

6. Whitely Stokes quoted in *Woodroffe on Injunctions*.

6. SECTIONS 1-4

The Specific Relief Act, 1963 was not meant to be an exhaustive code with all kinds of specific reliefs incorporated therein, but refers to only that branch of reliefs which could be obtained in civil suits. In its essence, the law of specific relief is, a part of the law of procedure, for, specific relief is a form of a judicial redress.⁷ It is adjective law.⁸ That is why the Act starts by stating its object, "to define and amend the law relating to certain kinds of specific reliefs". Specific reliefs obtainable in criminal and revenue courts is outside the precincts of this Act. The Act is therefore not exhaustive.⁹ When a case is governed by any section of the Act, the court must in the first instance examine the language of the section and find out its natural meaning.¹⁰ It will be seen that the Act is based on the rules and practice of the English Law in relation to the doctrine of specific performance and the sections must be interpreted in that light, but where there is an express divergence by the section then it will be strictly adhered to, whatever may be the English Law on the point.¹¹

The Act extends to the whole of India except the State of Jammu and Kashmir. Illustrations to the sections, it will be seen, have been removed as they do not serve any useful purpose in clarifying the provisions.

Relief in general means the remedy a court of justice may afford to some actual or apprehended wrong or injury¹² and the Act gives relief for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law (Section 4). This means that enforcement of a penal law must not be the sole object of the suit. Moreover grant of relief of declaration tending to affect the free flow of capital and mercantile business would be unjust.¹³ Section 3, one must note, recognises the fiduciary character of personal obligation created by a contract of sale.¹⁴ The jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract; where it is not so, the specific performance will not be ordered.¹⁵

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7. *Ali Hasan v. Rajkumar Haldar*, AIR 1943 Cal 417, 426; 208 IC 473; 47 CWN 557; 77 CLJ 216.
 8. *Radhey Shyam v. Kiran Bala Dasi*, AIR 1971 Cal 314; 74 CWN 573; Banerjee: *Law of Sp. Relief*, 9th edn. 1992, p. 3.
 9. *Hingerford Investment Trust Ltd. v. Haridas Murlidhar*, AIR 1972 SC 1826; 1972 SCD 378; (1972) 2 SCA 189; *Ashok Kumar Shrivastava v. National Insurance Co.*, (1998) 4 SCC 361; 1998 SCC (L&S) 1137; (1998) 2 LLT 699.
 10. *Bank of England v. Vagliano Brothers*, 1891 AC 107; *Ramdas Vithaldas Durbar v. S. Amerchand & Co.*, AIR 1916 PC 7; 43 IA 164; *Ardeshir Mama v. Flora Sassoon*, (1928) 55 IA 360; AIR 1928 PC 208.
 11. *Akshayalingam Pillai v. Avayambala Ammal*, 64 MLJ 536; AIR 1933 Mad 386; *Ramnath v. Shinoga Bank Ltd.*, A. No. 120 (Mys HC) 1948-49, quoted in *Indian Digest*, 1951: AIR 1951 Mys 59.
 12. *Sarsuti v. Kunj Behari Lal*, ILR (1883) 3 All 345.
 13. *American Express Bank Ltd. v. Calcutta Steel Co.*, (1993) 2 SCC 199, 213.
 14. *Narandas Karsondas v. S.A. Kamtam*, (1977) 3 SCC 247; AIR 1977 SC 774; (1977) 2 SCR 341.
 15. *Mayawanti v. Kaushalyadevi*, (1990) 3 SCC 1.

Chapter XXII

Recovering Possession of Property

“Suits under both the sections are mutually exclusive; if a suit is brought under Section 9 (new Section 6) for recovery of possession, question of title cannot be raised or determined, while in a suit under Section 8 (new Section 5) a plaintiff sues to establish his title for recovery of possession.”

Ananta Kumar Sarkar v. Meghu Kurmi,
(1957) 61 Cal WN 347

“Scope and Object of Section 9 is:

- (i) to restore a person dispossessed otherwise than in due course of law (and) *Fazal Hussain v. Abdul Latif*, AIR 1955 NUC Ajmer 334.
- (ii) to discourage people from taking law into their own hands however good their title may be.”

M.C. Batra v. Lakshmi Insurance Co. Ltd.,
AIR 1956 All 709.

SYNOPSIS

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|---|--|
| 1. Recovery of Property | (a) History |
| 2. Text of Sections 5 to 8 | (b) Comments |
| 3. Recovery of Specific Immovable Property (Sections 5 and 6) | Illustrations |
| 4. Recovery of Specific Movable Property (Sections 7 and 8) | (c) Difference between Section 7 and Section 8 |
| | (d) Burden of Proof |

1. RECOVERY OF PROPERTY

Sections 5 to 8 make provisions for recovering possession of property, movable and immovable. The procedure for the purpose is laid down in the Civil Procedure Code, Order 21, Rules 35 and 36. Section 7 speaks about a suit by a person dispossessed of immovable property and Section 8 explains that a person holding movable property not as an owner may be compelled in suitable cases to deliver it to the person entitled to its immediate possession.

Possession, as Salmond has explained, is a very vital relationship which needs protection from every system of law. All things we need to use and consume must be in our possession. It is, therefore, the most basic relationship between men and things. One must however note that the provision in Specific Relief Act is founded more on public policy than on Jurisprudence.¹

The question is, what relief is afforded by law to a person who has been deprived of his property (and therefore wants to recover the property); the manner of acquisition and the extent of his interest therein being questions different from this. Where property is vested in law the person dispossessed of it

1. *Krishna Kishore Firm v. Govt. of A.P.*, (1991) 1 SCC 184: AIR 1990 SC 2292.

has stronger reasons for getting specific relief and it will be for the defendant to show cause why the relief should not be granted against him. Where the property is vested in equity it will be for the plaintiff to explain why he should be granted specific relief. Putting the situation in a different way, when a person is deprived of his property or of any interest or right therein, he is entitled to have it back and enjoy or use the very interest or right thereto, as it is his own, and no amount of money compensation is adequate to satisfy his loss. Remembering this general basic principle we now look to the provisions of the Act in this regard.

2. TEXT OF SECTIONS 5 TO 8

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 (5 of 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 suit to establish his title to such property and to recover possession thereof.

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 I.—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 II.—A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

8. Liability of person in possession, not as owner, to deliver to person 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 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, or, as the case may be;
- (b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

3. RECOVERY OF SPECIFIC IMMOVABLE PROPERTY (SECTIONS 5 AND 6)

Although provision in Specific Relief Act empowering a person or tenant to recover possession if he has been evicted forcibly by landlord, may be judicial and not lawful or a tenant holding over is not in lawful possession unless landlord agrees or acquiesces expressly or impliedly but that does not alter the legal position about possession of a person not legal, yet not without interest. The provision in Specific Relief Act, it should be remembered, is founded more on public policy than on jurisprudence.²

In *Indian Iron & Steel Co. Ltd. case*³ there was a title suit for possession and for restraining the occupant-defendant from pulling down the structures on the site. The structures did not belong to the owner of the title. Under the circumstances decree although upheld, the plaintiff was directed to pay compensation to the defendant, for such structures.

The object of the provisions is to discourage people from taking the law into their own hands. The sections provide a speedy and summary remedy through a medium of civil court for restoration of possession to the dispossessed. Section 5 thus provides for a suit for ejection *on the basis of title*⁴ and Section 6 gives a remedy without *establishing title*, provided the suit is brought within six months of the date of dispossession. The sections thus give remedy in the alternative.⁵

The object of Section 6 is to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely providing previous possession and wrongful dispossession without proving title, but that is not the only remedy.⁶ He may bring a suit for possession on the basis of his title.⁷

A suit for possession simpliciter (Section 5) differs from a suit for possession under Section 6 in this that in the latter case a plaintiff need only prove dispossession within six months and the defendant cannot plead a superior title. But in the former the plaintiff can be defeated if the defendant proves his superior title to the land.⁸ Sections 5 and 6 are not mutually exclusive.

2. *Krishna Kishore Firm v. Govt. of A.P.*, (1991) 1 SCC 184; AIR 1990 SC 2292; See also *Express Newspapers Pvt. Ltd. v. Union of India*, (1986) 1 SCC 133.

3. *Indian Iron & Steel Co. Ltd. v. Chhaganlal Marwari*, (1994) Supp (3) SCC 719.

4. *Lachman v. Shambhu Narain*, ILR (1911) 33 All 174; 7 IC 495.

5. *East India Hotels Ltd. v. Syndicate Bank*, 1992 Supp (2) SCC 29.

6. *Ibid.*

7. Pollock and Mulla: *Indian Contract Act & Specific Relief Act*, p. 814.

8. *Yar Muhammad v. Lakshmidas*, AIR 1959 All 1; see also *Mahmoedsharif K. Rangawala v. Amibai A. Rangawala*, AIR 1984 Guj 90; (1983) 2 GLR 1481.

In *Alexander case*⁹, the plaintiff brought a suit for possession of lands alleging his possession for 70 years and forcible dispossession by the defendants. The defendant denied this forcible possession and pleaded that a suit for possession did not lie without proof of title and a prior trespasser could not eject a later trespasser, and a mere possessory suit after the expiry of six months was not possible under Section 6 of the Specific Relief Act. In appeal the High Court held that the plaintiff was in possession before the suit and could maintain a suit based on prior possession without proof of title and therefore could eject the defendants. The High Court's decision was upheld in appeal to the Supreme Court.

Section 6 is a reproduction of Section 15 of the Indian Limitation Act, 1859, provisions whereof are based on the Writ of Assizes in England. Its object is to resolve the *status quo ante*. In England a rightful owner of property has a right of re-entry on his property if he can do it in a peaceful and reasonable manner, but the Indian law differs from this in that even a rightful owner cannot by self-help regain his possession. If he does so it is a wrong. He must take the help of court in such cases.

Section 6 thus provides a summary remedy to the plaintiff to seek restoration of possession from defendant within 6 months of illegal recovery of possession by the defendant without referring to the title of the plaintiff and defendant. It is purely a possessory suit wherein status of the party is irrelevant. In such type of suits the plaintiff is not required to prove his title or a superior right to possession as compared to the defendant and has only to show that he was in possession of the immovable property and he was illegally dispossessed within a period of 6 months prior to the date of the suit. Once the plaintiff proves case he becomes entitled to succeed and can get *status quo ante* and restoration of possession of the suit premises through the assistance of the court.¹⁰ The question in such cases is about "prior possession" and the question of title does not arise under this section. As held in *Jagat Singh case*¹¹ this section is a reproduction of a provision of the Roman Law under which by an *interdictum de vi* a person wrongfully dispossessed from property could recover it by proving previous possession, without being required to prove his title.

The main elements of Section 6 are:

- (i) That the possession of the plaintiff must be "juridical" and he must establish it. "Juridical possession" is the same thing as legal possession in a more impressive form. It is a possession based on some right and not a possession obtained by force or fraud. Such possession, however cannot be equated with lawful possession. For example a tenant holding possession after expiry of his lease has a

9. *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165.

10. *Mansukhlal Dhanraj Jain v. Eknath Vithal Ogale*, (1995) 2 SCC 665: AIR 1995 SC 1102.

11. *Nagar Palika v. Jagat Singh*, (1995) 3 SCC 426: AIR 1995 SC 1377: (1995) 3 Punj LR 224.

juridical possession, however that cannot be termed as lawful possession.¹²

As observed by the Supreme Court in Mahale case¹³ where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law.¹⁴

This means that possession here cannot mean merely juridical possession or the same under a valid title; it includes possession which is excusable.

The expression "due course of law" means such an exercise of powers by duly constituted tribunal or court in accordance with the procedure established by law under such safeguards for the protection of individual rights.¹⁵

- (ii) That he must have been dispossessed against his will and without due process of law. The plaintiff in such a case has to prove his previous possession. The suit under this section is a possessory suit; it does not refer to title of the plaintiff and the defendant.¹⁶ If the suit is brought after six months, the plaintiff can recover only if he proves his title to the land.¹⁷ The purpose behind Section 6 is to restrain a person from using force and to dispossess a person without his consent otherwise than in due course of law.¹⁸
- (iii) That a plaintiff must file a suit within six months. The plaintiff in such a case has to prove his previous possession. If the suit is brought after six months, the plaintiff can recover only if he proves his title to the land.¹⁹ Moreover, one has to note that a person dispossessed is entitled to regain his possession; the better title of the dispossessor is of no relevance as it is not in issue. It therefore follows that a decision under this section does not make or mar the original title of either party.

Under this section court can grant interim relief of restoration of possession, however, the power has to be exercised carefully, wisely and in exceptional circumstances only.²⁰ The only prohibition under the provisions of Section 6 is not to use force and not to use any

12. *M.C. Chokalingam v. Manni Kkuvasagam*, (1974) 1 SCC 48; AIR 1974 SC 104; *Lallu Yeshwant Singh v. Rao Jagdish Singh*, AIR 1968 SC 620.

13. *Krishna Ram Mahale v. Shobha Venkat Rao*, (1989) 4 SCC 131.

14. *East India Hotels Ltd. v. Syndicate Bank*, 1992 Supp (2) SCC 29.

15. *Ibid.*

16. *Ibid.*

17. *Mansukhlal Dhanraj Jain v. Eknath Vithal Ogale*, (1995) 2 SCC 665; AIR 1995 SC 1102.

18. *Krishna Ram Mahale v. Shobha Venkat Rao*, (1989) 4 SCC 131; AIR 1989 SC 2097; 1989 MPLJ 767; *East India Hotels Ltd. v. Syndicate Bank*, supra; See *Chocka Lingam v. Mani Kuvasagam*, (1974) 1 SCC 48.

19. *Mansukhlal Dhanraj Jain v. Eknath Vithal Ogale*, (1995) 2 SCC 665; AIR 1995 SC 1102.

20. *Ramesh Devchand Pala v. Jayavantkumar Gordhandas Madani*, AIR 1998 Guj 120.

unlawful means for dispossessing a person. The position of a licensee remaining in occupation after the expiry of the term of licence is no better than a trespasser and if the true owner comes into possession of the premises without using any force or on account of fire or other act of vis major, it would not be in the interest of justice to grant a decree for possession in favour of such licensee under Section 6 of the Act.²¹

If the suit is one for possession against a trespasser (i.e., one who has no title to the land) what should a plaintiff prove: should he prove his title to the land or would proof of previous possession suffice? The answer is yes. In such circumstances it is not necessary for plaintiff to establish his title. This is because a trespasser has no right to disturb peaceful possession of long time of any person on any land and he cannot reap benefit of his illegal act.²² The Supreme Court has accepted this view in *K.C. Alexander case*.²³ But one has to note that in a suit against the trespasser after six months the period should not be so long as to allow a trespasser's possession to ripen into prescriptive title.²⁴

In a suit for recovery of possession by licensee forcibly dispossessed by the Municipal Corporation it was held that in such a case the licensee forcibly dispossessed has two remedies open to him:

- (i) to file a suit under Section 64 of the Easements Act, and
- (ii) to file a suit under Section 6 of the Specific Relief Act. One remedy does not bar the other.²⁵

No suit against the government can be brought under this section but one must bring a regular suit and prove one's title. An order under this section is not appealable nor reviewable except where jurisdiction is wrongly assumed.

4. RECOVERY OF SPECIFIC MOVABLE PROPERTY (Sections 7 and 8)

(a) *History*.—These sections embody the English rules as to detinue.

There are three specific torts in respect of the possession of goods²⁶: trespass, detention of goods or detinue and conversion. Detinue is a kind of conversion. It consists in wrongfully detaining from the plaintiff goods to the immediate possession of which he is entitled.²⁷ An action in detinue would lie

21. *East India Hotels Ltd.*, supra.

22. *Lallu Yeshwant Singh v. Rao Jagdish Singh*, AIR 1968 SC 620; (1968) 2 SCR 203; *Midnapur Zamindari Co. Ltd. v. N.N. Roy*, AIR 1924 PC 144; 51 IA 293; 23 ALJ 76; *Ram Rattan v. State of U.P.*, (1977) 1 SCC 188; 1977 SCC (Cri) 85; *State of U.P. v. Maharaja Dharmanda Prasad Singh*, (1989) 2 SCC 505 at pp. 516-517, paras 30-31.

23. *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165; see also *Naziruddin v. Abeda Khatun*, (1989) 1 Gau LR 177, 179; *Sankar Goala v. Muftiuddin*, (1988) 1 Cur CC 393.

24. *Narayan v. T. Mathayi*, AIR 1966 Ker 179.

25. *M.S. Baliga (dead, by his LRs) v. Mangalore City Corpn.*, AIR 1998 Kant 76; see also *Beharilal v. Bhuri Devi*, (1997) 2 SCC 279; AIR 1997 SC 1879.

26. *Underhills's Law of Torts*, 13th Edn., p. 92.

27. *Ibid.*

only for some specific article of movable property capable of being recovered in specie and of being seized and delivered up to the winning party. The elements of detinue may be laid down as: (i) existence of some specific article of movable property, (ii) plaintiff's immediate right to such property, (iii) defendant's possession and unjust detention of the property. When the defendant has got possession of the plaintiff's goods (whether wrongfully in the first instance, or by keeping them wrongfully after having lawfully obtained possession) the plaintiff can sue either for wrongful detention or for conversion, but generally an action for detention is brought where the defendant is at the time of action brought in wrongful possession of specific goods such as a horse or a picture, which the plaintiff wished to have returned to him.²⁸ Thus a plaintiff may demand the specific delivery of property or, on failing thereto, he may demand the value and also damages for detention of the property. Specific delivery of the article was not available up to 1854, in England, but due to the intervention of equity the same was made available in suitable cases where the article sought to be obtained had a peculiar value or some association or importance attached thereto. After 1854 this was granted without help from the equity courts, and in 1873-75 by the Judicature Acts the form of detinue was abolished, but the name has so far survived.

(b) *Comments.*—As the section provides, possession of specific movable property may be recovered not only by a person entitled to its possession but also by a trustee for his beneficiary and to be so entitled, a special or temporary right to the present possession of movable property is sufficient to support a suit under this section. *Donald v. Suckling*²⁹ and *Oliver v. Oliver*³⁰ are leading English cases on the point. In *Ramnath Gagoi v. Pitambar Deb Goswami*³¹, A leaves an elephant in charge of B, C wrongfully takes away the elephant from B. B may sue C for possession of the elephant. Likewise, the railway as bailee of goods³² is entitled to recover them from a person who takes them from its possession forcibly or fraudulently. If such goods are pledged it can be recovered from the pledgee of such person too by the railway.³³ As said before, the requisites of Section 7 are the same as the rules for detinue and the nature and quality of the property is immaterial. It is not necessary that the plaintiff must be an owner; he may be a limited owner, or he may have a special or a temporary right to possess. Thus immediate right to possess the property as against the defendant is material.

28. *Ibid.*, p. 96.

29. (1866) 1 QB 585; 14 LT 772.

30. (1861) 11 CBNS 139; 5 LT 287; *Ramnath Gagoi v. Pitambar Deb Goswami*, ILR (1916) 43 Cal 733; 31 IC 430; AIR 1916 Cal 788. See Pollock and Mulla: *Indian Contract Act & Specific Relief Act*, p. 820.

31. (1861) 11 CBNS 139; 5 LT 287; *Ramnath Gagoi v. Pitambar Deb Goswami*, ILR (1916) 43 Cal 733; 31 IC 430; AIR 1916 Cal 788. See Pollock and Mulla: *Indian Contract Act & Specific Relief Act*, p. 820.

32. Section 18 of the Indian Contract Act.

33. *Purshottam Das v. Union of India*, AIR 1967 All 549; ILR (1967) 1 All 398; *Sagarmal Megh Raj v. Abdul Hafeez*, 1964 MLJ (Cri) 623.

Illustrations to Section 10 of the old Act which have been dropped in this new enactment would be informative in order to understand the scope of this section. The same may be reproduced as under:

- (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 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.
- (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.
- (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 Section 168 of the Indian Contract Act, 1872.
- (e) 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.

A thief steals certain articles and pledges them with X (a pledgee). Such a pledge does not confer any title to the pledgee so as to have possession and control thereof. Its true owner can recover them and the pledgee cannot claim compensation or resist the owner's claim.³⁴ The articles of dowry given to wife can also be claimed by the wife under Dowry Prohibition Act.³⁵ This is so on the principle that the wife is the person entitled to the possession.

"Specific movable property" means property which is ascertained and ascertainable, but not its equivalent.³⁶ A dead body is not movable property. No suit under this section is therefore maintainable.³⁷ Share Certificates³⁸ and Government Securities³⁹ are specific movable properties, but money⁴⁰ is not movable property.

That the plaintiff is not entitled to possession of the property or that the property claimed by the plaintiff belongs to a third person (defence of *jus tertii*) are not considered as valid defences.⁴¹ It should be remembered that the plaintiff must succeed or fail on his own case and cannot take advantage of weakness in

34. *Sagar Mal Megh Raj v. Abdul Hafeez*, 1964 MLJ (CR) 623.

35. *Kamini Savhani v. Puma Chandra Sahoo*, AIR 1987 Ori 134.

36. *Fadu Jhala v. Gour Mohan Jhala*, 19 Cal 544.

37. *Ma Kin v. U. Ba*, AIR 1930 Rang 143; 121 IC 775; 11LR 7 Rang 603.

38. 12 BLR 513.

39. 12 CWN 1010.

40. *Bhubaneshwar v. Dwarkeshwar*, AIR 1921 Cal 77.

41. *Armory v. De la mirie*, 1 Stra 504.

defendant's case to get a decree. The Supreme Court would not interfere in such cases.⁴²

Section 8 speaks of the liability of a person in possession of movable property not as owner, to deliver the same to the person entitled to its immediate possession—

- (i) when he holds it as the agent or trustee of the plaintiff;
- (ii) when compensation is an inadequate relief for the loss to the plaintiff;
- (iii) when ascertainment of actual damage caused is extremely difficult;
- (iv) when possession of the thing is wrongfully transferred from the plaintiff.

In cases covered under clause (ii) or (iii) the court presumes that the compensation is not an adequate relief and that the ascertainment of the damage caused is extremely difficult, unless it is proved otherwise.

(c) *Difference between Section 7 and Section 8*—Sections 7 and 8 speak of the recovery of specific movable property but there is a difference between them which is as follows:

- (1) It can be seen that relief given by Section 7 is (i) of a general nature, (ii) independent of the nature of property, and (iii) relation between the parties. The relief afforded by Section 8 is of a special character and depends upon the nature of property and the relationship existing between the parties, as can be seen from its clauses.
- (2) Relief claimed under Section 7 is for possession of the movable property and *in alternative* for compensation equal to *the value* of property, whereas the relief sought under Section 8 is for the very property *i.e.*, for delivery of the specific movable property.
- (3) Under Section 7, a suit to recover possession can be maintained even against the owner of property if the plaintiff has vested in him the immediate right to possess it. Section 8 does not contemplate a suit against the owner.

Leading cases on the sections are *Wood v. Rowcliffe*⁴³ and *Falcke v. Gray*.⁴⁴

(d) *Burden of Proof*.—The section contemplates in other words the restitution of chattels. Pollock and Mulla in their earlier editions of the treatise⁴⁵ on contract and specific relief remarked that the burden of proof thrown on the plaintiff under a more logically developed system would be on the defendant to show cause why it should not be just and equitable to award specific restitution. These remarks were approved by the Madras High Court in *G.J. Subbarayulu v.*

42. *Punjab Urban Planning and Development Authority v. Shiv Saraswati Iron & Steel Rolling Mills*, (1998) 4 SCC 539.

43. (1844) 3 Hare 304.

44. (1859) 4 Drew 651; 62 ER 250.

45. *Indian Contract Act and Specific Relief Act*, 9th Edn., 1972, p. 821.

*Annamalai Chettiar*⁴⁶ and led to the enactment of the explanation which now clarifies that the burden of proof in clauses (a) and (d) rests on the plaintiff, while the burden under clauses (b) and (c) rests on the defendant who has to prove that the compensation would be an adequate relief and that it would not be extremely difficult to ascertain the actual damage caused by the loss of the chattel.

It must be noted that a plaintiff under this section has to prove that the defendant is in possession; if he cannot, he will not get a decree.⁴⁷

46. ILR (1946) Mad 174; AIR 1945 Mad 281.

47. For execution of decree under this section see Order 21, Rule 31 of Civil Procedure Code, 1908.

Chapter XXIII

Specific Performance of Contracts

"Two great remedies it invented, remedies peculiar to itself—the decree for specific performance of a contract, and the injunction."

"On the whole I think that specific performance applies to agreements for sale or lease of lands as a matter of course; its application outside these limits is somewhat exceptional and discretionary."

Maitland: *Lectures on Equity*, pp. 301, 304

"In India we are free from these anomalies."

—Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, p. 823

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1. INTRODUCTION

The jurisdiction of the English court of chancery to decree specific performance of contracts was founded on the want of an adequate remedy at law. As Pollock and Mulla¹ note: "If the conception of equitable remedies had been maintained with logical strictness, the court would have held itself bound to examine each individual case with an open mind before deciding whether an extraordinary remedy was called for. But after the court of chancery was recognised as a regular and ordinary court it was impossible to affect such an attitude, and it became the settled rule that in certain classes of cases the nature of the case itself was ground enough for the court's interference." At one time contract for the sale or letting of land was presumed to be a subject-matter fit for the exercise of this jurisdiction but in the modern doctrine of the courts of equity it has been extended to contracts of other species only when exceptional circumstances make it proper to do so. As to why this doctrine does not in general extend to sale of goods is that regularly, a complete contract for the sale of ascertained goods transfers the property at once to the buyer, who thereupon has all the ordinary legal rights and remedies of an owner.² Another and more extensive reason is that where the goods are of a kind purchasable in the market, whether the contract is for specific goods or not, compensation in money is an adequate remedy: the successful plaintiff can, if he chooses, employ the damage awarded to him in buying goods equivalent to those contracted for.

Further, it was held³ that if the vendor of property was compellable in a court of equity to perform his contract, he must also be entitled to come to the court, though merely seeking payment of his purchase money; this was commonly accounted for as being required by the principle of "mutuality" in order to give a right corresponding with that which is given to a purchaser.⁴

The attitude of English law and lawyers that the remedy of specific performance applied only to suits for land (sale or letting) as if there were no other kinds of contracts in the world, has been criticised by Pollock and Mulla.⁵ In India, we are free from these anomalies but they also express their disapproval towards the language employed by the framers of the Act, saying that "one could wish, however, that the Specific Relief Act had not in many places adopted the language of the old-fashioned English books". In applying this law, they say, the best thing to do is to forget all the technicalities as

1. *Indian Contract Act and Specific Relief Act*, 9th Edition, 1972, p. 823.

2. See Sections 19 and 20 of the Sale of Goods Act, 1930.

3. Lord Cranworth in *Webb v. Direct London & Portsmouth Ry. Co.*, (1852) 1 De GM & G 521: 42 ER 654.

4. Pollock & Mulla: *Indian Contract Act and Specific Relief Act*, p. 823.

5. *Ibid.*

thoroughly as possible for Indian purposes. Where there is an express divergence of the English principles and those laid down in this Act, the Act will be strictly adhered to, whatever be the English law.⁶

2. PURPOSE OF SPECIFIC RELIEF

The purpose of this kind of relief or remedy is to serve the ends of justice.⁷ It consists in doing the very act which one has agreed to do, or to omit. It consists of both, the negative stipulations and the positive. Negative stipulations are called injunctions. As remarked by Pollock and Mulla, the *order* for specific performance falls into two parts: the first can be of a declaratory nature and the second contains consequential directions.

Common Law allowed, so to say, a party to a contract to break it at his pleasure and to pay compensation without being responsible for anything more; but equity did not approve of this. It required from the offending party's conscience a strict adherence to and performance of that which he could not without manifest wrong or fraud, refuse. Moreover, as the legal relief was compensatory it was inadequate and unsuitable to the situation. Here, equity intervened and granted specific relief. Specific performance was not one-sided, but was "a mutual remedy". It must be noted that the defence of 'mutuality' has been abolished by the Specific Relief Act in India.

3. SCHEME OF THE TOPIC

The Specific Relief Act has dealt with the topic of specific performance of contracts in Sections 9 to 25 under the following sub-headings:

- (a) Defences to specific performance (Section 9)
- (b) Contracts which can be specifically enforced (Sections 10-13)
- (c) Contracts which cannot be specifically enforced (Section 14)
- (d) Persons for or against whom contracts may be specifically enforced Sections (15—19)
- (e) Discretions and powers of courts (Sections 20—24)
- (f) Applicability to awards and directions to execute settlements (Section 25)

4. TEXT OF SECTIONS 9 TO 25

✓ Specific Performance of Contracts

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.

6. *Ardeshir Mama v. Flora Sassoon*, (1928) 55 IA 360; ILR (1928) 52 Bom 597; AIR 1928 PC 208.

7. Cf. Maitland: *Lectures on Equity*, Chap. XX, p. 301.

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 non-performance of the act agreed to be done; or
- (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; 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 the 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.—(1) Except as otherwise hereinafter provided in this section, 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) 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.

(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.

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.

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 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 securing the repayment of any loan which the borrower is not willing to repay at once;

Provided that where only a part of 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 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 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.

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 of 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.

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 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, with the variation so set up, in the following cases, 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 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.

Discretion and Powers of Court

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.

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 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.

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 (5 of 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.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under Section 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 purpose of securing the 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.

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 to awards to which the Arbitration Act, 1940 (10 of 1940); does not apply and to directions in a will or codicil to execute particular settlement.

5. GENERAL PRINCIPLES FOR GRANTING SPECIFIC PERFORMANCE

In England, inadequacy of the Common Law remedies in general⁸ and incompleteness of the compensatory remedy in special became the foundation of equitable remedies of which specific performance was one. Granting specific performance started from land cases and by and by it spread its tentacles to other kinds of contracts too. As observed by Maitland, it "applies to agreements for sale or lease of lands as a matter of course; its application outside these limits is somewhat exceptional and discretionary".⁹ The basic idea underlying the grant of specific performance is that there should be a valid contract of which specific performance could be decreed; not that there should be a

8. *Hutton v. Watling*, 1948 Ch 26; (1947) 2 All ER 641 (Ch D).

9. Maitland: *Lectures on Equity*, p. 304.

breach.¹⁰ The equitable principles which regulated the grant of specific performance by the Separate Court of Equity which existed in England at one time have been given statutory form in India.¹¹ They are as under:

In order that a decree for specific performance of a contract may be passed it is necessary to consider whether such a relief can be granted in view of Section 16 of the Act. It is for the appellant to prove that Section 16 does not prohibit granting such a decree while it is for the respondent to prove otherwise.¹²

In respect of specific performance of agreement of sale of immovable property, the same must be identifiable in order to avail relief under the Act.¹³

As observed by the Supreme Court in *Kamlashwari Devi v. Nawal Kishore*, in view of Section 52 of the Transfer of Property Act, 1882 (doctrine of *Lis Pendens*) transfer during pendency of a suit for specific performance does not affect the right of the plaintiff.¹⁴

(a) *Remedy in Personam*.—As explained by Hanbury, the decree of specific performance issues against the defendant personally and he will be compelled to carry out his obligation if he is within the court's jurisdiction. As the defendant's conscience was bound by the agreement, he was compelled to act even though the subject-matter fell outside the court's jurisdiction.¹⁵ This tendency to expand jurisdiction has been restricted and checked nowadays in England. In India, according to some writers, no such jurisdiction is recognised, while according to some the courts have but a limited power of making a decree *in personam*.¹⁶

(b) *Remedy of damages inadequate*.—It is a fundamental rule that specific performance will not be granted where the plaintiff would be adequately compensated by the common law remedy of damages.¹⁷ In other words, where pecuniary damages are adequate or will put the plaintiff in a similar position as if the contract had been specifically performed, equity will not interfere to grant specific performance.¹⁸ But as decided in *Jeewan Lal Daga v. Nilmani Chaudhuri*¹⁹, specific performance of an agreement to execute a mortgage will be ordered where money has been actually advanced.

10. *Hasham v. Zenab*, 1960 AC 316: (1958) 3 All ER 719 (PC).

11. *M.L. Devender Singh v. Syed Khaja*, AIR 1973 SC 2457.

12. *Thakamma Mathew v. M. Azamathullah Khan*, 1993 Supp (4) SCC 492, 497, 498: AIR 1993 SC 1120: (1993) 21 ALR 170.

13. *Nahar Singh v. Harnak Singh*, (1996) 6 SCC 699.

14. 1995 Supp (1) SCC 141: 1995 SCC (Cri) 60: AIR 1994 SC 1200.

15. *Penn v. Baltimore (Lord)*, (1750) 1 Ves Sen 444: 27 ER 1132 cited in Hanbury: *Modern Equity*, p. 34.

16. For details see Mulla: *Civil Procedure Code*, 13th Edn., 1965, pp. 133—136 and Maxim 12 in Chap. III *Supra*.

17. *Hutton v. Watling*, 1948 Ch 26: (1947) 2 All ER 641 (Ch D).

18. *Harnett v. Yielding*, (1805) 2 Sch & Lef 549 (Ireland).

19. AIR 1928 PC 80: 55 IA 107.

(c) *Reciprocal Remedy*.—This remedy is a mutual or a reciprocal remedy and can be obtained as effectively by the vendor as the vendee. On the same principle, contracts for minors and against minors will not be specifically enforced. In *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*²⁰, a Mahomadan minor, on coming of age, sued the vendor for specific performance of a contract for sale. Dismissing the case the Privy Council held that since it was not within the competence of the guardian of a minor to bind the minor or his estate for the purchase of immovable property, the contract was short of mutuality or reciprocity and consequently no specific performance thereof could be obtained by the minor. Thus, this remedy is mutual and *mutuality refers to the time* when the contract was entered into. Advantage to the minor is of no consequence here.

(d) *Enforceable (Valid) Contract*.—The basis of specific performance is a valid contract.²¹ The doctrine of part performance of a contract is an expression of this basic idea. *Maddison v. Alderson*²² and *Wakeham v. Mackenzie*²³ are the leading examples on the point. The acts of part performance done must be referable to the contract and it must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing. It must be noted that Section 53-A of the Transfer of Property Act (part performance) in India requires a contract to be in writing. In short, in the words of Lord Selborne in *Maddison v. Alderson*²⁴, the gist of the situation is that “the defendant is really ‘charged’ upon the equities resulting from the acts in execution of the contract and not upon the contract itself”.²⁵

(e) *Contracts without consideration*.—Specific performance would not be awarded to a party who has given no consideration. A contract to be valid must be supported by consideration.]

(f) *No Part Performance*.—The court will not usually decree specific performance of any part of a contract unless it can decree performance of the whole. But in case of a divisible contract parts whereof express several, separate, independent and distinct contracts, such a performance can be decreed.²⁶

Question of granting specific performance of a part of the contract arose in *Surya Narayana case*.²⁷ In this case a house which was mutated in joint names of two brothers was agreed to be sold by the appellant. Both the brothers were in possession and enjoyment thereof. The neighbour to whom the entire property was sold sought specific performance and it was granted. This was not correct.

20. ILR (1912) 39 Cal 232 (PC); 39 IA 1.

21. *Hasham v. Zenab*, 1960 AC 316; (1958) 3 All ER 719 (PC); *Mayawanti v. Kaushalya Devi*, (1990) 3 SCC 1 (Defence of no contract exists, and is available to defendant).

22. (1883) 8 AC 467; 49 LT 303 (HL).

23. (1968) 1 WLR 1175; (1968) 2 All ER 783 (Ch D).

24. (1883) 8 AC 467; 49 LT 303 (HL).

25. Hanbury: *Modern Equity*, Chap. 2.

26. *William Graham v. Krishna Chandra Dey*, AIR 1925 PC 45; 52 IA 90.

27. *Surya Narayan Upadhyaya v. Ram Roop Pandey*, 1995 Supp (4) SCC 542; AIR 1994 SC 105.

In appeal however, having regard to the principles of equity and justice partial performance of the contract was allowed and specific performance of half of the share of the appellant's brother was granted. Discussing the provisions of S. 20(1) the court remarked that the circumstances specified in S. 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest of the contract.

(g) Discretionary Remedy.—As observed by the Supreme Court of India the jurisdiction of the court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds “guided by judicial principles and capable of correction by a court of appeal”. This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. This is made perfectly clear by the provisions of Section 23 (Section 20 old Act) of the Act of 1963, so that the court has to determine on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted.²⁸ Mulla and Pollock also note in their commentary²⁹, this discretion in England is intimately bound up with the historical limits of the jurisdiction of judges. “Everyone who came to a court of equity was bound to show that he had no remedy, or no adequate remedy in the ordinary jurisdiction of a court of common law. Failing this his suit would be dismissed ‘for want of equity’. Now a claim for specific performance assumes the existence of an actionable contract. Therefore the plaintiff had always to face the question: why is not the common law right to recover damages good enough for your case? and the court was in strictness always on the defensive against a charge of trespassing on the domain of the common law. The court of chancery did indeed establish the presumption that specific performance was the proper remedy on a contract to convey land, but it was only a presumption liable to be displaced; there is no absolute right to this remedy”.

In exercising the discretion the court will take into account the circumstances of the case, the conduct of the parties and their respective interests under the contract.³⁰ The discretion is thus not arbitrary but is controlled by certain rules of certainty, fairness and justice between the parties.³¹ Consequently where it has been exercised perversely, arbitrarily or against judicial principles, it will be interfered with.³²

28. *M.L. Devender Singh v. Syed Khaja*, (1973) 2 SCC 515; AIR 1973 SC 2457; *Sardar Sing v. Krishna Devi*, (1994) 6 SCC 18; *Kallathil Shridharan v. Kamath Pandiyala Prasanna*, (1996) 6 SCC 218; *Lordu Mari David v. Louis Chinnaya Aragiaswamy*, (1996) 5 SCC 589; AIR 1996 SC 699.

29. *Indian Contract Act and Specific Relief Act*, pp. 869-870.

30. *Oxford v. Provand*, (1868) LR 2 PC 135; 16 ER 472 (PC); *Jethalal Nanshah Modi v. Bachu*, (1945) 47 BLR 463; AIR 1945 Bom 481; *G. Rasaiah v. C. Balarami Reddi*, AIR 1989 AP 179.

31. *G. Rasaiah v. C. Balarami*, AIR 1989 AP 179.

32. *Pujari Narasappa v. Shaik Hazrat*, AIR 1960 Mys 59; *Mademsetty Satyanarayana v. G. Yelloji Rao*, AIR 1965 SC 1405; *Malins v. Freeman*, (1837) 2 Keen 25; 48 ER 537; also see (1994) 6 SCC 18; (1996) 6 SCC 218 and (1996) 5 SCC 589 in foot note 28 supra.

(b) *Contracts of personal services.*—Cannot be specifically enforced.³³

(c) *Continuous Supervision.*—Specific performance of a contract involving continuous supervision of the court will not be granted.

(d) *Sale of Goods cases.*—Here the damages would generally afford an adequate remedy and therefore no specific performance will be granted. The reason is that since the specific goods contracted for can be had from the market such performance is uncalled for. But if the contrary is proved as provided in Section 10, explanation, specific performance will be ordered.

(e) *Specific Performance Refused.*—There are also cases wherein though compensation is not an adequate relief, the court will not decree specific performance of a contract.

6. APPLICABILITY OF ENGLISH PRINCIPLES IN INDIA

The above general principles have been incorporated in the Specific Relief Act. Where there are *specific provisions* in the Act regarding particular situations, the provisions of the Act prevail, and *in cases of divergence* between the provisions and the principles abovesaid the general English principles must give way to the specific provision of the Act as laid down in *William Graham v. Krishna Chandra Dey*³⁴ by the Privy Council. Moreover, as expressed in *Ardeshir Mama v. Flora Sassoon*³⁵, at the time of codification of the above principles where a *reference* has been made to English rules, that must be a guide in interpretation and application of the provisions of the Act. But where the *Act is silent* on a particular situation, the English principles and practice are a valuable guide.³⁶ Besides, the principles of equity, justice and good conscience will apply in situations and in the fields where the *Act does not apply*.

7. DIFFERENCE OF THE ACT WITH ENGLISH GENERAL PRINCIPLES

The Specific Relief Act has at many places avoided the complications of the English law and provided clear provisions for the same as in cases of specific performance with abatement or compensation under Section 12(2) and in cases of serious deficiency under Section 12(3). The defence of 'mutuality' prevailing in England has been abolished by the Act. If a suit is brought for specific performance all remedies must be sought therein. It is for this reason that Section 24 provides that on dismissal of such a suit no suit for compensation for breach of agreement shall lie. This is not so in England. Besides, the doctrine of laches with its bedroll of cases is not applicable in India in view of the provisions of the Limitation Act, 1963, Article 54 whereby such a suit must be brought within three years from the date fixed for performance or from the date when the plaintiff has notice that performance is refused.

33. *Page One Records Ltd. v. Britton*, (1968) 1 WLR 157; (1967) 3 All ER 822 (Ch D).

34. AIR 1925 PC 45; 52 IA 90.

35. AIR 1928 PC 208; 55 IA 360.

36. *Akshayalingam Pillai v. Avayambala Ammal*, AIR 1933 Mad 386.

8. DEFENCES TO AN ACTION FOR SPECIFIC PERFORMANCE (SECTION 9)

General.—A defence is denial of the plaintiff's claim. A defendant may advance a plea of total denial of the plaintiff's claim on account of contract having been induced and therefore vitiated by mistake, fraud and undue influence or on the ground that the contract is one which cannot be specifically enforced. And these we have considered before. We shall now look into the various other defences that equity provided and the Specific Relief Act lays down. As expressed by Snell³⁷ in his *Principles of Equity*, those defences may be—

- (a) no effective contract
- (b) absence of writing or part performance
- (c) plaintiff's misrepresentation
- (d) mistake
- (e) misdescription
- (f) default by plaintiff
- (g) lapse of time
- (h) trickiness
- (i) great hardship
- (j) Illegality
- (k) defective title.

In such a suit the defendant may plead any ground available to him under any law relating to contracts such as incapacity of parties, absence of a concluded contract, coercion, fraud, misrepresentation, mistake, illegality or want of authority to enter into the contract³⁸ and so on.

Section 9 in this regard provides that:

“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.”

As the defences are scattered over various sections, we shall take them serially in a logical and chronological order.

(a) *No effective contract*

Specific performance presupposes the existence of a complete and definite contract. The statutory requirement of a written evidence of the contract, it must be noted, “is a weapon of defence, not offence and does not make any signed instrument a valid contract by reason of the signature, if it is not such according

37. 27th Edn., 1972, Part VII, Chap. 1, pp. 583-600.

38. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, p. 825.

to the good faith and real intention of the parties".³⁹ This means that to be enforceable at law that agreement should not be void because of uncertainty or illegality.⁴⁰ It should also not be voidable because of lack of consent, or presence of fraud, mistake, misrepresentation or undue influence. An incomplete contract is also a good defence.

Uncertainty.—Want of certainty is a ground for resisting specific performance. Certainty must be with regard to terms, parties, value, date and description of the subject-matter. The uncertainty in a contract which may arise in different ways must be determined at the commencement of the action, because it is at that time that the non-compliance with the terms of the contract must be incapable of justification. It is well known that there cannot be a contract to make a contract. If the parties leave the essential terms of the agreement undetermined, the same cannot be enforced for uncertainty, but if the agreement is otherwise complete leaving certain details (non-essential) incomplete, the court will find out or ascertain them from the evidence produced and enforce the contract, because what is essentially required is the reasonable certainty.⁴¹ But one must note that the evidence produced has to explain the terms; it cannot be allowed to alter or vary the terms of a written agreement.⁴² Section 14(1) (b) of the Specific Relief Act expresses this when it speaks of a contract which "from its nature is such that a court cannot enforce specific performance of its terms". Section 29 of the Indian Contract Act also expresses that an agreement, the meaning of which is not certain, or capable of being made certain, is void. Mulla has dealt with these under the heading "Vague Contracts".⁴³

(b) Defective Title

It is a good defence by the purchaser to show that the vendor cannot make a good title to the property in accordance with the contract he made. In the same way, where the property is encumbered or its title is doubtful, a suit for specific performance can be resisted. In suitable cases, therefore, the purchaser may be relieved or discharged from the contract or may repudiate the contract because the court will not compel a purchaser to buy a lawsuit, a term which means not a bare possibility of proceedings, but "a reasonable, decent probability of litigation".⁴⁴

Section 17 of the Act lays down the Indian law on the point. It applies to both movable as well as immovable property and to sales and leases. The section says:

"(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor—

39. *Jervis v. Berridge*, (1873) 8 Ch App 351: 28 LT 481.

40. *Douglas v. Baynes*, 1908 AC 477: 99 LT 599 (PC).

41. *Sheo Kumar v. Gyan Nath*, AIR 1955 All 408, 412.

42. *Gajkumar v. Luchhmanram*, (1911) 14 Cal LJ 627: 10 IC 503.

43. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, p. 848.

44. *George v. Thomas*, (1904) 90 LT 505: 52 WR 416.

- (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 sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property."

The section thus deals with the case wherein the seller or lessor has either (i) no title to the property sold or let out, or (ii) where he cannot give the purchaser or lessee a title free from reasonable doubt, and (iii) where prior to such sale or letting he has made a settlement of the subject-matter of the contract.

In this connection Section 55(2) of the Transfer of Property Act explains that a seller impliedly contracts that he has an interest in the property, the same subsists, and that he has power to transfer the same. The title must be in the vendor himself and Section 13 of the Specific Relief Act therefore expressly lays down the rights of the purchaser or lessee against the vendor who has no title or imperfect title. The suit for specific performance can therefore be resisted where the vendor's title is either defective, doubtful, encumbered or bad. One has to note that the defect in the title must be substantial and the doubt a very serious doubt. Section 17(1) (a) is in conformity with the view of Lord Knight Bruce, V.C. in *Adams v. Broke*⁴⁵ that subsequent acquisition of title will not entitle the vendor to enforce the specific performance even though the time fixed for completion has not passed. This view has been confirmed by the Nagpur High Court in *Kisanlal Rudmal Agarwal v. Namdeo Krushnaji Dhangar*⁴⁶.

In the following cases, it must be noted, the title is not considered to be open to doubt—

- (i) where the doubt raised is *mala fide* and unsupported by any proof;
- (ii) where the probability of litigation is not great;
- (iii) where there is an adverse decision of the inferior court regarding title which the superior court thinks to be clearly wrong; and
- (iv) where the question depends upon the general rule of construction of words against the special context and the court is in favour of title.

In short, defective title is a good ground for resisting specific performance, subject to the exceptions mentioned above.

45. (1842) 1 Y & C Ch Cas 627: 62 ER 1046.

46. AIR 1943 Nag 299.

(c) *Mistake and Misrepresentation*

Sections 20 and 22 of the Specific Relief Act and Section 18 of the Indian Contract Act lay down the effects of mistake and misrepresentation on the contract.

(d) *Great Hardship*

A contracts to buy a piece of land from X. There is no right of way existing to it and nothing is mentioned in the contract above it. No right of way can be shown to exist also. Such a contract cannot be specifically enforced because if performance is decreed, it would create great hardship for A in so far as access to the land is concerned. And this defect is incurable. Hardship is therefore a good defence here.⁴⁷

It must therefore be said that as a general rule if the contract is otherwise valid or legal it does not lie in the mouth of the defendant to say that specific performance thereof should be refused because it involves hardship to him. But in genuine cases of hardship the court would definitely not allow specific performance.⁴⁸ And this is what is provided by Section 20(2)(b).

What is hardship.—When we say that hardship is a good defence we must also understand in what cases and how it comes into existence and what it means. Firstly, hardship is not the same as onerousness, because what is onerous is mentally burdensome or oppressive. But hardship may be said to be an untoward event or a difficulty or inconvenience usually of a lingering character for which the sufferer is not deemed directly responsible. A contract mixed with hardship is almost unconscionable. But where it is the creation of the plaintiff himself as when he induces another to strike a contract by use of misrepresentation or fraud and obtains an unfair advantage from that other⁴⁹, hardship and unfair advantage are good defences and the court will not decree a specific performance of such a contract. Secondly, as the section provides, the hardship must be one which the defendant could not foresee.⁵⁰ Moreover, the hardship must not be such as flows from the terms of the contract; it must be something existing side by side or collateral,⁵¹ which grows from outside the contract without the default or some other act of the defendant. Where the defendant knowingly enters into a contract involving hardship, he would have no defence of hardship.⁵² The court in deciding such cases will look to the facts of the case, its circumstances and the relative position of the parties at the time of making the contract, because hardship arising subsequent to the formation of a contract cannot be advanced as a defence against specific performance, unless it has arisen due to some act of the plaintiff.⁵³ At the same time, the court will

47. Cf. *Kamini Sundari Chaodhrani v. Kali Prossunno Ghose*, (1886) 12 Cal 225 (PC): 12 IA 215. Facts have been given under the next topic.

48. *Preston v. Luck*, (1884) 27 Ch D 497: 33 WR 317 (CA).

49. *Davis v. Maung Shwe Goh*, 38 Cal 805 (PC): 38 IA 155.

50. *Janakdhari Lal v. Gossain Lal Bhaya Gaywal*, ILR (1910) 37 Cal 107: 1 IC 871.

51. Halsbury: *Laws of England*, 2nd Edn., Vol. 31, para 421, p. 370.

52. *Radha Kanta Pal v. United Bank of India Ltd.*, AIR 1955 Cal 217.

53. *Peer Mohd. v. Mahmud*, ILR (1905) 29 Bom 234: 6 Bom LR 1013: 7 Bom LR 200.

not look into the hardship of the defendant only, but will look into that of the plaintiff too and after weighing the facts and consequences it will decree or refuse the specific performance; not before. Explanation 2 to Section 20(2)(b) enlightens the position mentioned above.

(e) *Unfairness*

As Section 20(2) (a) provides, the court may properly exercise its discretion not to decree specific performance where (i) the terms of the contract, or (ii) the conduct of the parties at the time of entering into the contract, or (iii) 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. Where A sells land to B for protection of which an embarkment is to be maintained by A, and A does not disclose this to B but conceals this position knowingly, the court will not grant specific performance to A because by so decreeing A will gain an unfair advantage over B. What is unfair is far from just. Similarly, where a *pardanashin* lady obtained a loan from her own *mukhtar* at an excessive rate of interest, the security being ample, it was decided by the Privy Council that as the bargain was hard and unconscionable the rate of interest in the contract could not be enforced in equity.⁵⁴

Unfairness arises from the terms of the contract or from the conduct of the parties or from other circumstances attending the contract. It expresses itself in various ways. It must arise at the time of entering into the contract, but it may arise subsequent to it also, as when a contract to sell at a price to be fixed at a future date is made or some precondition is to be fulfilled before the contract becomes absolute. The time when the contract becomes absolute (when price is fixed or condition is fulfilled) is the time with reference to which the fairness is to be judged; the date of execution of the contract not being material to judge the fairness. Unfairness arising from surrounding circumstances may take place from mental weakness, or due to age, sex, poverty, illiteracy, or intoxication of the parties or from any other circumstance giving unfair advantage to the plaintiff.

(f) *Inadequacy of Consideration*

Mere inadequacy of consideration is no ground for resisting specific performance because "the value of all things contracted for is measured by the appetite of the contractors and therefore the just value is that which they be contended to give". At the same time, a voluntary contract cannot be decreed on the principle that "equity will not aid a volunteer". If the inadequacy leads to some fraud or undue advantage by the plaintiff, that is a ground for resisting specific performance. Similarly, inadequacy which may amount to mere hardship is no ground for relief, but if the inadequacy is such as shocks the conscience it is a good ground for resisting specific performance.

Explanation 1 to Section 20(2) therefore provides that *mere inadequacy* of consideration or the mere fact that the contract is *onerous* to the defendant or

54. *Kamini Sundari Chaudhrani v. Kali Prossunno Ghose*, (1886) 12 Cal 225 (PC): 12 IA 215.

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).

The inadequacy of consideration to be a good defence must be such as to shock the conscience of a person or to lead by itself to an evidence of fraud or undue advantage; or when weighed with other surrounding circumstances forms an evidence of fraud or undue advantage. Here one thing must be noted that, as decided in *Ganga Baksh v. Jagat Bahadur Singh*⁵⁵, the adequacy or inadequacy of consideration has to be determined with reference to the state of things or circumstances surrounding or existing at the time when the contract was made and not with reference to subsequent events. Thus inadequacy of consideration, to be a good defence, must exist at the time when the contract was made, must be shocking to the conscience, cannot emanate from mere onerousness of the contract, is not obtainable by a volunteer and taken by itself or taking the existing or surrounding circumstances of the contract into consideration must lead to some fraud or undue advantage obtained by the plaintiff.

(g) *Delay and Laches*

Section 54 of the Limitation Act, 1963 has prescribed a period for filing a suit for specific performance of contracts and accordingly all such suits must be brought within 3 years from the date fixed for performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.

It is very plain that a suit for specific performance must be brought *within the time* when time is the essence of the contract. Time may be made to be the essence of the contract by express provision in the contract. This is so in mercantile contracts. Besides, if the nature of the contract is such or if the terms thereof are such, it may be apparent that time is the essence of the contract. Thus where time is such, a suit for specific performance must be brought within that time but where time is not such no party can insist for performance within a particular period of time. But performance can be insisted upon within a *reasonable time*, according to law. And what is reasonable time is a question of fact. If a suit for specific performance is not brought within a reasonable period of time a decree for specific performance will not be granted.⁵⁶

The basic requisites for the plaintiff's success in a suit for specific performance of a contract are (i) his performance or his *readiness and willingness all along to perform the terms of the contract*, and (ii) his readiness and willingness to do all matters to be thereafter done. A failure of the plaintiff in any of these respects will afford a good defence to the opposite side.⁵⁷ In other words, he has to allege and if the fact is traversed, he must prove his continuous readiness and willingness from the date of the contract to the time of the hearings to perform the contract on his part.⁵⁸

55. (1895) 22 IA 153; ILR (1896) 23 Cal 15 PC.

56. *Binda Prasad v. Kishori Saran*, AIR 1929 PC 195; 116 IC 388.

57. 37 IC 257 (DB); (1916) 24 Cal LJ 90.

58. *Dau Alakhram v. Kulwantin Bai*, ILR 1950 Nag 386; AIR 1950 Nag 238.

Article 54 of the Limitation Act, 1963 provides that a suit for specific performance must be brought within "three years from the date fixed for performance, or if no such date is fixed, when the plaintiff has notice that performance is refused". This provision of the Limitation Act makes the doctrine of laches inapplicable in India to this kind of litigation. Like England we have no rules in the Limitation Act on the subject of delay and laches. But from the decided cases there should be no difficulty in laying them down as below.

A. RULES

(1) Even if mere delay does not disentitle a plaintiff to claim specific performance of a contract, nevertheless, delay is one of the factors to be considered while granting the discretionary relief.⁵⁹

(2) Whether lapse of time destroys the plaintiff's right has to be considered with reference to the other prevailing circumstances. If the plaintiff has been in substantial possession of the benefits of the contract and has always been claiming the completion of the legal estate, delay, if properly explained, will not affect his rights to claim specific performance.⁶⁰

(3) Inordinate and unexplained delay coupled with the change of conditions is sufficient ground for refusing specific performance and dismissing the suit.⁶¹

(4) In no case does mere delay or lapse of time deprive the plaintiff of his right to specific performance unless it be held that—

- (i) there has been abandonment,
- (ii) acquiescence,
- (iii) waiver, or
- (iv) at the least an alteration in the position of the defendant in that the other party has been put in a situation in which it would not be reasonable to place him if the remedy was afterwards to be asserted.⁶²

(5) The court may exercise its discretion and not decree specific performance where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant. Mere delay by itself is no ground for refusing relief but when it raises the presumption of an abandonment of the plaintiff's claim or has caused—

- (i) a hardship to the opposite party; or
- (ii) something to his prejudice,

the courts are entitled to exercise their discretion and refuse the relief prayed for.⁶³

59. *Sultan v. Sharfan*, 113 IC 140 (DB): AIR 1929 Lah 249.

60. ILR 1952 Cal 198.

61. *Sultan v. Sharfan*, 113 Ind Cas 140 (DB): AIR 1929 Lah 249; *Dau Alakhram v. Kulwantin Bai*, ILR 1950 Nag 386: AIR 1950 Nag 238.

62. *Allah Ditta v. Jamna Das*, 117 Ind Cas 225 (DB): AIR 1929 Lah 679; 44 Ind Cas 244: (1918) 4 Pat LW 192.

63. *Rami Reddi v. Pattabhirami Reddi*, 169 Ind Cas 12 (DB): AIR 1937 Mad 124.

(6) Where delay does not amount to waiver, abandonment or acquiescence, and which in no way alters the position of the defendant, it does not disentitle the plaintiff to sue for specific performance. Thus when the suit is within time and the delay is not so great as to induce the court to hold that the plaintiff has forfeited his right under the agreement, the court will not refuse equitable relief.⁶⁴

(7) Where status quo position of the parties was changed, as when there was a change in value of property, and it had occurred by reason of delay attributable to the plaintiff, specific performance was rightly refused.⁶⁵

(8) In cases of serious laches specific performance is refused, but where the plaintiff was guilty of delay of over two years in filing suit⁶⁶, or where he delayed till the end of the limitation period unnecessarily⁶⁷, specific performance was refused.

(9) But one has to note that mere laches or delay, even if it is up to the hilt of the limitation period, is not always evidence of waiver and abandonment.⁶⁸ To operate as a bar to relief the delay should be such as to amount to a waiver or abandonment of the plaintiff's right by acquiescence or where by his conduct or neglect he has though perhaps not waived his remedy yet put the other party in a situation in which it would not be reasonable to place him. If the remedy were afterwards to be asserted.

When such is not the case, any lapse of time short of the period allowed under the Limitation Act should not disentitle the claimant to relief which he is otherwise entitled.⁶⁹

B. TIME WHEN ESSENCE OF THE CONTRACT⁷⁰

In *Burjorji case*⁷¹ the Privy Council laid down the principles governing contracts of sale of land and when time is or is not of the essence of the contract. Following this decision it has been held by the Indian courts that time in contracts for sale of immovable property is not of the essence of the contract unless the nature of the property and surrounding circumstances make it so. Equity treats the limits of the time as subordinate to the main purpose of the parties.⁷² After *Burjorji case*⁷³, again in *Paul Couvreur v. M.G. Shapiro*⁷⁴, the

64. *Jaugal Singh v. Gulam Mahomed*, 67 Ind Cas 700 (DB): 32 PWR 1922: AIR 1922 Lah 461.

65. *Bahadur Singh v. Suresh Chandra Roy*, 34 CLJ 364 (DB): AIR 1921 Cal 179.

66. *Narooshankar Pranshanker v. Rajamal Bhagwandas*, AIR 1921 Sind 197: 15 Sind LR 21.

67. *Marudanayagam Pillai v. Munusamy Pillai*, AIR 1917 Mad 8: 37 IC 776, 37 Ind Cas 776 (DB): 58 Ind Cas 23. See also *Ram Charan Lal v. Karim-un-Nissa Bibi*, 26 Ind Cas 121 (DB): (1914) 27 Mad LJ 482: ILR (1915) 37 All 12 where delay of 20 months disentitled the plaintiff to sue for specific performance.

68. 23 Ind Cas 56 (DB).

69. *Kissen Gopal Sadanay v. Kally Prosonno Sett*, ILR (1906) 33 Cal 633, 636.

70. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, pp. 825-826.

71. *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*, (1916) 43 IA 26: AIR 1915 PC 83: 32 IC 246.

72. *Gomathinayagam Pillai v. Pillaniswami Nadar*, (1967) 1 SCR 227: AIR 1967 SC 868.

73. *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*, (1916) 43 IA 26: AIR 1915 PC 83: 32 IC 246.

Privy Council again had the occasion to consider the question as to time being of the essence of the contract and it was held that (i) reasonable time for getting a permit applies to a contract which fails to be carried out within a reasonable time, and (ii) where the contract fails to be completed within a fixed period and therefore time is of the essence of the contract, to allow the purchaser reasonable time beyond the fixed period to enable him to do what by the terms of the contract he was required to do, would amount to making a new contract for the parties. In *Gomathinayagam Pillai case*⁷⁵, the Supreme Court after reviewing the authorities laid down the law as below:

(1) There is a presumption in the case of immovable property that time is not of the essence of the contract.

In the matter of enforcement of the agreement or agreement of reconveyance, time is not always the essence of the contract unless the agreement specifically stipulates and there are special facts and circumstances in support thereof. It must be specifically pleaded and issue raised so that the other party has a right to lead evidence.⁷⁶

(2) Even where a contract contains a stipulation making time the essence of the contract, the presumption applies and more so where time for performance has been extended more than once.

(3) Similarly, incorporating a clause imposing penalty in case of default does not by itself evidence an intention to make time the essence.⁷⁷ In a case where a promisor has an option either to do or to abstain from doing on payment of the sum of money, court may treat covenants to perform or to pay as alternative where specific performance would work unreasonable results.⁷⁸ Where stipulation in a contract is uncertain and ambiguous specific performance cannot be granted.⁷⁹

It was further expressed that intention to make time of the essence of the contract must be in unmistakable language. It may be inferred from the nature of the property agreed to be sold, the conduct of the parties and the surrounding circumstances at or before the contract. As observed in *Chaturvedi case* High Court cannot make the essence of the contract an issue if it was not an issue in the trial court.⁸⁰

In case of contracts the object whereof is commercial enterprise, the court is strongly inclined to hold time to be essential, e.g., agreement to purchase land for construction of a factory.⁸¹ It must be once again remembered that to allow this defence is discretionary and it may be refused too in suitable cases where

74. AIR 1948 PC 192; 1948 Mad WN 121.

75. (1967) 1 SCR 227; AIR 1967 SC 868.

76. *Bibi Jaibunisha v. Jagdish Pandit*, (1997) 4 SCC 481.

77. (1967) 1 SCR 227; AIR 1967 SC 868.

78. *Mayawanti v. Kaushalya Devi*, (1990) 3 SCC 1.

79. *Ibid.*

80. *Govind Prasad Chaturvedi v. Hari Dutt Shashtri*, (1977) 2 SCC 539; AIR 1977 SC 1005; (1977) 2 SCR 877.

81. *Sri Ram Cotton Pressing Factory (P) Ltd. v. K.E. Narayanswami Naidu*, AIR 1965 Mad 352.

delay had led the other party to change his position thinking that the plaintiff has abandoned his rights.

(h) *Other Defences*

Moreover, where the plaintiff has not performed his part or where he has not been continuously ready and willing to perform his part, where compensation is an adequate relief (Section 14), where the plaintiff is not competent to sue (Section 15), where the plaintiff, by his conduct, has disqualified himself for the relief (Section 16), where the defendant is a person against whom specific performance cannot be obtained or enforced (Section 19) and where he is incapable of performing his part due to some statutory bar or due to impossibility arising out of destruction of the subject-matter of the contract—a good defence for resisting the specific performance is constituted.

**9. CONTRACTS WHICH CAN BE SPECIFICALLY ENFORCED
(SECTIONS 10 TO 13)**

While the negative proposition that “no agreement which is not a contract shall be enforced in specie” is true, its converse that “all contracts shall be enforced in specie” is not universally true.⁸² The act therefore speaks of contracts which may be specifically enforced and those which cannot be specifically enforced (Sections 10-14).

No one is allowed to depart from the contract at his pleasure because as expressed by Jessel, M.R. “No principle can be more sacred than that a man shall be compelled to perform his contract”. Where persons voluntarily, without any fraud, accident or mistake, enter into contracts, the jurisdiction of the court of equity ought to be exercised.⁸³

Where there is a concluded and complete contract.⁸⁴ Where it is in writing, fair and certain, where it is upon adequate consideration and capable of being enforced and where its nature is such as requires enforcement in specie,⁸⁵ the contract would be enforced. Specific performance is thus a conscience attempt on the part of the court to do complete justice between the parties with regard to all the juridical relations growing out of the contract.

The section for its enforcement requires fulfilment of the following conditions:

- (a) the suit must relate to specific performance of a contract;
- (b) it must fall within clause (a) or clause (b) of Section 10;
- (c) it must be a fit case for specific performance; and
- (d) it should not be barred for specific performance, as per other sections of this chapter.

82. Banerjee: *Law of Specific Relief*, edn. 9, 1992, pp. 108-109.

83. *Leech v. Schweder*, (1874) 9 Ch App 463; Cf. *Davis v. Maung Shwe*, ILR 38 Cal 805 (PC): 13 Bom LR 704; Banerjee: p. 109.

84. *S.V.R. Mudaliar v. Rajabu F. Buhari*, (1995) 4 SCC 15; AIR 1995 SC 1607.

85. *Induben Ashokrao Nalvade v. Dhirajlal Shivlal Surati*, 1995 Supp. (3) SCC 541.

Sections 10 to 13 explain where specific performance is enforced either in full or in part, either of a contract or contracts connected with trusts, and in doing so they explain the very general principles which we have noted before. It must also be noted that Section 14(3) grants specific performance in six cases.

Section 10.—Section 10 of the Act lays down the following equitable rules—

- (i) that the specific performance of a contract is within the discretion of the court;
- (ii) it will be granted where there exists no standard for ascertaining the actual damage [Section 10, clause (a)]. As decided in *Falcke v. Gray*⁸⁶, where a rare China vase or an old and rare manuscript is agreed to be sold, there is no standard for ascertaining the actual damage that would be caused by its non-performance and therefore the contract will be specifically enforced. As is the case with a China vase (a movable property) so is the case with land or a house or shares of a particular company or construction of a building,⁸⁷ but the goods or chattel must have a particular value or association, or some antiquity, unusual beauty, variety and distinction attached to it from the buyer's viewpoint. As Story⁸⁸ writes the grounds of such a rule is utter-uncertainty of any calculation of damages as they must, in such a case, be, in a great measure conjectural. Thus all contracts concerning unique and precious articles, heirlooms, or paintings, old furniture and the like, in which there are no details to furnish a criterion nor any other means of estimating the *pretium affectionis* which constitutes the real value to the owner, and which is beyond the competency of the court to decide, writes Pomeroy⁸⁹ may be specifically enforced. The leading cases on this point are *Pusey v. Pusey*⁹⁰ and *Duke of Somerset v. Cooxson*⁹¹.
- (iii) as clause (b) of Section 10 provides, specific relief will also be granted where compensation is not an adequate relief;
- (iv) as is further provided by the explanation, the court in such cases will presume that unless and until the contrary is proved in case of sale of immovable property, compensation is not an adequate relief;
- (v) in case of movable property, compensation is an adequate relief [Explanation (ii)];
- (vi) But in the following cases the court presumes that compensation is not an adequate relief and hence specific performance will be granted—

86. (1859) 4 Drew 651: 62 ER 250.

87. *Storer v. Great Western Rly. Co.*, (1842) 2 Y & C Ch Cas 48: 63 ER 21.

88. Story: *Equity*, S. 722(a).

89. *Pomeroy*, Sp. Cs 34, p. 101: Cited in Banerjee: *Law of Specific Relief*, edn. 9, 1992, at pp. 115, 116.

90. (1864) 1 Ver 273 (a horn with inscription thereon).

91. (1935) 3 P wms 390 (a thing of antiquity and curiosity).

- (a) where the movable property is not an ordinary article of commerce, or
- (b) is of special value or interest to the plaintiff, or
- (c) it consists of goods not easily available in the market [Explanation (ii)(a), or]
- (d) where the defendant holds the property as the agent or trustee of the plaintiff [Explanation (ii) (b)]

In *Cohen v. Roche*⁹², the plaintiff failed to recover in specie certain antique furniture though it was of some beauty and distinction because he was merely a dealer who had bought it for resale. Similarly, any stock for which there is a regular market is not a proper subject for specific performance.⁹³

Section 11.—Section 11 provides for cases in which specific performance of contracts connected with trusts are enforceable. For this purpose it may be said that—(i) to grant specific performance of such contracts rests solely within the discretion of the court as the word “may” suggests [Section 11(1)]. No specific performance is granted where (ii) a trustee contracts in excess of his powers or (iii) in breach of a trust [Section 11(2)]. Behind this lies the simple reason that a court will not aid the use of excess powers of a trustee nor aid his breach of trust by granting specific performance of a contract connected with trust.

For example, A is a trustee of land with powers to lease it for seven years. He contracts with B to lease the land for 7 years and to renew the contract after its expiry. This contract cannot be specifically enforced as it is in excess of A's powers as a trustee.⁹⁴ Thus a trustee selling trust property at a price below its market value and the directors of a company selling property without proper sanctions, are instances of misuse of trust and excess use of powers. Such contracts cannot be specifically enforced.

Section 12.—This section is in relation to specific performance of a part of contract. It explains that (i) specific performance of a part of contract shall not be granted [Section 12(1)]. (ii) Where a part of contract cannot be specifically performed but its non-performance admits of compensation and the part left unperformed is of small value, the court will allow specific performance of so much of the contract as can be performed and will allow compensation for the rest [Section 12(2)]. (iii) When a party is unable to perform the whole of his part of the contract and the part so left unperformed is (a) a considerable one and admits of compensation, or (b) is such that it does not admit of compensation, the plaintiff cannot get specific performance.

92. (1927) 1 KB 169; 136 LT 219.

93. *Tej Singh v. State of U.P.*, AIR 1981 All 103 (waste coal ash); for contrary opinion see *U.P. State Ele. Bd. v. Ram Barai Prasad*, AIR 1985 All 265.

94. *Mahomed Esmat Khan v. Nunda Dulal*, 16 IC 390; see *Mortlock v. Buller*, (1804) 10 Ves 292; 32 ER 857.

But in cases falling under (a) above, the consideration paid will be abated or reduced suitably and in cases under (b) above there will be no abatement and the whole of the consideration must be paid. In both these cases the plaintiff will have to let go all his claims to performance or for compensation for the part left unperformed as the case may be [Section 12(3)]. (iv) When a contract consists of two parts: one, which ought to be performed and the other standing apart and being independent of the first cannot or ought not to be specifically performed, the first part must be specifically performed [Section 12(4)]. (v) Ceasing of a part of the subject-matter of the contract at the date of its performance raises a presumption in favour of a party that he is unable to perform it [Explanation to Section 12(4)].

Section 12, as noted by Mulla, constitutes a complete code in respect of a claim for specific performance of a part of a contract.⁹⁵ But here he sounds a note of caution that in the area of "specific performance with compensation" English cases would have to be applied with great care. Strong remarks have been made by eminent English judges on the unfortunate adventures of the courts of equity in "making bargains for the contracting parties which they never would have made for themselves".⁹⁶

General principles as to compensation have been ably summed up in *Rutherford case*⁹⁷ as cited by Mulla. The question for the court is always whether the contract can be executed in substance. "If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency provided the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and the court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement of the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract".⁹⁸

The explanation includes the cases that fall under Section 56 of the Contract Act.

In case of sale of immovable property by a single owner to several purchasers, no specific performance can be decreed against the vendor at the suit of only some of them if others do not join it claiming performance. The section, therefore, would not apply to such a case.

95. *Indian Contract Act and Specific Relief Act*, pp. 833-34.

96. *Re Arnold, Arnold v. Arnold*, (1880) 14 Ch D 270; 42 LT 705, cited in *ibid.*

97. *Rutherford v. Acton-Adams*, 1915 AC 866; 113 LT 931 (PC); *Arun Prakash v. Tulsi Charan*, 1949 AC 510.

98. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, p. 834.

Section 13.—This section provides regarding the rights of a purchaser or lessee against persons with no title or imperfect title. As the section provides, where a person contracts to purchase or to obtain a lease of immovable property from a person who has no title or only an imperfect title to it, he will have the following rights:

- (i) He can compel the vendor or lessor to make good the contract when he acquires any interest in the property subsequent to the contract [Section 13(1)(a)].
- (ii) He can compel him to procure concurrence or conveyance from the other person when it is necessary for validating the title and the persons are bound to concur [Section 13(1)(b)].
- (iii) He can compel him to redeem the property and to get a valid discharge if it is mortgaged and also compel him to make a conveyance from the mortgagee if necessary [Section 13(1)(c)].
- (iv) A purchaser or lessee will have a right to return of his deposit with interest, to costs of the suit and to a lien for all these three items on the vendor's interest or on his property subjected to contract, in case vendor's or lessee's suit for specific performance is dismissed for want of his title or imperfect title [Section 13(1)(d)].
- (v) The above rules apply to contracts for sale or hire of movable property.

As is provided, where a party enters into a contract regarding property which he has no power to dispose of, but subsequently acquires that power, he can be compelled to perform the contract he entered into.¹ But the purchaser cannot afford to remain negligent and the rule of *caveat emptor* applies to him.²

This section should not be confused with Section 43 of the Transfer of Property Act. In *Silla Chandra Sekharam v. Ramchandra Sahu*³, the Supreme Court explained that the expression "subsequently to the sale or lease" in Section 18 of the old Specific Relief Act (Section 13 here) means subsequently to the *contract to sell or let* and not subsequently to the *execution of the sale deed or lease deed*. The above expression should preferably be construed in a way that there are no overlappings between the provisions of clause (a) of Section 13 and Section 43 of the Transfer of Property Act as the legislature does not ordinarily intend to make duplicate provisions for similar situations. Sub-section (1)(a) is really plain justice.⁴ A seller's obligation is determined by what he has contracted for, and one may bind oneself to sell that which he has not, but expects to have it in time to perform the promise, taking the risk of failure. There is nothing extraordinary here therefore to compel him at a suitable time to perform that which he has undertaken to perform.

1. *Halroyd v. Marshall*, (1862) 10 HLC 191; *Ehsanul Haq v. Mohammad Umar*, AIR 1973 All 425.
 2. *Gour Chandra Das v. Prasanna Kumar Chandra*, ILR (1906) 33 Cal 812; 10 Cal WN 788; *Gajapathi v. Alagia*, ILR (1886) 9 Mad 89; 9 Ind Jur 419.

3. (1964) 7 SCR 858; AIR 1964 SC 1789.

4. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, p. 840.

Section 43 of the Transfer of Property Act refers to the sale or lease and under it property is conveyed first and title is acquired afterwards, whereas Section 13 refers to the performance of a contract and the vendor is required to convey the property contracted for, when acquired by him. Thus Section 13 refers to facts during the pendency of a contract.

It must be noted that the main principle is laid down by Section 13(1)(a) and sub-clauses (b) and (c) declare the consequences of the principle. In so far as return of deposit is concerned the principles laid down in *Howe v. Smith*⁵ by Cotton, L.J. apply in India.⁶ Similarly, where a contract for sale goes off by default of a purchaser the vendor is entitled to retain the deposit.⁷

The provisions of sub-section (1) apply to immovable property but they may be applied to contracts for sale or hire of movable property also, as provided by sub-section (2).

10. WHAT SHOULD A PLAINTIFF PROVE

As Section 16(c) provides, in a suit for specific performance the plaintiff has to prove the following things:

- (i) That there was a concluded contract between himself and the defendant.⁸ If he cannot prove it, decree for specific performance cannot be granted.⁹
- (ii) 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.
- (iii) That he is ready and willing to do everything on his part in future too, i.e., he has to prove his continuous readiness and willingness to perform the contract as it really was and not as he alleges it to be.¹⁰ His readiness and willingness would be inferred from his conduct, and that is a question of fact in each case.¹¹

Readiness to perform according to Fry consists of (a) past acts as well as (b) future acts including all conditions precedent, the express and essential terms, the implied and essential terms and all the representations made on the faith of which the contract was entered into, but for the non-essential terms or the terms of a collateral contract no such performance need be shown.

"Aver" and "Prove" are two entirely different words with two different connotations. "Aver" means to ascertain or to mention something in the plaint,

5. (1884) 27 Ch D 89; 50 LT 573 (CA).

6. *Natesa Aiyar v. Appavu Padayachi*, ILR (1915) 38 Mad 178; 24 Mad LJ 488; 19 IC 462.

7. *Narash Chandra Guha v. Ram Chandra Samanta*, AIR 1952 Cal 93.

8. *S.V.R. Mudaliar v. Rajabu F. Buhari*, (1995) 4 SCC 15; AIR 1995 SC 1607.

9. *Ganesh Shet v. GSGK Setty*, (1998) 5 SCC 381.

10. *Ardeshir Mama v. Flora Sassoon*, (1928) 32 CWN 953 (PC); (1928) 55 IA 360; AIR 1928 PC 208.

11. *Bindeshri Prasad v. Jairam Gir*, ILR (1887) 9 All 705 (PC); 14 IA 173; *Bank of India Ltd. v. Jamsetji A.H. Chinoy*, AIR 1950 PC 90; 77 IA 76.

while "prove" connotes that what has been asserted in the plaint has to be proved by presenting evidence. As expressed in *Palthur H. Saheb case*,¹² it is therefore imperative on the part of the plaintiff to aver in the plaint that he has performed his part or that he has been always ready and willing to perform the essential terms of the contract which are to be performed by him. In judging this readiness and willingness the Court has to look to the totality of circumstances, a literal compliance with the terms is not imperative, nor it is a requirement of law.¹³ The plaintiff in such cases may be directed suitably so that interest of both the parties are safeguarded.¹⁴ However the performance of the essential terms must be full and not of a part only.¹⁵ A plaintiff failing to fulfil any of the two obligations enjoined by the law will not be allowed to succeed.¹⁶ This is because "he who seeks equity, must do equity". The Court has no power to relax this rule. The burden of proving readiness and willingness up to the date of trial lies on the plaintiff;¹⁷ it is his duty. There is no particular form prescribed for expressing readiness and willingness.¹⁸ The plaint in this respect should not be construed in a pedantic manner in order to non-suit the plaintiff.¹⁹ The averment of the plaintiff's readiness and willingness, if it is not initially made due to counsel's mistake, may be allowed to be made later on by amending the plaint. Such an amendment does not tantamount to adding a new cause of action; it merely completes the prayer already made.²⁰

As observed by the Supreme Court of India where a subsequent purchaser had deemed notice from fact of possession of previous purchaser, he would be deemed to be a non-bona-fide purchaser with notice, and consequently specific performance of sale agreement of previous purchaser was decreed.²¹ Where there are clear recitals in an agreement of sale of whole building the same cannot be whittled down by inaccuracy in the recitals.²² In case where there was an agreement to sell share of a joint holder of property, the submission that the property will have to be partitioned or that it was scattered at different places was held not to be a legal difficulty.²³ Performance of contract in a "reasonable time" is a question of fact in each case.²⁴ Finally to grant specific performance or not is a question depending upon facts and circumstances of a case. Where a

12. *P.H. Saheb v. Bapanna Annapumamma*, AIR 1986 Kar 109.

13. *Mithukhan v. Pipariawali*, AIR 1986 MP 39, relying on AIR 1971 SC 1238.

14. *C.L. Jain v. Gopi Chand*, AIR 1990 Del 380.

15. *Byomkesh Banerjee v. Nani Gopal Banik*, AIR 1987 Cal 92.

16. *Jagannath Misra v. Umar Misra*, 1984 (1) Cri LJ 223; *Abdul Khader v. P.K. Sarabai*, AIR 1990 SC 692.

17. *Saral Kumar Chatterjee v. Madhusudan*, AIR 1964 Cal 556.

18. *K. Sambasiva Rao v. P. Bangaru Raju*, AIR 1985 AP 392.

19. *Naval Kishore v. Kuleshwari Devi*, 1986 BLJ 268; (1986) 34 BLJR 418.

20. *Gajanan, J. Joshi v. P.M. Kalwar*, (1990) 1 BLJ 650; *Oscar Lovis v. Sarodha*, (1990) 1 KLT 469; *Joga Singh v. Pakhar Ram*, AIR 1990 P & H 314.

21. *Ram Vilas Ojha v. Bishwa Muni*, (1979) 1 SCC 21; AIR 1998 SC 1094; *Govinddas v. Shantibai*, (1973) 3 SCC 418; AIR 1972 SC 1520.

22. *Induben Ashokrao Nalrade v. Dhirajlal Shivlal Surati*, 1995 Supp (3) SCC 541.

23. *Kartar Singh v. Harjinder Singh*, (1990) 3 SCC 517; AIR 1990 SC 854.

24. *Hungerford Investment Trust Ltd. v. Haridas Mundhra*, (1992) 3 SCC 684; AIR 1992 SC 1826; (1972) 3 SCR 690.

plaintiff in seeking specific performance obtains an unfair advantage over the defendant, the same would not be granted by the court.²⁵

11. CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED

General.—As discussed before, where pecuniary compensation was not an adequate relief specific performance was decreed. Looking at the proposition the other way, it could be said that if compensation is an adequate relief, specific performance will not be decreed. But this is not all and it is not so simple as to close the discussion, because there are situations wherein, on the general principles, specific performance should have been granted by the Chancery Courts in England even though they have declined to grant it. Those cases have been grouped by Snell²⁶ under the following headings:

- (i) Illegal or immoral contracts
- (ii) Agreements without consideration
- (iii) Contracts for transient interests
- (iv) Contracts involving personal skill
- (v) Contracts requiring personal supervision
- (vi) Contracts to transfer goodwill alone
- (vii) Divisible contracts
- (viii) Contracts for arbitration
- (ix) Contracts wanting in mutuality
- (x) Contracts to exercise a testamentary power of disposition.

Section 14 of the Specific Relief Act when viewed with Sections 11, 12 and 13 enlists the contracts which cannot be specifically enforced, as under:

- (i) Contracts where compensation is an adequate relief [Section 14(1)(a)]
- (ii) Contracts running into minute or numerous details [Section 14(1)(b)]
- (iii) Contracts dependent upon personal qualifications [Section 14(1)(b)]
- (iv) Contracts dependent upon volition of the parties [Section 14(1)(b)]
- (v) Contracts which from their very nature are such that they cannot be specifically enforced [Section 14 (1) (b)]
- (vi) Contracts in their nature determinable [Section 14(1)(c)]²⁷
- (vii) Contracts requiring continuous supervision of the court [Section 14(1)(d)]
- (viii) Agreements to refer to arbitration [Section 14(2)]
- (ix) Agreements to lend money or to mortgage [Section 14(3)(a)]

25. *Sandhya Rani Sarkar v. Sudha Rani Devi*, (1978) 2 SCC 116; AIR 1978 SC 537; *B.R. Mulani v. A.B. Aswatha Narayan (Dr)*, 1993 Supp (4) SCC 743; AIR 1993 SC 1318.

26. *Snell's Principles of Equity*, pp. 578, 583.

27. *Indian Oil Corpn. Ltd. v. Amritsar Gas Service*, (1991) 1 SCC 533.

- (x) Agreements to form partnership [Section 14(3)(b)]
- (xi) Contracts to build or repair [Section 14(3) (c)]
- (xii) Contracts made by trustees in excess of their powers [Section 11(2)]
- (xiii) A part of contract cannot be specifically enforced [Section 12(1)]
- (xiv) A contract whose material part of the subject-matter has ceased to exist [Section 13(4) explanation].

Equity will not compel the specific performance of an illegal contract in England even though it is legal in the country of its origin, e.g., agreement between husband and wife for future separation. An agreement for immediate separation was once believed to be contrary to the policy of law but now it is not so and will be enforced if it was by way of matrimonial or other proceedings. Section 9 of the Specific Relief Act, 1963 provides this by way of defence available to a party under any law relating to contracts. With the legality of contract are connected the questions regarding consideration, consent, capacity, legality of the object and formalities, but since they are peculiar to the Contract Act we must leave them. It would therefore suffice to say that a contract entered into by a minor misrepresenting his age²⁸, a contract entered into by a trustee that necessitates a breach of trust²⁹, are contracts the specific performance whereof would not be granted as they are not valid at law. Similarly, agreements without consideration will not be enforced. Agreements for transient interests or interests which are not lasting or enduring will not be specifically enforced. Where there is no concluded contract, its specific performance cannot be granted.³⁰

(a) *Contracts involving personal skill.*—There is a limit to courts' power in granting specific performance and it is discernible in case of contracts to do acts involving personal skill, knowledge, inclination and qualification. Courts cannot control the mind and the ideas of an individual. Their scope becomes limited here. In *Lumley v. Wagner*³¹, a singer agreed with a theatrical manager to sing at his theatre for a particular period. In a suit for specific performance against her the court could not compel her to sing as it depended on personal inclination, but it must be noted that she was enjoined from singing elsewhere. As noted by Snell³², the threat of committal might induce her to perform but the court could not control imperfections of performance or judge whether they were natural or self-induced.³³ It is for such reasons that a contract to report cases for a series of law reports³⁴, or an infant's apprenticeship deed, are not specifically enforced. It is true that in such cases of breach, money compensation is wholly inadequate, the real ground behind it being the inability of the court in executing its decree.

28. *Ajudhia Prasad v. Chandan Lal*, AIR 1937 All 610.

29. *Willmott v. Barber*, 1880 15 Ch D 96: 43 LT 95 (CA).

30. *Ganesh Shet v. GSGK Setty*, (1998) 5 SCC 381.

31. (1852) 1 De GM & G 604: 42 ER 687.

32. *Snell's Principles of Equity*, p. 580.

33. *C.H. Giles and Co. Ltd. v. Morris*, 1972 1 WLR 307: (1972) 1 All ER 960 (Ch D).

34. *Clarke v. Price*, (1819) 2 Wils Ch 157: 37 ER 270.

In the words of Professor Langdell, if a contract consists in giving, equity can enforce a specific reparation of a breach of it, but if it consists in doing something, it cannot enforce it. Similarly, a contract of employment by or against an employer³⁵, or a contract of personal service³⁶ cannot be specifically enforced. The cases of *Vaish Degree College v. Laxminarayan*³⁷ and the *Kayastha Pathshala, Allahabad*³⁸ reiterate the same principle. In the first case it was held that a court would not normally give a declaration that the contract subsists and the employee even after having been removed from service can be deemed to be in service against the will of the employer. Of course, this rule is subject to three exceptions. In the second case³⁹ the employee, a teacher in educational institution taught for one or two years. He was afterwards suspended and was out of teaching job for about 25 years. The Supreme Court held that his reinstatement is not justifiable and salary of three years as damages would suffice. In educational institutions, the court cannot focus only on the individual forgetting all else. The court must have regard to varying circumstances in the academic atmosphere and radically changed position of the individual sought to be reinstated. Specific enforcement and reinstatement in service in such cases are rarely made because to do so, in the words of Dr. Hanbury⁴⁰, would be difficult if the defendant proves recalcitrant, and it is contrary to public policy to compel one person to submit to the orders of another. The courts, said Fry, L.J. in *De. Francesco* case⁴¹, "are bound to be jealous, lest they should turn contracts of service into contracts of slavery". Conversely, equity will not compel an employer to keep a servant. The proper and exclusive remedy for wrongful dismissal is an action for damages.⁴² Under this heading may be included the cases of personal service⁴³, contract of employment, contracts to marry, to paint a picture, to sing, to report cases, or to write a book.

As observed in *Jitendra Nath case*⁴⁴ a contract of employment for personal service cannot be enforced specifically, and more so when the services are of

35. *Calcutta Chemical Co. Ltd. v. D.K. Barman*, AIR 1969 Pat 371.

36. *Dr. S. Dutt v. University of Delhi*, AIR 1958 SC 1050; *Boal Chand (Dr.) v. Chancellor Kurukshetra University*, AIR 1968 SC 292; (1968) 1 SCR 434; 68 Punj LR 1031; (1968) 2 LLJ 135; *Vidya Ram Mishra v. Managing Committee, Shri Jai Narayan College*; (1972) 1 SCC 623; AIR 1972 SC 1450 (College & its teacher); *S.R. Tewari v. District Board, Agra*, AIR 1964 SC 1680; (1964) 3 SCR 55 (action can be declared ultra vires).

37. AIR 1975 SC 888.

38. *The Kayastha Pathshala, Allahabad v. Rajendra Prasad and State of U.P. v. Rajendra Prasad*, AIR 1990 SC 415.

39. AIR 1990 SC 415.

40. Hanbury: *Modern Equity*, p. 45.

41. *De Francesco v. Barnum (No.2)*, (1890) 45 Ch D 430; 63 LT 438.

42. *Boal Chand (Dr.) v. Chancellor Kurukshetra University*, AIR 1968 SC 292; (1968) 1 SCR 434; *Nandganj Sihori Sugar Factory Ltd. v. Badri Nath Dixit*, (1991) 3 SCC 54; AIR 1991 SC 1525.

43. *Steel Industries Kerala Ltd. v. S.M. Rebello*, (1985) 2 SCC 363; *Jitendra Nath v. Empire of India and Ceylon Tea Co.*, AIR 1990 SC 255.

44. AIR 1990 SC 255.

trust and confidence.⁴⁵ Similarly contracts for the purposes of pleasure, for pursuit of science or for the purpose of charity⁴⁶, contracts wherein an employee is demoted or wherein he is dismissed from Zilla Parishad Service,⁴⁷ no specific enforcement is possible; the proper remedy for the plaintiff being to seek damages.⁴⁸ A party to an illegal contract cannot enforce his rights thereunder.⁴⁹

Statutory Servants

However whenever a Court is satisfied that a departure from this principle is desirable and called for it will grant a declaration that the employers action in determining the employee's services is illegal and *ultra vires*.⁵⁰ This will compel the employer to reinstate or re-employ the servant. Thus to this general rule that there can be no specific enforcement of a contract of employment for personal service, the following are the exceptions which impels the court to grant specific performance of a contract—

- (a) a public servant dismissed from service in contravention of Article 311 of the Constitution;
- (b) a dismissed worker under Industrial Law or by Labour or Industrial Tribunal; and
- (c) when a statutory body acts in breach of a mandatory obligation imposed by statute.⁵¹

In such cases the Court may grant an injunction and further compel the employer to reinstate the employee. Such an order is made because there is a breach of statutory obligation on the part of the employer. However no such relief can be claimed against a non-statutory body.⁵²

In case of Government servants the only relief would be by way of appeal to superior officers. They cannot get injunction in their favour but may claim damages for the actual loss caused to them by the dismissal.⁵³

(b) *Contracts involving personal supervision.*—Such contracts require continuous, constant and possibly ineffective, supervision of successive acts by the court.⁵⁴ As noted by Snell, equity will not enforce an award for repair of a railway involving continuous supply of engine power, a term in a lease to employ a resident porter and an agreement to publish an article which has not

45. *Madan v. Kamaldhari*, AIR 1930 Pat 121: 127 IC 281.

46. *Rigby v. Connol*, (1880) 14 Ch D 482.

47. *Zilla Parishad, Gorakhpur v. Ramanuj Sahai*, 1986 Lab IC 319

48. *Vidya Ram Mishra v. Managing Committee Shri Jai Narain College*, (1972) 1 SCC 623; AIR 1972 SC 1450.

49. *ITC Ltd. v. George Joseph Fernandes*, (1989) 2 SCC 1: AIR 1989 SC 839.

50. *S.R. Tewari v. District Board, Agra*, AIR 1964 SC 1680: (1964) 3 SCR 55; *Sirsi Municipality v. Cecelia Kom Francis Tellis*, (1973) 1 SCC 409: 1973 SCC (L&S) 207: AIR 1973 SC 855.

51. *Indian Air Lines v. Sukh Deo Rai*, (1971) 2 SCC 192: AIR 1971 SC 1828; *Executive Committee of Vaish Degree College v. Laxmi Narayan*, AIR 1976 SC 888; for details see Banerjee S.C.: *Law of Specific Relief*, Ch II, Edn.9, 1992, pp. 194-198.

52. *Agarwal Digambar v. B.P. Shrivastava*, 1984 Lab IC 2591 (All) (DB).

53. *Dahyalal Babubhai v. Patna Municipality*, ILR 1967 Pat 182: (1967) 8 GLR 167.

54. *C.H. Giles and Co. Ltd. v. Morris*, (1972) 1 WLR 307: (1972) 1 All ER 960 (Ch. D).

reached its final form. "In such cases, equity's view is that of a wise parent dealing with his children; it is best not to issue orders unless you can be absolutely sure of effecting compliance."⁵⁵

Under this heading fall the cases of agreements to build or repair. *Ryan v. Mutual Tontine Westminster Chambers Association*⁵⁶ is a leading case on the point, wherein the court refused to grant specific performance of an agreement to employ a resident porter who should be in constant attendance and perform certain specified duties. Similarly, an agreement to provide a housekeeper⁵⁷, or the obligation of a shipowner under a charter party⁵⁸, or a contract to deliver goods by instalments⁵⁹, cannot be specifically enforced. Difficulty of supervision is also experienced in building contracts and contracts to keep buildings in repair. Still, however, in suitable cases⁶⁰ specific performance would be decreed. Para 3(c) of Section 14 deals with building contracts which can be specifically enforced. It is based on the English rule expressed in *Wolverhampton Corporation v. Emmons*⁶¹ which says that the court will order specific performance of an agreement if (i) the building work is sufficiently defined by the contract; (ii) the plaintiff has a substantial interest in the performance of the contract so that damages would not compensate him, and (iii) the defendant is in possession of the land so that the plaintiff cannot employ another person to build without committing a trespass.⁶² A writer cannot get specific performance of his contract but he will be entitled to damages for loss of opportunity to enhance his reputation.⁶³

(c) *Contracts to transfer goodwill alone.*—"Sale of the goodwill of a business unconnected with the business premises cannot be transferred because of the uncertainty of the subject matter and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it." In *Baxter v. Conolly*⁶⁴ and *Darbey v. Whitaker*⁶⁵ this was the law declared, but in *Beswick v. Beswick*⁶⁶ specific performance for the sale of goodwill without business premises at the suit of the personal representatives of a vendor who had performed his part of the contract, was ordered. This trend must be noted.

(d) *Divisible Contracts.*—If a contract is divisible into two or more independent parts or if some of its terms are legal and the rest are illegal and

55. Hanbury: *Modern Equity*, p. 45.

56. (1893) 1 Ch 116: 67 LT 820 (CA).

57. *Barnes v. City of London Real Property Co. etc.*, (1918) 2 Ch 18: 119 LT 293.

58. *De Mattos v. Gibson*, (1858) 4 De & J 276: 45 ER 108.

59. *Dominion Coal Co. Ltd. v. Dominion Iron and Steel Co. Ltd.*, 1909 AC 293: 100 LT 245 (PC).

60. *A.G. (at the relation of Allen) v. Colchester Corporation*, (1955) 2 QB 207: (1955) 2 All ER 124 (QBD). See also *Chitty on Contracts*, 23rd Edn., para 1530.

61. (1901) 1 KB 515: 84 LT 407 (CA).

62. *Snell's Principles of Equity*, p. 581.

63. *Joseph v. National Magazine Co. Ltd.*, (1958) 4 All ER 52 (Ch D).

64. (1820) 1 Jac & W 576: 37 ER 487.

65. (1857) 4 Drew 134: 62 ER 52.

66. 1968 AC 58: (1967) 3 WLR 932: (1967) 2 All ER 1197 (HL).

they can be severed, effect can be given to those independent parts, or the terms which are legal can be specifically enforced.

(e) *Contracts for arbitration.*—As Snell notes, “equity will not directly enforce an agreement to appoint an arbitrator⁶⁷ but the court may indirectly compel performance of the agreement by staying an action which is brought, if the defendant so applies”. In India too, the existence of such an agreement bars a suit for specific performance as is provided by sub-section (2) of Section 14. The bar applies equally to the institution as well as the further prosecution of the suit.⁶⁸ For such a bar to exist the plaintiff must have refused to refer the controversy to arbitration and this has to be proved, it cannot be simply inferred by mere filing of the plaint.⁶⁹ The simple reason behind putting the bar is to prevent people from breaking their promises to refer to arbitration and thus to achieve the result desired. As Pollock and Mulla have expressed,⁷⁰ “the procedure for enforcing an award was only under Section 14 of the (Specific Relief) Act” and this view has received statutory force by virtue of an amendment of Section 32 of the Arbitration Act, 1940 contained in Section 43 of the Specific Relief Act, 1963.

(f) *Contracts wanting in mutuality.*—As per Cardozo, J., mutuality is important only to secure that the decree will operate without injustice to either party.⁷¹ A contract, to be specifically enforceable, must at the time when it is made, be mutually binding. In *Farrer v. Nash*⁷², it was decided that if a vendor has no title to the estate which he has contracted to sell and has no right to compel the real owner to convey it, he cannot force the purchaser to take a conveyance from the true owner, even if he is willing to convey the property, for the purchaser has no right to compel a conveyance by the true owner. Thus mutuality implies that the specific performance of a contract should be such as can be claimed by or granted to both the parties to the contract. Mutuality does not mean equality and exact arithmetical correspondence. It means that each party must have the freedom to enforce rights under the contract against the other.⁷³ In *Mir Sarwarjan case*⁷⁴ the Privy Council decided that no specific performance could be granted in a contract which can be enforced at the option of only one of the parties, but Section 20(4) of the Specific Relief Act provides that it cannot be so refused merely on the ground that the contract is not enforceable at the instance of the other party. The controversy regarding introduction and application of the doctrine of mutuality which existed in India between various High Courts has been put at rest now by introducing Section 20(4) in the Specific Relief Act, 1963.

67. *Re Smith & Service & Nelson & Sons*, (1890) 25 QBD 545: 63 LT 475 (CA).

68. *Shiblal v. Hiralal*, (1888) AWN 133.

69. *Koomud Chunder Dass v. Chunder Kant Mookerjee*, ILR (1880) 5 Cal 498: 5 Cal LR 284.

70. *Indian Contract Act and Specific Relief Act*, p. 850.

71. Cited in *Snell's Principles of Equity*, p. 582.

72. (1865) 35 Beav 167: 55 ER 858.

73. *Dasarath Gayen v. Satyanarayan Ghosh*, AIR 1963 Cal 325.

74. *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*, (1912) 39 IA 1: ILR (1912) 39 Cal 232: 13 IC 331.

(g) *Contracts to exercise a testamentary power of appointment.*—Courts of equity will not compel a donee of such a power to exercise it, even if it was for value. According to equity, to do so would amount to defeating the donor's intention.

(h) *Contracts where compensation is adequate relief.*—This proposition has been discussed in the previous chapter. Stating the gist succinctly, we may say that in case of contracts of ordinary marketable things, since the same are available in the market, money compensation is sufficient here. But in respect of other articles which cannot be so obtained because there is no market for the same, specific performance is a proper remedy.⁷⁵

(i) *Agreements to lend money or to mortgage.*—Equity refuses specific performance of such agreements because compensation is adequate relief here. But where it is not so, i.e., in exceptional circumstances, an agreement to execute a mortgage would be specifically enforced. As decided in *Meenakshisundara Mudaliar v. Rathnasami Pillai*⁷⁶, where a loan has been advanced and the borrower does not execute a mortgage or where a part of the loan is advanced and the lender is willing to perform his part by granting the remaining part of the loan, specific performance of the contract to mortgage would be decreed against the defendant borrower. If the borrower is not willing to repay the loan at once the same result would follow.⁷⁷ Section 14(3)(a) explains this.

(j) *Agreements to form partnership.*—According to Section 14(3)(b), where only a formal deed of partnership is to be executed, the parties having commenced to carry on business of partnership, or where the suit is for the purchase of the share of a partner in a firm, there would be no objection in decreeing specific performance; otherwise the court does not decree specific performance of an agreement to form and carry on partnership.

(k) *Vague contracts.*—Contracts which are so vague in language⁷⁸ that their terms cannot be known or fixed definitely, cannot be enforced specifically, e.g., a contract to sell at a fair price or to let out at a fair rent is vague, unclear, indefinite and incomplete for specific enforcement [Section 14(1)(b)].

(l) *Contracts in their nature determinable.*—Likewise, where A and B enter into a partnership at will and no duration of the same is specified, such a contract cannot be specifically enforced because A and B might at once dissolve partnership.⁷⁹ It may be otherwise if the partnership is for a definite, or a fixed and defined term.

In a case where the assurance was given by the Food Corporation of India, in writing that it would take the plinths to be constructed by owners of land on lease for a period of three years, the owners invested huge amounts for

75. *Bank of India v. Jamshedji A. H. Chinoy*, AIR 1950 PC 90: 77 IA 76.

76. ILR (1918) 41 Mad 959: 49 IC 291: AIR 1919 Mad 322.

77. *Jewan Lal Daga v. Nilmani Chaudhuri*, AIR 1928 PC 80: 55 IA 107.

78. *Savage v. Uwechia*, (1961) 1 WLR 455: (1961) 1 All ER 830 (PC).

79. *Scott v. Rayment*, (1868) LR 7 Eq 112: 19 LT 481.

construction of plinths. The FCI terminated the Contract of lease. The Supreme Court observed that though the contract was not against public policy, or prohibited by any statutory provision of law or ultra vires and the FCI was bound to discharge its obligations on the principle of promissory estoppel (being a statutory corporation), the respondent was entitled to damages as the specific performance of the contract was not possible due to expiry of the period of three years.⁸⁰ It is evident that such contracts are in their nature determinable. Section 14(1) (c) expresses this idea. The word *volition* used in Section 14(1)(b) connotes the volition of the parties to a contract and none else. The remaining types of contracts as enumerated earlier have been discussed before.

In *Rajasara case* specific performance of a contract, to sell agricultural land with an imperfect title was allowed when the title was perfected.⁸¹ Similarly in one case an old lessee did not exercise option for renewal and during pendency of the eviction proceedings, the old lessee with full knowledge of the new lease continued in possession. Held, the third party is entitled to possession under the new lease.⁸²

12. PARTIES TO AN ACTION FOR SPECIFIC PERFORMANCE (SECTIONS 15, 16, 17 AND 19)

Section 15 lays down a list of the kinds of parties besides the actual contractors who are entitled to sue on a contract. Mulla, citing Whitley Stokes,⁸³ agrees with him that no reason appears why sub-section (c) should not have extended to all compromises of doubtful claims. The enforcement of restrictive covenants by way of injunction does not come within this section. Section 19 can be said to be a complementary part of Section 15 as it enumerates the classes of possible defendants who were not original parties to the contract. Stated succinctly, a suit for specific performance of a contract can be maintained by and against—

- (i) the parties to the contract; and
- (ii) their representatives in interest.

(a) *For whom contracts may be specifically enforced [Section 15].—* Section 15 enumerates possible plaintiffs, and consequently specific performance of a contract may be enforced in favour of—

- (i) a party thereto
- (ii) representatives in interest or the principal thereto
- (iii) Any person beneficially entitled
- (iv) the remainderman
- (v) a reversioner in possession

80. *Food Corporation of India, Bhopal & Ors. v. M/s. Babulal Agarwal*, AIR 1998 MP 23.

81. *Rajasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai*, (1986) 3 SCC 300; AIR 1986 SC 1912.

82. *H.V. Rajan v. C.N. Gopal*, (1975) 4 SCC 302; AIR 1975 SC 261.

83. Pollock & Mulla: *Indian Contract Act and Specific Relief Act*, p. 851.

- (vi) a reversioner in remainder
- (vii) the amalgamated company
- (viii) the company.

Representative-in-interest includes assignee of right to repurchase the property.⁸⁴ Where the right to reconveyance of property is not a personal right or where there is no express or implied prohibition for its assignment to third party, its specific performance can be obtained by the assignee.⁸⁵

As the general rule goes a contract cannot be enforced except by a party thereto. This rule has however the following exceptions:⁸⁶

Where—

- (i) a trust is created in favour of a stranger by the contract;
 - (ii) the promisor constitutes himself as agent for the stranger;
 - (iii) it is so provided by a marriage settlement;⁸⁷
 - (iv) the contract itself provides for maintenance;
 - (v) the contract itself provides for marriage expenses;
 - (vi) the aim of the contract itself is to benefit a stranger;
 - (vii) a charge is created in favour of a stranger by the contract;
 - (viii) there is established a privity of contract between the promisor and the stranger;
 - (ix) it would be conducive to justice to allow a stranger to enforce a contract; and
 - (x) the promisor is bound to the stranger on the principle of estoppel.
- (b) *For whom specific performance cannot be enforced* [Section 17].—(i) One who would not recover compensation for its breach [Section 16(a)].
- (ii) One who becomes incapable of performing or violates any essential term of the contract that on his part remains to be performed, e.g., insolvency [Section 16(b)].
 - (iii) One who acts in fraud of the contract, or wilfully acts at variance with or in subversion of relations intended to be established by the contract [Section 16(b)].
 - (iv) One who is not ready and willing to perform his part of the contract [Section 16(c)].
 - (v) One (a vendor or lessor of movable or immovable property) who knowing himself not to have any title to the property, has contracted to sell or let the same⁸⁸ [Section 17(a)].

84. *T.M. Balkrishna Mudaliar v. M. Satyanarayana Rao*, (1993) 2 SCC 740: AIR 1993 SC 2449.

85. *Habiba Khatoon v. Ubaidul Huq*, (1997) 7 SCC 452: AIR 1997 SC 3236.

86. *Safiur-Rehman v. Maherunnissa*, ILR 24 Cal 832.

87. *Nawab Khwaja Mohd. v. Husaini Begum*, 7 LJ 871.

88. *Imperial Ice Manufacturing Co. v. Munchershaw Barjorji Wadia*, ILR (1889) 13 Bom 415.

(vi) One who cannot give the purchaser or lessee a title free from reasonable doubt [Section 17(b)].

(vii) One who has, previous to such sale or letting, made a settlement of the subject matter of the contract [Section 16-17].

There are two conditions precedent as held in *Bansidhardas v. Duryodhan Majhi*¹, to the enforcement of specific performance of a contract and they are that (i) one must have either performed or (ii) one has been always ready and willing to perform his part of the contract. This requirement is mandatory.² Moreover, as the section makes it clear one must assert so or state so in the plaint and must lead evidence to prove his averment.³

Readiness means capacity of the plaintiff including his financial ability to pay the purchase price. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant relief of specific performance. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. This can be proved from the attendant circumstances.⁴

In determining the question as to which party is not ready and willing to perform his part of the contract the court must examine the position of both the parties.⁵ Because the bank pass book is not produced, it cannot be presumed that the purchaser has no capacity to pay.⁶ Similarly instead of cash payment, presentment of a bank draft would amount to a legal tender.⁷

One must note that readiness and willingness must be continuous. It is a condition precedent. It must exist right from the date of the execution till the date of the decree.⁸ If it is not so, specific performance would not be granted. It is only the vendor-defendant that can raise the plea that the plaintiff was not ready and willing to perform his part of the contract.⁹ Moreover the performance of the contract must be within a reasonable time where its terms so require.¹⁰

There is no bar for decree for specific performance of a contract of a sale under Section 16 and a suit should be filed for the same within the period stipulated under Article 54 of Limitation Act, 1963.¹¹ Time is always the essence of the contract for reconveyance of the property.¹²

1. (1985) 59 Cnt LT 44 (DB).

2. *Anant Prasad v. J.S. Sahai*, 1986 BLJ 164; *G. Pillai v. P. Nadar*, AIR 1967 SC 868.

3. *Sukhbir Singh v. Brijpal Singh*, (1997) 2 SCC 200; AIR 1996 SC 2510.

4. *N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr.)*, (1995) 5 SCC 115; *Acharya Swami Ganesh Dassji v. Sitaram Thapar*, (1996) 4 SCC 526; AIR 1996 SC 2095; *Indira Kaur v. Shiv Lal Kapoor*, (1988) 2 SCC 488; AIR 1988 SC 1074.

5. *Indira Kaur v. Shiv Lal Kapoor*, (1988) 2 SCC 488; AIR 1988 SC 1074.

6. *Bibi Jaibunnisha v. Jagdish Pandit*, (1997) 4 SCC 481.

7. *Sohan Singh v. Sarvan Singh*, (1996) 5 SCC 759.

8. *N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr.)*, (1995) 5 SCC 115.

9. *Jugraj Singh v. Labh Singh*, (1995) 2 SCC 31; AIR 1995 SC 945.

10. *P.R. Deb & Associates v. Sunanda Roy*, (1996) 4 SCC 423.

11. *Thakamma Mathew v. M. Azamathulla Khan*, 1993 Supp. (4) SCC 492; AIR 1993 SC 1120; (1993) 21 ALR 170.

12. *Bismillah Begum v. Rahmatullah Khan*, (1998) 2 SCC 226; (1998) 2 MLJ 6 (SC).

A distinction can be made between "readiness" and "willingness": the former means the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price; while the latter is to be found out from his conduct, which has to be properly scrutinized for the purpose. Readiness and willingness is to be adjudged with reference to the conduct of the party and the attending circumstances.¹³

The plea that the plaintiff was not ready and willing to perform his part of the contract cannot be availed of by the purchasers from the vendor.¹⁴

It is sufficient for the respondent to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till the date of the decree.¹⁵

The word violates in clause (b) incorporates in it the instances where the plaintiff acts in fraud, or in contravention of the contract or at variance with it; however, this clause, as amended, limits the meaning of the word to violation of an essential term of the contract that on his part remains to be performed.

The following are the cases¹⁶ wherein it was held that the plaintiff was proved not to be ready and willing to perform his part of the contract.—

- (1) where he had postponing sale from date to date, was short of money and never fulfilled his offer to pay part of sale transaction.¹⁷ But money need not be ready where time is not of essence.¹⁸
- (2) Where in a contract of reconveyance he pleaded that the transaction was a mortgage and he was willing to pay the balance after accounting and the court held it not to be a mortgage. It is obvious that the plaintiff was not ready and willing to pay the agreed consideration.¹⁹
- (3) Where in a contract of reconveyance plaintiff sued in *forma pauperis* and pleaded that no sale consideration was payable by them at all and pleaded willingness to pay the sale consideration as a last alternative.²⁰
- (4) Where the plaintiff falsely pleaded payment of consideration and the court held that no such payment was made. The plaintiff here clearly never intended to make full payment.²¹
- (5) Where plaintiff was granted time from the date of passing of the decree of trial court to perform his part of the contract but failed to

13. (1996) 4 SCC 526, Supra; see also (1997) 2 SCC 200 infra.

14. *Jugraj Singh v. Labh Singh*, (1995) 2 SCC 31: AIR 1995 SC 945.

15. *Sukhbir Singh v. Brijpal Singh*, (1997) 2 SCC 200.

16. See Banerjee's (Tagore Law Lectures) Law of Sp. Relief, Edn. 9, 1992, p. 249.

17. *Chand Rani v. Kamal Rani*, (1993) 1 SCC 519: AIR 1993 SC 1742.

18. *Sohan Singh v. Sarwan Singh*, (1996) 5 SCC 759.

19. *Hasan Noorani v. Mohan Singh*, AIR 1974 Bom 136.

20. *Harpratap Singh v. S.N. Misra*, AIR 1980 All 52.

21. *Biswa Nath v. Janki Devi*, AIR 1978 Pat 190.

deposit the required amount within the time allowed or even thereafter.²²

- (6) Where under a compromise it was agreed that in the event contemplating a sale of his share, one co-owner will give first option to the other co-owner, and when that option was given, the other co-owner in his reply questioned the very title of the co-owner-plaintiff giving notice of the option.²³
- (7) Where there was an agreement specifying period of 6 months within which plaintiff had to purchase the stamp papers, tender the balance amount of consideration and require the defendants to execute the sale deed, total inaction for two years after initial payment of a small amount as earnest money by the plaintiff would be a circumstance which would weigh against exercise of discretion for grant of specific performance of the agreement in favour of the plaintiff.²⁴

Readiness and willingness cannot be treated as a straight jacket formula. The same is to be found out from facts and circumstances relevant to the intention and contract of the concerned party.²⁵

As a general proposition of Law, in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the court may infer that it is to be performed in a reasonable time if the conditions are evident (i) from the express terms of the contract, (ii) from the nature of the property and (iii) from the surrounding circumstances, for example: the object of making the contract.²⁶

In this case of sale of immovable property the document of sale contained: "Rs 98,000 only will be paid by the second party to first party within a period of ten days only". The language thus showed that the amount was to be paid before September 6, 1971. The defendant did not pay the amount and thus committed a breach. The word "only" has been used twice over (1) to qualify the amount of Rs 98,000, and (2) to qualify the period of ten days. Having qualified the amount there was no further need to qualify the same unless it be the intention of the parties to make time as the essence of the contract. Despite notices of the vendor to perform vendee's part of the stipulated amount, vendee was not willing to pay the same unless vacant delivery of possession of part of the property was given. In view of the express term of the contract coupled with the conduct of the vendee, held, time was essence of the contract and vendee was not ready and willing to perform the contract. The High Court was therefore justified in setting aside decree for specific performance granted by the trial court.²⁷

22. *N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr)*, (1995) 5 SCC 115; see also *P.R. Deb & Associates v. Sunanda Roy*, (1996) 4 SCC 423.

23. *Bhagwan Ram v. Prabhu Ram*, 1983 ALJ 637.

24. *K. Vidyanandam v. Vairavan*, (1997) 3 SCC 1; AIR 1997 SC 1751.

25. *Ramesh Chandra v. Chunnilal*, AIR 1971 SC 1238.

26. *Chand Rani v. Kamal Rani*, (1993) 1 SCC 519; AIR 1993 SC 1742.

27. See also *K.S. Vidyanandam v. Vairavan*, (1997) 3 SCC 1; AIR 1997 SC 1751.

The ratio of the above case is reiterated by the Supreme Court in *Bibi Jaibunisha's case*.²⁸

(c) *Persons against whom contracts may be enforced* [Section 19].— Specific performance of a contract may be enforced against—

- (i) either party thereto [Section 19(a)]
- (ii) a person claiming under him by a title arising subsequently to the contract, except a transferee for value who paid money in good faith and without notice of the contract [Section 19 (b)]
- (iii) a person claiming under a title, which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant [Section 19(c)]
- (iv) the amalgamated company
- (v) the company.

13. WHEN CONTRACT CANNOT BE ENFORCED EXCEPT WITH A VARIATION (SECTION 18)

When a plaintiff sues for specific performance of a contract and the defendant sets up a defence of variation in the contract under the circumstances mentioned below, the court will not grant specific performance in favour of the plaintiff but with a variation so set up by the defendant in the following cases:

- (a) When by (i) fraud, (ii) mistake of fact, or (iii) misrepresentation, the contract is in terms or effect different from what the parties agreed to or supposed it to be, or
- (b) when the contract does not contain all the terms agreed to by the parties on the basis of which the defendant entered into the contract, or
- (c) where the contract as framed between the parties does not produce the result calculated to produce, which may be as a result of fraud, misrepresentation, mistake or misapprehension and thus the object of the contract is rendered meaningless, or
- (d) where the parties have, subsequently to the execution of the contract, varied its terms.

Under the circumstances, the plaintiff is put to an election, so to say, between having his suit dismissed or having the judgment with a variation set up. The contract must be in writing and one²⁹ thing must be noted here that as laid down in *Narain Pattor v. Aukhoy Narain*³⁰, there is a difference between a

28. *Bibi Jaibunisha v. Jagdish Pandit*, (1997) 4 SCC 481. But see *Kedar Nath Dhingra v. Kanwal Bhati*, AIR 1998 P&H 86. (Though time was essence of the contract, the vendor never agitated it. Court grants time on condition. Plaintiff fails to pay. Court dismisses suit and grants compensation of Rs 10,000/- to vendor. Court can thus grant consequential order.)

29. *Ramsbottom v. Gosden*, (1812) 1 Ves & B 165; 35 ER 65; *Narain Pattor v. Aukhoy Narain*, ILR (1886) 12 Cal 152.

30. ILR (1886) 12 Cal 152.

plaintiff seeking a specific performance and a defendant resisting it. In such a case the plaintiff cannot himself adduce *oral* evidence in order to get specific performance with a variation, but the defendant can resist it and adduce *parol* evidence to show that the contract does not express the real terms of the parties due to fraud, mistake, etc. Thus oral evidence can be in the latter kind of cases and not in the former.³¹ However, this general principle is subject to some four exceptions.

It is a basic principle that specific performance must be of a contract in its entirety and in accordance with the exact and actual terms of the same. But where the contract does not express the real terms agreed to between the parties due to some misunderstanding or misdescription, either in respect of the quantity or quality of the subject matter, it cannot be enforced in its entirety except with a variation. Equity desires substantial fulfilment of the contract, not simply a literal one and therefore, where the essence of the contract can be enforced and performed, non-essential circumstances of little importance can be neglected and consequently it justifies a part performance of the contract. On the same principle, specific performance of a contract with a variation is allowed by the English law. It was once believed that such a sort of relief combines in itself more than one relief, but on the principle laid down in *Craddock Bros. v. Hunt*³² and under Section 43 of the Judicature Act, 1925, a court can grant all the reliefs to a party in one action and the same principle is incorporated in Section 18 of the Specific Relief Act. In short, we may say that where a contract between the parties does not express its real intention or the object of the contract is frustrated due to not expressing it correctly, and in cases where there is a subsequent variation made to the contract by parties, the court does not treat it as if a new contract has come into existence replacing the old, but the original one exists and it can be specifically enforced with variations alleged therein and proved by the defendant by evidence adduced.

A sues B to compel specific performance of a contract in writing to buy a dwelling house. B proves that he assumes that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was included or not. The court will refuse to enforce the contract, except with the variation set up by B.³³

14. DISCRETION AND POWERS OF THE COURT (SECTIONS 20 TO 24)

That specific performance is a discretionary remedy and that it will be refused where the enforcement of a contract results in hardship to the defendant or unfair advantage to the plaintiff has been discussed earlier in this chapter. It's difficult to define this field of discretion.³⁴

31. *Woollam v. Hearn*, 2 W & TLC 573.

32. (1923) 2 Ch 136; 129 LT 228 (CA).

33. *C.Y. Denny v. Hamcock*, (1870) Ch App. 1: 23 LT 686, (where a plan furnished by the seller was misleading).

34. *Satyanarayan v. Yellaji Rao*, AIR 1965 SC 1405.

As an important condition one may say that a party desirous of seeking such relief must come with clean hands; or else specific performance would be refused.³⁵ This relief is discretionary and is not given merely because it is legal but it is governed by sound judicial principles. The circumstances referred to in subsections (2) to (4) of Section 20 in regard to exercise of discretion for granting a decree of specific performance are not exhaustive.³⁶ The discretion of the court has to be exercised in accordance with justice, equity and good conscience and fairness to both the parties.³⁷ It has to be exercised on sound, reasonable and judicial principles. Specific performance would not be granted where the court thinks that doing so, would generate injustice.³⁸ Of course the use of discretion depends upon facts and circumstances of each case,³⁹ where granting of damages is an adequate relief, the specific performance would be refused.⁴⁰

The court has power to refuse this relief. Where specific performance is used as an instrument of oppression to get an unfair advantage over the other party,⁴¹ where damages are adequate relief,⁴² where the act of a third party could be regarded akin to champertous⁴³ and where the property in question is not identifiable,⁴⁴ the relief of specific performance would be refused.

In *Jaibunnisha case*⁴⁵ the question was about the essence of time. The court held that time is not always the essence of the contract, unless the agreement specifically stipulates and there are special facts and circumstances in support thereof. But this rule that time is not the essence of the contract in case of sale of immovable property was evolved at a time when prices and values were stable and inflation was unknown. This rule is now required to be relaxed, if not modified, particularly in case of urban immovable properties. It is high time, the courts do so.⁴⁶

In one case there was an agreement to sell 100 years old building. The building had six tenants which affected its value. The expert valued the building between sixty to seventy thousand. An agreement for sale price of Rs 65,000 was executed the court granted the specific performance of the agreement as it was not inequitable. In other words since the transaction had not given unfair advantage to the purchaser, its specific performance was justified.⁴⁷

35. *Lourdu Mari David v. Louis Chinnaya Arogiya Swamy*, (1996) 5 SCC 589.

36. *Ganesh Shet v. C.S. G.K. Setty (Dr)*, (1998) 5 SCC 381.

37. *Kanshi Ram v. Om Prakash Jawal*, (1996) 4 SCC 593; *Surya Narayan Upadhyaya v. Ram Roop Pandey*, 1995 Supp (4) SCC 542.

38. *Kallithil Sridharan v. Komath Pandiyala Prasanna*, (1996) 6 SCC 218.

39. *S. Rangaraju Naidu v. S. Thiauvara K. Karasu*, 1995 Supp (2) SCC 680; AIR 1995 SC 1769.

40. *Prakash Chandra v. Angadlal*, (1979) 4 SCC 393; AIR 1979 SC 1241.

41. *Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son*, 1987 Supp SCC 340; AIR 1987 SC 2328.

42. *Prakash Chandra v. Angadlal*, supra.

43. *S.V.R. Mudaliar v. Rajabu F. Buhari*, (1995) 4 SCC 15; AIR 1995 SC 160.

44. *Nahar Singh v. Aanak Singh*, (1996) 6 SCC 699.

45. *Bibi Jaibunnisha v. Jagdish Pandit*, (1997) 4 SCC 481.

46. *K.S. Vidyanadam v. Vairavan*, (1997) 3 SCC 1; AIR 1997 SC 1751.

47. *Maria Eduaria A. Gonslaves Mesquita (dead) by L.R. v. Shripad Vishnu Kamat Tarkar*, AIR 1998 Bom 41.

For refusal to enforce specific performance factors cumulatively or with other factors can form the basis [see S. 20(2), Explan. (1) & (2) and sub-sec. (4)].⁴⁸ Similarly where there is no concluded contract between the parties, a decree for specific performance could not be granted.⁴⁹

We have discussed where the court will grant specific performance or refuse it, and also where it grants the same only with a variation in the contract. It may also grant compensation in suitable cases in addition to specific performance. The section is, however, not exhaustive of all such pleas leading to dismissal of the suit for specific performance.⁵⁰ Section 21 speaks about this.

(a) *Compensatory Relief* (Sections 21 to 24).—Under Section 21 the plaintiff may claim and the court may grant a compensatory relief, i.e., the plaintiff may claim here compensation for breach in addition to or in substitution of such performance.⁵¹ There may be cases wherein specific performance is *not advisable to be granted* but still however the plaintiff must be awarded compensation for the breach of the contract made by the defendant. The court will award compensation in such cases.

In *Kalyanpur Lime Works Ltd. v. State of Bihar*⁵², a substantial part of the lease had already expired and a suit for specific performance was filed. In this case the Supreme Court refused specific performance for the lessee as it had only a few months to run and the lease would have expired by the time the contract could be specifically performed. The court here awarded compensation only to the lessee for the seven years he had been denied possession.⁵³

If the court is satisfied that specific performance ought to be granted but that alone is not sufficient to satisfy the justice of the case, the court will award compensation also. Suppose *A* contracts with *B* to sell him a house for Rs 1000, the price to be paid and the possession to be given on January 1, 1877. *A* fails to perform his part and *B* brings a suit for specific performance and compensation, which is decided in his favour on January 1, 1878. The decree may besides ordering specific performance, award to *B* compensation for any loss which he has sustained by *A*'s refusal. This is aptly explained by sub-section (3) of this section.

For deciding compensation principles laid down in Section 73 of the Indian Contract Act will apply, but the plaintiff has to claim it. In suitable cases the court will allow him to amend the plaint for including such a claim. The explanation added to the section points to the situation wherein there is a departure from the English law. English law provided that damages cannot be awarded where specific performance was impossible. But the plain words in the

48. *Sen Mukherjee & Co. v. Shrimati Chhaya Banerjee*, AIR 1998 Cal 252.

49. *Ganesh Shet v. C.S. G.K. Setty (Dr)*, AIR 1998 SC 2216.

50. *Faujmal v. Nathumal*, AIR 1965 Raj 115.

51. *Jagdish Singh v. Nathu Singh*, (1992) 1 SCC 647; AIR 1992 SC 1604.

52. AIR 1954 SC 165.

53. See also *Food Corporation of India v. Babulal Agarwal*, AIR 1998 MP 23 wherein court awarded damages as the specific performance was not possible due to expiry of stipulated period. For facts see Para 11 (i), *supra*.

section leave no doubt that compensation can be awarded even where specific performance is impossible and in several cases such compensation has been awarded. But a plaintiff cannot by his own act make the specific performance impossible and proceed to claim damages.⁵⁴

(b) *Other reliefs.*—The object of Section 21 is to prevent multiplicity of proceedings. Reading this section with Section 24 it follows that a dismissal of the suit for specific performance of a contract or its part thereof shall be a bar for the plaintiff's right to sue for compensation for the breach of such contract or its part. But it does not close the doors for any other relief to which a plaintiff may be entitled by reason of the breach.

Section 22 which is a new section introduced by the Act is also there to avoid multiplicity of proceedings.⁵⁵ The section incorporates a rule settled by judicial decisions that the plaintiff in a suit for specific performance may claim a decree for possession even though the right to possession strictly speaking accrues only when specific performance is decreed. Under the section, in suitable cases, the court may direct a refund for earnest money while refusing specific performance. Sub-section (2) gives effect to this rule. Sub-section (3) provides that the court's power under clause (b) is without prejudice to its power to award compensation under Section 21.

(c) *Liquidation of damages not a bar to specific performance.*—What is agreed by the parties to be done must be done even if a penalty for its non-performance is attached thereto, because liquidation of damages is not an option granted to the other party to perform a contract or not to perform it. This is the principle of equity incorporated in the section. In *Long v. Bowrin*⁵⁶, A contracts with B to grant him an underlease of property held by A under C and that he will apply to C for the necessary licence to validate the underlease. If licence is not procured, A is to pay B Rs 10,000. Now A refuses to apply for licence and offers to pay B the amount of Rs 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the licence. Contracts are made to be performed, not to be broken and evade their liabilities. Naming a particular sum, even if it is *in terrorem*, is to secure its performance and therefore the courts will enforce its specific performance.

Section 25 read with Section 43 of the Act provides that the provisions of this chapter apply to enforcement of awards also.

54. *A.V.V. Co-op. Housing Society Ltd. v. K.K. A. Deo*, AIR 1991 Bom 129.

55. *Babu Lal v. Hazarilal Kishori Lal*, (1982) 1 SCC 525; AIR 1982 SC 818; (1982) ALJ 345.

56. (1864) 33 Beav 585; 10 LT 683.

Chapter XXIV

Rectification, Rescission, Cancellation and Declaration

"The remedy of rectification exists to correct, but not to improve an instrument."

—*Whiteside v. Whiteside*, 1950 Ch 65:
[1949] 2 All ER 913 (CA)

"Rescission is . . . not strictly a judicial remedy but the act of a party entitled to rescind." . . . It is "a right which a party to a transaction sometimes has to set the transaction aside and restore to its former position."

—*Snell's Principles of Equity*, Part VI

"The relief as to cancellation of an instrument is founded upon the administration of the protective justice for fear that the instrument may be vexatiously or injuriously used by the defendant against the plaintiff when the evidence to impeach it may be lost or that it may throw a cloud of suspicion over his title or interest."

—*Jeka Dula v. Bai Jivi*, 39 Bom LR 1072:
AIR 1938 Bom 37

"A declaratory decree creates no new rights; it only declares what was plaintiff's right before. It is a non-coercive declaration. In many cases a declaration is inherent in the grant of an injunction."

—T.R. Desai: *Principles of Equity*
8th edn., 1959, p. 231; Hanbury:
Modern Equity, para 2, p. 81;
Indumatiben v. Union of India, AIR
1969 Bom 423, cited in Mulla: *Indian
Contract and Specific Relief Acts*,
9th edn., 1972, p. 911

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Text of Sections 26 to 35

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 [not being the articles 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, 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.

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 (4 of 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 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 such further relief as he may be entitled to, including in appropriate cases 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.

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 (16 of 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 Section 11 of the Indian Contract Act, 1872 (9 of 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.

Declaratory Decrees

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 someone who is not in existence, and for whom, if in existence, he would be a trustee.

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.

A. RECTIFICATION (SECTION 26)

1. Nature of Rectification

If by mistake a written instrument does not accord with the true agreement between the parties, equity has power to reform or rectify that instrument so as to make it in accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing.¹ “Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts.”²

As expressed in *Whiteside case*³ by Evershed, M.R., rectification is a discretionary remedy “which must be cautiously watched and jealously guarded”. But unlike remedies such as specific performance, which are based on the inadequacy of the remedy at law, rectification “gives relief from the inflexibility of the common law, and from the nature of the case involves a

1. *Frederick E. Rose (London) Ltd. v. William H. Pim Jur. & Co. Ltd.*, (1953) 2 QB 450.

2. *Mackenzie v. Coulson*, (1869) LR 8 Eq 368, cited in *Snell's Principles of Equity*, Part VII, Chap. 4, p. 610.

3. *Whiteside v. Whiteside*, 1950 Ch 65; [1949] 2 All ER 913 (CA).

contravention of its terms".⁴ As laid down in *Fowler v. Fowler*⁵, oral evidence is admissible to prove the agreement and there is no need to show anything in the nature of error on the face of the instrument; but the evidence of the agreement must be compelling. The crux of the remedy is proof of what the parties had actually decided at the time of reaching their agreement and not what they, or one of them, had thought at a later date, or what they might have thought if they had considered the matter in greater detail or in the light of more information than that available to them. In other words, the remedy exists to correct, but not to improve, an instrument.⁶

2. What is Rectification

As pointed out by Hanbury⁷, rectification of an instrument is a distinct equitable remedy, based on the facts of an instrument not according with the intentions of the parties to it. It must be very clearly shown that the parties had come to a final and genuine agreement and that the instrument had failed to record it.

As expressed in *Sudha Singh v. Munshi Ram*⁸, 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 store if no error had been committed.

3. Conditions to be satisfied

Mulla presents the position very lucidly and succinctly, that in a proper case the court will amend the language of an instrument for the purpose of making it accord with the true intention of the parties, having ascertained:—

- (i) what that intention was, and also
- (ii) that the words as they stand fail to express it.

Rectification cannot be adjudged unless the court is satisfied on both these points.⁹

According to Snell, (i) there must be a mistake sufficient to invoke the doctrine, (ii) there must be "strong irrefragable evidence"¹⁰ which means that there must be "something more than the highest degree of probability".¹¹ There must be evidence "of the clearest and the most satisfactory description", that will establish the mistake with a "high degree of conviction" and "leave no fair and reasonable doubt upon the mind that the deed does not embody the final

4. *Thompson v. Hickman*, 76 LJ Ch 254: (1907) 1 Ch 550, 562 per Neville, J.

5. (1859) 4 De G&J 250: 45 ER 97.

6. *Whiteside v. Whiteside*, 1950 Ch 65: (1949) 2 All ER 913 (CA).

7. *Modern Equity*, 9th edn., 1969, p. 661.

8. AIR 1927 Cal 605.

9. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, 9th Edn., 1972, p. 888; *Snell's Principles of Equity*, pp. 610-619.

10. *Countess of Shelburne*, (1784) 1 Bro CC 338.

11. *Fowler v. Fowler*, (1859) 4 De G&J 250: 45 ER 97.

intention of the parties". In short, there must be a "convincing proof"¹² of the mistake on the part of the parties. Lastly, (iii) there must be absence of alternative remedy. Rectification will not be decreed if the desired result can conveniently be achieved by other means. Thus the material which is sought to be inserted in the written instrument may itself be enforceable as a collateral contract. Again, if those concerned voluntarily rectify the instrument, the court will not decree rectification, even if such a decree would, by operating retrospectively, have fiscal advantages which the voluntary rectification lacks.¹³

There is no need, as Pollock and Mulla observe,¹⁴ to invoke this jurisdiction in case of verbal slips and omissions as are obvious on the face of the writing and can be corrected by the context alone. The remedy of these minor blunders is within the court's ordinary function of construing the expressions used. Even a missing clause (reference to counterpart) can be supplied in an instrument of a well-known form if the sense clearly requires it.

It must be noted that both the preliminary and the finally executed agreement can be rectified and an unskillfully drafted instrument not expressing the real intention of the parties may also be reformed. The proximate origin of mistake lies in the carelessness or want of skill of the draftsman but when the mistake has crept in due to concealment or non-disclosure which defeats the real intention, the party in default will not be allowed to plead that his intention in concealment or non-disclosure was different.

4. When an Instrument may be Rectified (Section 26)

As the section on rectification goes, to avail of this right one has to establish that there had been cause for not truly expressing the real intention of the parties. This relief is to be specifically claimed. Unilateral mistake is no ground for rectification unless there was fraud. To prove fraud or mistake, oral evidence is admissible. It has been however the usage of the English courts of equity that a written instrument will not be allowed to be rectified on oral evidence alone when the alleged mistake is positively denied by the defendant.¹⁵ The Indian practice is also the same as the court has to be satisfied before an order for rectification can be made. Rectification may take place at the instance of either party or their representatives, or by a plaintiff or defendant in any suit, or by the court in its own discretion. The rectified contract will be enforced if so prayed by the plaintiff. The material question in rectification is what the parties intended to express and not what they "always intended".

12. *Joscelyne v. Nissen*, (1970) 2 QB 86; *Lloyd v. Stanbury*, (1971) 1 WLR 535; 1971 2 All ER 267 (Ch D).

13. See *Whiteside case* cited above, wherein rectification was refused of a covenant that mistakenly used the phrase "free of tax" over which the parties had never come to an actual agreement.— *Whiteside v. Whiteside*, 1950 Ch 65; [1949] 2 All ER 913 (CA). See also *Hanbury: Modern Equity*, pp. 661-662.

14. *Indian Contract Act and Specific Relief Act*, p. 888

15. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, citing *Clark v. Barnes*, (1929) 2 Ch 368.

In *Allarakhia case* a steamer was chartered by the plaintiff to sail from Jeddah on 10th August, 1892 (15 days after the Haj) in order to transport pilgrims returning to Bombay. The plaintiffs believed that 10th August, 1892 corresponded with the fifteenth day after the Haj. The defendants had no belief on the subject. They contracted with respect to the English date. In fact 10th August, 1892 did not, but 19th July, 1892 corresponded with the fifteenth day after the Haj. On finding out his mistake the plaintiffs sued the defendants for rectification of the charter party. The court held that the agreement was one for 10th August, 1892 and that the mistake was not mutual. It was one-sided, i.e. on plaintiff's part alone. The document therefore could not be rectified. Even if both the parties were under the mistake the court would not rectify but only cancel the instrument as the agreement was one for 10-8-1892, and that date was a matter materially inducing the agreement.¹⁶

A intending to sell his house to B and one of the three godowns adjacent to it, executes a conveyance prepared by B. Through B's fraud all the three godowns are included in the instrument. Of the two godowns so included fraudulently B gives one to C and lets the other to D for rent. C and D do not know of the fraud of B. The conveyance as against B and C may be rectified so as to exclude from it the godown given to C, but it cannot be rectified so as to affect D's lease.¹⁷

5. Exceptions

The illustration above explains that an instrument will not be rectified so as to prejudice the rights acquired by third parties in good faith and for value.¹⁸

6. What Instruments are Rectified

Any instrument can be rectified. Snell¹⁹ has given a long list of such instruments, but as the section lays down, articles of association of a company cannot be rectified because the articles are a contract between the company and its shareholders, and *ex hypothesi* the company cannot have had a different intention before incorporation. Nor is there any power to rectify a will short of fraud. One must note that for a mistake of law rectification is available. So far as Section 26 is concerned, the court will allow rectification of an instrument so as to bring the legal consequences into conformity with those intended by the parties. This is the limit of rectification and the court will not allow it to be abused.

The words in Section 26(1) "other instrument", as observed in *C.I.T. v. Kamia Town Trust*²⁰ include a trust deed and therefore a civil court has jurisdiction to entertain suit for rectification of a trust deed.

16. *Haji Abdul Rehman Allarakhia v. Bombay & Persia Steam Navigation Company*, (1892) 16 Bom 56.

17. Illustration to Section 31 of the former Act of 1877; *Ladha Singh v. Munshiram*, 13 CWN 717; AIR 1927 Cal 605.

18. cf. *Mahadeva Aiyar v. Gopala Aiyar*, (1911) 34 Mad 51: 8 IC 390.

19. *Snell's Principles of Equity*, p. 617

20. (1996) 7 SCC 349; (1996) 217 ITR 699.

7. Time limit

As decided in *Geerda Kahta v. Dharmeswar Saikia*²¹, a party can file a suit for rectification at any time when fraud is discovered or a mistake has come to light.

8. Defences

Laches and acquiescence will bar a suit for rectification. Besides, where the remedy sought is found to be inequitable and where it is too late to claim it, as when a rectified contract is no longer capable of performance, the court will not order rectification.

The decree of rectification will have retrospective force. The document has to be read as if it had been originally drawn in its rectified form.²²

B. RESCISSION (SECTIONS 27 TO 30)

1. General

It is but common sense that a voidable contract cannot be avoided or challenged at the suit of the guilty party, but the innocent party who has become the victim of the transaction and therefore does not affirm the contract but challenges it in order to avoid it, can plead defences that vitiate and render the contract voidable. Under the circumstances, and at the instance of such a party, a court may grant him a remedy of rescission which relieves him of all the obligations of the contract. *Rescission is thus the converse of specific performance*. A right of rescission is not assignable.

2. Nature and Meaning

To rescind, therefore, is "to make of no effect". Rescission is an equitable remedy which is converse to that of specific performance. It is "a right which a party to a transaction sometimes has to set the transaction aside and restored to his former position".²³

Rescission is thus not strictly a judicial remedy but the act of a party entitled to rescind. In affecting rescission assistance of the court is necessary to decide whether a party is entitled to rescind and to obtain restitution of property handed over pursuant to the transaction. This being an equitable remedy only a court of equity could do what was necessary to make restitution, e.g., take accounts and make allowances for deterioration in the property dealt with by the contract.²⁴ Equity therefore intervenes to rescind a contract only on substantial grounds. While adjudging rescission of contract the court is concerned with the question whether the person rescinding the contract was justified in doing so. The court does not create any right which parties did not possess when it makes a declaration that contract has been validly rescinded. The court, one must note,

21. AIR 1961 Ass 14.

22. *Craddock Bros v. Hunt*, (1923) 2 Ch 136; 129 LT 228 (CA).

23. *Snell's Principles of Equity*, 27th edn., 1973, Part VII, Chap. 2, p. 601.

24. *Ibid.*

does not rescind the contract. The court is only passing upon the validity of the rescission already made by the party.²⁵

3. Grounds for Rescission

Rescission can be adjudged on the grounds of voidability of the contract which includes the following: mistake, misrepresentation, constructive fraud and fraudulent misrepresentation. In case of a contract *Uberrimae fidei* and where there is a term in a contract for its rescission, it can be rescinded. But the right to rescission is lost on account of acquiescence of the plaintiff, on account of impossibility of *restitutio integram*, and due to intervention of third parties in the contract.

The Specific Relief Act, Sections 27 to 30, deals with rescission.

4. Rescission when Adjudged (Sections 27, 28 and 29)

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

(a) *Where the contract is voidable or terminable by the plaintiff [Section 27(1)(a)].*—A contract, as we have seen, becomes voidable on account of mistake, misrepresentation, fraud, coercion and undue influence and the party who becomes its victim can avoid it.

Moreover, a contract may contain within itself a term whereby it becomes terminable as when (i) a vendor fails to show a good title to the property in question, or (ii) when the purchaser fails to pay consideration within a stipulated period. Such contracts are terminable and therefore may be put to an end by the plaintiff and are therefore rescindable.

(b) *Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff [Section 27(1)(b)].*—Where such unlawfulness arises, the maxims *in pari delicto potior est conditio defendantis* and *ex turpi causa non oritur actio* may operate. Moreover, necessity of clean hands will be insisted upon by the court. But even in such cases it is possible that the defendant is more to blame than the plaintiff as when the plaintiff has been the victim of the defendant's oppression, imposition, undue influence and great inequality and hardship due to his age or particular mental condition.

Where A, an attorney, induces his client B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors, the contract can be rescinded at the instance of B and here A, the attorney and B, his client are not on equal level; not only so, A is more to be blamed as his fault is greater and more serious than that of his client. As decided in *Hari Balkrishna Joglekar v. Naro Moreshwar Joglekar*²⁶ the provisions of this clause do not apply if the parties are in *in pari delicto*.

25. *Hungerford Investment Trust Ltd. v. Haridas Mundra*, (1972) 3 SCC 684; AIR 1972 SC 1826; (1972) 3 SCR 690.

26. ILR (1894) 18 Bom 342.

(c) Where in a contract for the sale or lease of immovable property a decree for specific performance is made and the decree made grants a time to the purchaser or lessee²⁷ to pay the purchase money or other sum to which he does not comply, the vendor or lessor may apply to have the contract rescinded, and the court may rescind the contract. [Section 28(1)]

(d) Where there is an alternative prayer for rescission (Section 29).—Where, a suit for specific performance is instituted, a plaintiff may pray in the alternative to rescind the contract and deliver it up for cancellation if it cannot be specifically performed, and the court may order accordingly.

The words in Section 28(1) "in the same suit" mean in the suit itself, i.e. on the original side and not in the execution proceedings. An appeal is a continuation of the suit. After passing the decree for specific performance, the court does not cease to have any jurisdiction. It retains control over the decree even after the decree has been passed. It is open to court to exercise the power under Section 28(1) of the Act either for extension of time or for rescinding the contract as claimed.²⁸

5. Refusal for Rescission [Section 27(2)]

In the following cases the court will refuse rescission—

- (i) where the plaintiff has expressly or impliedly ratified the contract; or
- (ii) where parties cannot be restored to their original position in which they were at the time the contract was made; or
- (iii) where third parties have, during the subsistence of the contract, acquired rights in good faith, without notice and for value; or
- (iv) where only a part of the contract is sought to be rescinded and it is not severable from the rest of the contract.

As noted by Mulla, the sub-clauses of sub-section (2) are a statutory recognition of the case law on the subject.²⁹

6. Important Aspects and Effects of Rescission³⁰

(a) *Damages cannot be recovered.*—A party to a contract may commit such a breach as goes to the root of the contract and releases the other party from his obligation to perform his part. The party so discharged from his obligation may yet recover damages for the breach³¹, but a party who has rescinded a contract cannot recover damages.

27. See *Yeshoda v. K. Nagarajan*, (1996) 11 SCC 228; *Sardar Mohar Singh v. Mangilal*, (1997) 9 SCC 217; *Mohd. Alimuddin v. Waizuddin*, (1998) 9 SCC 108; AIR 1997 SC 1995 (Court may extend time for payment.)

28. *Ramankutty Guptan v. Avara*, (1994) 2 SCC 642; AIR 1992 SC 1699; (1994) 2 MLJ 52 (SC); (1994) 1 GLH 416.

29. *B. Ganapati v. S. Rajaram*, AIR 1974 Bom 104; Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, 9th Edn., 1952, p. 895

30. Based on *Snell's Principles of Equity*, pp. 601-607.

31. *Harold Wood Brick Co. Ltd. v. Ferris*, (1935) 2 KB 198; 153 LT 241.

(b) *Intervention of third parties a bar to rescission.*—A contract void for mistake is void *ab initio*.³² A contract which a party may rescind is valid unless and until it is rescinded. This is important when third parties have acquired rights under the contract, for this will bar the right to rescission and restitution of property. [Section 27(2)(c)]

(c) *Restitution in Integrum is possible.*—In illegal contracts, the two maxims *in pari delicto potior est conditio defendantis* and *ex turpi causa non oritur actio* may operate to prevent any restitution of property. On the other hand, a party rescinding a contract is entitled to recover and is bound to restore property which has passed pursuant to the contract. Thus no restitution is possible where restoration and restitution of property passed under the contract is impossible. [Section 28(2)(b)]

A enters into a contract with B for purchase of goods under a misrepresentation practised by B. A sells away the goods or consumes them. He cannot get rescission of the contract as restoration of the property to B is now impossible.

(d) Relief of rescission may be prayed for in the alternative in a suit for specific performance of contract (Section 29), but a person suing for rescission cannot in the alternative sue for specific performance.³³ But if third parties have acquired rights in good faith, for value and without notice, during the subsistence of the contract before its rescission, the same cannot be allowed. [Section 27(2)(c)].

(e) While granting this relief the court may require the party to whom such relief is granted to do equity, by restoring 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 (Section 30). This is on the principle that he who seeks equity must do equity. Thus in case of sale of property, if the vendor has obtained earnest money and the contract is rescinded at his instance, he will be ordered to refund the earnest money received by him. But where a contract is rescinded on account of the purchaser's default, the vendor may forfeit³⁴ and retain the deposit already received. Here one must note that the vendor cannot recover any unpaid part of the deposit, for it is one thing to forfeit money paid as a pledge and another to seek to enforce an obligation under a contract that has been rescinded.³⁵

(f) The effect of rescission is restoration of the plaintiff to his original position as if the contract *had not been made*. Consequently, property must be returned, possession given up, and accounts taken of profits or deterioration. But no damages are recoverable because the purpose of damages is to put the party

32. *Cundy v. Lindsay*, (1878) 3 App Cas 459; 38 LT 573.

33. *Prem Raj v. D.L.F. Housing and Construction (Pvt.) Ltd.*, AIR 1968 SC 1355.

34. *Anandilal Poddar v. Gunendra Kr. Roy*, AIR 1966 Cal 107.

35. *Lowe v. Hope*, 1970 Ch 94; (1969) 3 All ER 605 (Ch D).

recovering them in the same position (so far as money can do it) as he would have been, *had the contract not been carried out*.³⁶

C. CANCELLATION (SECTIONS 31 TO 33)

1. Meaning

The equitable relief of cancellation of an instrument is based on the maxim "he who seeks equity must be prepared to do equity". To cancel has as its first meaning the "removal of written character or other form of record". It literally means to cross out.³⁷ We may say that a document by cancellation is made inoperative and invalid. It is different from rescission wherein operation of a document is put to an end.

2. Object of Cancellation

The relief as to cancellation of an instrument is founded upon the administration of protective justice, for fear that the instrument may be vexatiously or injuriously used by the defendant against the plaintiff when the evidence to impeach it may be lost or that it may throw a cloud of suspicion over his title or interest.³⁸ In words of Snell,³⁹ "its mere existence may nevertheless be embarrassing, e.g., lest some claim be founded upon it, or some third party be deceived by it. This would be done even if the document was wholly void at law, unless the defect appeared on the face of the document, so that it carried its own refutation and there was no need for equity to intervene".⁴⁰ In other words, if the instrument is left outstanding it will cause injury to the plaintiff.⁴¹ Sections 31 to 33 make provisions for cancellation.

3. What can be Cancelled

For these reasons, a conveyance made for immoral consideration, a guarantee procured by misrepresentation, a loan made on unconscionable terms, a lease granted at a low rent mistakenly by the lessor which the lessee knew, or where there is a forged document or a conveyance which may endanger a title, or where a document initially valid becomes subsequently ineffective, e.g., by release or breaking off the engagement for marriage in contemplation of which it was executed, may be cancelled at the instance of the party to whom it will cause injury.

But it must be noted that mere speculation as to unknown and vague complications arising in the future is hardly any ground for cancellation.⁴²

Section 31 of the Specific Relief Act is not limited to a suit for cancellation of a written contract only. It covers a case where a person against whom a

36. Snell's Principles of Equity, p. 607.

37. Funk and Wagnall: Standard Handbook of Synonyms, Antonyms and Prepositions, p. 107.

38. Jeka Dula v. Bai Jivi, AIR 1938 Bom 37: 39 Bom LR 1072.

39. Snell's Principles of Equity, p. 608.

40. Simpson v. Howden (Lord), (1837) 3 My & Cr 97: 6 LJ Ch 315.

41. AIR 1923 Mad 109.

42. Jeka Dula v. Bai Jivi, AIR 1938 Bom 37: 174 IC 24 (DB): 39 Bom LR 1072.

written instrument, be it a contract or deed of sale or a deed of trust or any other kind of written instrument, is void or voidable which is sought to be adjudged void or voidable and cancelled.⁴³

In other words relief of cancellation would be available when (1) an instrument is void or voidable against the plaintiff; (2) where the plaintiff may apprehend serious injury if the instrument is left outstanding and (3) where it is proper under the circumstances to grant the relief.

As decided in *Cooper v. Phibbs*⁴⁴, a document vitiated by mutual mistake being a mistake of private rights of the parties, and a document executed under undue influence as was the case in *Huguenin v. Baseley*⁴⁵ (wherein a widow plaintiff made a voluntary settlement in favour of a clergy), were likewise ordered to be cancelled. But in *Stapilton case*⁴⁶, a family arrangement made by a document was not disturbed because equity looks upon such arrangements with favour.

4. Illustrations

(a) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy. (Section 31)

(b) A draws a bill on B, B endorses it to C by whom it appears to be endorsed to D, who endorses it to E. C's endorsement is forged. C is entitled to have such endorsement cancelled, leaving the bill to stand in other respects. (Section 32)

Sections 31 and 32 state that a document can be cancelled *in toto* or in totality, or in suitable cases where it is evidence of different rights or different obligations, it may be cancelled in part and be allowed to stand for the residue. But in case of its cancellation, the party who obtains such relief has 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 the justice of the case may require. (Section 33)

5. What a Plaintiff must Prove

To be entitled for the decree of cancellation a plaintiff may have to show—

(a) that it is void or voidable against him under one or the other sections of the Contract Act. One has to note that the person seeking such a cancellation need not be a party to it⁴⁷, i.e., the relief may be obtained not only by a party to the instrument but by any person against whom the instrument is void or voidable. Thus if the creditors of a party are defrauded, defeated or delayed, any

43. *Manick Lal v. Shiva Jute Bailing*, (1948) 52 Cal WN 389.

44. (1867) LR 2 HL 149; 16 LT 678.

45. (1807) 14 Ves 273.

46. *Stapilton v. Stapilton*, (1739) 1 Atk 2.

47. *Manick Lal v. Shiva Jute Bailing*, (1948) 52 Cal WN 389.

creditor may sue on behalf of himself and all others.⁴⁸ When a person seeking cancellation is not a party to it, the provisions of the Contract Act do not come into play.⁴⁹

(b) that the plaintiff has reasonable apprehension that the instrument if left outstanding may cause him serious injury.

Whether “reasonable apprehension of serious injury” exists or not can be decided from the circumstances of the particular case with which the court is to deal⁵⁰, and the apprehension of a party being sued on covenants in a conveyance apparently binding is “reasonable apprehension of serious injury” within the meaning of this section.⁵¹

(c) that the court ought under the circumstances of the case and in exercise of its discretion order the instrument to be delivered up and cancelled. The court has full discretion to order cancellation whether the plaintiff expressly asks for it or not, and therefore the suit is in no case merely declaratory.⁵²

6. Rectification, Rescission and Cancellation: A Comparison

It will be fruitful to note here the points of similarities and differences.

- (a) In so far as rescission and cancellation are concerned, the question at issue in both is whether or not the contract or the instrument is void or voidable.
- (b) While rescission is “to make of no effect”, cancellation is the removal of written character or other form of record. In other words, by rescission the operation of a document is put to an end while in cancellation the document is made inoperative. Thus in rescission, a document remains operative, in cancellation it is rendered inoperative.
- (c) Relief afforded by rescission is consequently limited in scope while that in cancellation is wider. Rescission is available in regard to contract only, while cancellation is obtainable with regard to any instrument.
- (d) Relief granted in case of rescission is where contract is merely voidable or where its unlawfulness or nullity is apparent on the face of it. In so far as cancellation is concerned, the relief is given in case of void as well as voidable instruments whether nullity is apparent on the face of it or not.

In so far as rectification on one side and rescission and cancellation on the other is concerned, the difference can be laid down as follows:

48. *Ishvar Timapp Hegde v. Dewar Venkappa Shaubog*, ILR (1903) 27 Bom 146: 5 Bom LR 19.

49. *Manick Lal v. Shiva Jute Bailing*, (1948) 52 Cal WN 389.

50. *Kotrassappaya v. Chenvirappaya*, ILR (1899) 23 Bom 375.

51. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, p. 900, where they differ from a decision (on the above italicised expression) in *Iyyappa v. Ramalakshamma*, ILR (1890) 13 Mad 549.

52. *Kattaiya Pillai v. Ramaswamia Pillai*, AIR 1929 Mad 396: 56 Mad LJ 394.

- (a) In rectification, the contract that is sought to be rectified though complete and legal and unobjectionable, does not express the real intention of the parties, i.e., the writing therein does not correspond with the intention of the parties. In rescission and cancellation, the contract or the instrument is void or voidable.
- (b) In the former (rectification), the plaintiff does not want to avoid it altogether. He wants to avoid only a part of it so far as it is on account of error. In the latter, the contract or the instrument as a whole is sought to be avoided.
- (c) In the former, the relief is in addition to specific performance while in the latter, specific performance can be alternated with rescission, but it cannot be so alternated in cancellation.
- (d) Thus on the whole the grounds for relief in the former are limited in scope, those in the latter are wider. Besides, in rectification, what is rectified is an error not the instrument⁵³, in cancellation what is cancelled is the instrument itself.

7. Minor's position

Sub-section (2) of Section 33 makes a clear provision that a defendant who is a minor or a lunatic at the time of making the contract may have to restore, as far as may be, any benefit received by him whether it is proprietary or monetary. But there is no liability for making compensation in such cases. This provision therefore brings an end to a conflict of opinion as to restoration of benefit by a minor. One view was that "restoration stopped where repayment began"; the other view was that a minor should restore the benefit when he has made misrepresentations as to his age.⁵⁴ In cases where a minor has not expressly asked for cancellation of an instrument, relying on its being a nullity, the court may make him restore the benefit under this section.

Still, however, the Orissa High Court in *Daneyi case*⁵⁵ and the Mysore High Court in *Dyaviah case*⁵⁶ are not of one opinion; the former treating a contract by the guardian of the minor as void *ab initio* and holding that neither Section 38 nor Section 41 of the Specific Relief Act, 1877 (Sections 30 and 33 of the Specific Relief Act, 1963 respectively) can apply; and the latter holding that restitution in case of void contracts is also applicable in case of minors who cannot be allowed to have a double advantage.⁵⁷

53. *Sabhaji v. Nawalsingh*, AIR 1928 Nag 4: 104 IC 736.

54. *Limbaji v. Rahi*, ILR (1925) 49 Bom 576: 88 IC 643; AIR 1925 Bom 499 (attempted sale by minor's stepmother, minor required to refund benefit to estate and himself); *Rang Ilahi v. Mahub Ilahi*, ILR (1926) 7 Lah 35: 94 IC 25; AIR 1926 Lah 170 (similar case in Mahomedan law); *Milkhiram v. Jivan Singh*, AIR 1953 Pepsu 45.

55. *Daneyi Gurumurty v. Raghu Podhan*, AIR 1967 Ori 68; *Mohori Bibee v. Dharmodas Ghose*, ILR (1903) 30 Cal 539: 30 IA 114, followed.

56. *Dyaviah v. Shivamma*, AIR 1959 Mys 188. But see *Mohori Bibee case* and Sections 64 and 65 of Indian Contract Act.

57. See also *Emperor v. Brij Lal*, AIR 1937 Oudh 130: 160 IC 489.

D. DECLARATION (SECTIONS 34 AND 35)

1. Meaning

Sections 34 and 35 of the Specific Relief Act, 1963 provide for grant by the court of a declaration of status or right of the plaintiff and its effect.

“To *allege* is formally to state as true or capable of proof, but without proving. To *adduce*, literally to lead to, is to bring the evidence up to what has been alleged. Adduce is a secondary word; nothing can be adduced in evidence till something has been stated or alleged, which the evidence is to sustain. To speak of an *alleged* document, an alleged will or an alleged crime, is either to question, or at least very carefully to refrain from admitting, that the document exists, that the will is genuine or that the crime is committed; alleged simply concedes nothing and leaves the question open. But to *aver* is to declare confidently. Declare has often an authoritative force.”⁵⁸

We may consequently say that declaration is an authoritative pronouncement by the court in respect of a person's right to property or his status. Section 34 thus makes a provision for a particular type of relief where there is no specific performance, no award of compensation, but merely a declaration of the rights of the parties.

2. Origin and Object of the Provision

In England, before 1873-75, the courts of law and equity had for long made declarations in claims brought against the Crown and the courts of equity had made declarations in other cases where consequential relief was also claimed. But in 1850 an innovation of a very important kind was made (by the Court of Chancery Act, 1850, Section 14 and Chancery Procedure Act, 1852, Section 50) which empowered the Court of Chancery to make a declaration without granting any consequential relief. In 1873-75 the Judicature Act empowered the Supreme Court to make declarations whether or not any consequential relief was or even could be claimed. This led some to form an impression and to assert that declarations are a form of equitable relief.⁵⁹ However, the Court of Appeal⁶⁰ has held that they are not; they are “neither land nor equity”, but primarily statutory.⁶¹

This provision was incorporated in Section 15 of the Civil Procedure Code, 1859 in India whereby it was lawful for the civil courts to make binding declarations of right without granting consequential relief.⁶²

58. Funk and Wagnall: *Standard Handbook of Synonyms, Antonyms and Prepositions*, pp. 38, 50.

59. *Barnard v. National Dock Labour Board*, (1953) 2 QB 18; (1953) 1 All ER 1113.

60. *Gray v. Spyer*, (1921) 2 Ch 549; 126 LT 238.

61. *Snell's Principles of Equity*, p. 571; Hanbury: *Modern Equity*, p. 81

62. *Rooke v. Lord Kensington*, (1856) 2 K&J 753; 25 LJ Ch 795; *Strimathoo Moothoo Tija Ragoonadah Raneer Kalandapuree Natchiar v. Dorasinga Tever*, (1875) 2 IA 169; *Sadut Ali Khan v. Khajeh Abdool Gunnee*, 1873 Supp IA 165.

The Code of 1859 was replaced by the Code of 1877 and the provision as to declaration was transferred to Section 42 of the Specific Relief Act, 1877 which now stands before us as Section 34 of the Specific Relief Act, 1963.

The object of the legislature was to grant to the plaintiff a relief granted by the Court of Chancery in cases where no relief at Common Law was available.

Sir Lawrence Jenkins in *Deokali Koer v. Kedar Nath*⁶³ said: "The section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled to any legal character or to any right as to any property'; it is the disregard of this that accounts for the multiform and at times, eccentric declarations which find a place in Indian plaints. If the courts were astute, as I think they should be, to see that the plaint presented conformed to the terms of Section 42 (now Section 34) the difficulties that are to be found in such class of cases would no longer arise." Moreover, "It is a common fashion to attempt an evasion of court fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour". The section is thus intended to avoid multiplicity of suits and the courts will not merely make a declaration of a hypothetical or an abstract right without any reference to its practical utility.⁶⁴ If the plaintiff being able to obtain any further consequential relief omits to do so, the court shall not grant him a declaratory decree.⁶⁵

In *Abdul Hakim v. Habib Khan*⁶⁶, the plaintiff, a tenant of a shop, was on basis of an undertaking filed under Section 151 C.P.C. by the parties, was dispossessed of his shop. As he was dispossessed during the pendency of the suit he was entitled to the possession of the shop. The plaintiff wanted to amend the plaint to incorporate the subsequent events. It was his duty to do so. However, his request was objected to by the defendant-petitioner (in H.C.). The court held that if the plaintiff is dispossessed during the pendency of the suit for declaration, amendment of the plaint should not be insisted upon and the plaintiff should be put back in possession so that status quo ante be restored. The act of the defendants in this case amounts to overreaching the process of law and it is the duty of the trial court to protect the rights of the parties as they existed on the date of filing the suit.

But one must note that the section is not exhaustive of the categories of declaratory suits maintainable under the law.⁶⁷

3. Essentials for the Relief⁶⁸

To file a suit under this section,

- (a) The plaintiff must be a person entitled to any legal character at the time of the suit.

63. ILR (1912) 39 Cal 704: 15 IC 427.

64. *Sabitri Thakurain v. F.A. Savi*, AIR 1933 Pat 306: ILR (1933) 12 Pat 359.

65. *Kumud Ranjan v. Manabendra*, AIR 1974 Cal 342.

66. AIR 1998 Raj 107. The court relied on *Azim Khan v. State*, 1958 Raj LW 90.

67. *Lakshminarasimha Samayajiyarr v. Ramalingam Pillai*, AIR 1920 Mad 573.

68. *Jeka Dula v. Bai Jivi*, 39 Bom LR 1072: AIR 1938 Bom 37.

- (b) He must be a person entitled to a right to property⁶⁹. This explains that the interest of the plaintiff must be existing, present interest; it may be a distant possibility of its coming into possession and enjoyment. But a mere contingency howsoever proximate will not suffice if there is no present state of interest.⁷⁰
- (c) Defendant should have denied these, or be interested to deny this, character or right. That is to say, there must be some present danger or obstacle to the interest which the plaintiff seeks to avoid by the decree. Mere hypothetical, abstract and speculative grounds would not suffice.⁷¹
- (d) The plaintiff should not be in a position to ask for relief consequential upon declaration sought. In other words, a cloud must be cast on his title before he can ask for its removal. He must allege and prove hostility on the part of the defendant for no court will move on merely speculative grounds.⁷² In other words, if the plaintiff is able to seek further relief he must do so; if he omits to seek it, the decree will be refused to him.⁷³

We have to make a note that (i) if any of the first three conditions is not fulfilled, the suit should be dismissed. If they are fulfilled but the fourth is not, the court shall not make the declaration requested. (ii) The decree creates no new rights. It only declares the plaintiff's right he had. (iii) The decree cannot be claimed as a matter of right because it is discretionary. (iv) If all the parties are not joined the declaration is not available.⁷³ (v) The court at the most can refuse to make a declaration in case the plaintiff does not pray for consequential relief; it cannot dismiss a suit.⁷⁴ (vi) The proviso to the section does not stop a plaintiff from seeking a relief he wants unless he asks for the consequential relief. It contemplates only a further relief which could be claimed against the defendant only and not one which could be claimed against anybody else.⁷⁵ (vii) Such a decree apart from the provisions of Section 11 of C.P.C., is conclusive between parties to it and persons litigating through them.

4. Use of Declarations and Injunctions

The action for a declaration is today commonly used as a remedy in public law either in addition or as an alternative to the injunction.⁷⁶ A declaratory decree declares the legal position as to a matter in dispute. In other words it merely declares the right of the decree holder vis-a-vis the judgement debtor, but it does not direct him to do or to refrain from doing any particular act or

69. *Saurashtra Vipra Sabha v. Namakkal Municipality*, (1996) 11 SCC 584.

70. *Wajid Ali Shah v. Dianat-ul-lah-Beg*, ILR (1886) 8 All 31.

71. *Sabitri Thakurain v. F.A. Savi*, ILR (1933) 12 Pat 359; AIR 1933 Pat 306.

72. *Jeka Dula v. Bai Jivi*, 39 Bom LR 1072; AIR 1938 Bom 37; AIR 1930 Lah 803.

73. *Maharaja of Benares v. Ramji Khan*, ILR (1905) 27 All 138.

74. *Kunj Bihari v. Keshavlal*, ILR (1904) 28 Bom 567.

75. *Humayun Begam v. Shah Mahammad Khan*, AIR 1943 PC 94; 207 IC 188.

76. Hanbury: *Modern Equity*, Chap. 3, p. 81.

thing.⁷⁷ Such a decree when granted is not in itself an order of the court which has to be obeyed. It can be said to be a non-coercive declaration. It is for this reason that applicants frequently apply for an injunction as well as a declaration so that the relief obtained is, so far as the injunction is concerned, enforceable.⁷⁸ Looking from a different angle, in declaration, a court cannot grant the declaratory relief where further relief could be obtained. In case of injunction, there is no such restriction; it can be granted without requesting for a declaration, though one cannot fail to note that in many cases a declaration is inherent in the grant of an injunction.⁷⁹

Section 34 is not exhaustive of cases in which a declaratory decree can be made. Consequently as held in *Ratnamala Dassi* court has power to grant such a decree independently of the requirements of the section. For example in the instant case a suit by a tenant for declaration relating to his interest in the tenanted property was held as maintainable, as such an interest is property.⁸⁰

5. Declaration when Refused

(a) *In case of vexatious litigation.*—In *Deokali Koer case*⁸¹, it was expressed that the section does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to any property". If this is disregarded it will give rise to multiplicity of proceedings. Before that, in *Narain Mitter's case*⁸², this proposition was expressed by the Privy Council thus: "In every case the court must exercise a sound judgment as to whether it is reasonable or not under all circumstances of the case to grant the relief prayed for. There is so much danger in India of harassing and vexatious litigation that the courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation".

(b) *In case of evasion of court fee.*—When prayer casted in the form of declaratory suit is an attempt at an evasion of court fee⁸³, such relief would be refused.

(c) *In case of multiplicity of suits.*—When it amounts or leads to multiplicity of suits for the same cause of action, relief of declaration may be refused.⁸⁴

In *Ashok Kumar Srivastava case*⁸⁵, the appellant was appointed on certain terms and conditions. He was initially put on probation for twelve months.

77. *State of M.P. v. Mangilal Sharma*, (1998) 2 SCC 510: 1998 SCC (L&S) 599: (1998) 1 LLJ 995.

78. *Hiles v. Amalgamated Society of Woodworkers*, 1968 Ch 440: (1967) 3 All ER 70 (Ch D); *Indumatiben Chimanlal Desai v. Union of India*, AIR 1969 Bom 423.

79. *Ibid.*

80. *Ratnamala Dassi v. Ratan Singh Bawa*, AIR 1990 Cal 26.

81. *Deokali Koer v. Kedar Nath*, ILR (1912) 39 Cal 704: 15 IC 427.

82. *Narain Mitter v. Kishen Soondori Dasse*, 1873 Supp IA 149.

83. *Deo Kali Koer v. Kedar Nath*, (1912) 39 Cal 704: 15 IC 427.

84. See *Indian Iron & Steel Co. Ltd. v. Chhaganlal Marwari*, 1994 Supp (3) SCC 719.

Conditions of his appointment stated that unless a letter appointing him as a probationary Inspector is issued before expiry of his probation period, his services shall stand terminated. No such letter was issued before expiry of probation period. His initial period of probation was also not extended. He therefore sued for declaratory relief that he continues in service. It was held that no such declaration can be given.

Similarly in *Navalram case*⁸⁶, it has been held by the Gujarat High Court very recently that a casual unnoticed user of open piece of land cannot be considered as exclusive possession of the land conferring right over the land in the person using it. Here the plaintiff was in exclusive possession of the land. The presumption, therefore, that possession follows the title comes into play and construction of water tank or shed over a small piece of land by the defendant which was convenient in many ways to him and was made use of by him, without notice of plaintiff would not be construed as an act of dispossession of plaintiff necessitating the claim for possession by the plaintiff as contemplated by S. 34 of the Act. Other efficacious remedies are available to the plaintiff.

6. Merely Declaratory Decree

A question was posed in *Kathama Natchiar case*⁸⁷, whether the courts in India had power to make a merely declaratory decree otherwise than under Section 15 of the Civil Procedure Code, 1859 (see "origin and object" in para 2 above in this section) and it was answered in the negative. The correct view, as expressed by Pollock and Mulla⁸⁸, is that Section 34 is exhaustive of the cases in which a decree merely declaratory can be made and that the courts have no power to make such a decree independently of that section. This view of the text is approved in *Kishorilal v. Begraj*⁸⁹ by the Punjab High Court. At all events one must note that the proviso to Section 34 is paramount and its effect cannot be avoided. After referring to the observations of the Privy Council in *Sheoparsan Singh case*⁹⁰ and *Fischer case*⁹¹, the Calcutta High Court in *Manjur Al Haque case*⁹² has upheld this view. This means that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same court or in some cases in some other court, i.e., a revenue court. Under the present section a suit would lie for a merely declaratory decree though no consequential relief could be claimed, e.g., a suit by an owner of land against any member of the public who formally claims to use such land as a public road and who thereby endangers the title of the

85. *Ashok Kumar Srivastava v. National Insurance Co. Ltd.*, AIR 1998 SC 2046.

86. *Navalram Laxmidas Devmurari v. Vijayaben Jayavant Bhai Chavda*, AIR 1998 Guj 17.

87. *Strimathoo Moothoo Tija Ragoonadah Rane Kolandapuree Natchiar v. Dorasinga Tever*, (1875) 2 IA 169.

88. *Indian Contract Act and Specific Relief Act*, 9th Edn., 1972, p. 910.

89. *Kishori Lal v. Beg Raj*, AIR 1952 Punj 387.

90. *Sheoparsan Singh v. Ramnandan Singh*, (1916) 43 IA 91: ILR (1916) 43 Cal 694: 33 IC 914: AIR 1916 PC 78.

91. *Fischer v. Secretary of State for India in Council*, (1899) 26 IA 16: ILR (1899) 22 Mad (270).

92. *Chowdhury Mohammad Manjural Haque v. Sebait of Sri Sri Iswar Lakshmi Narayan Jew Thakur*, AIR 1943 Cal 361.

owner.¹ Similarly, a suit lies for a mere declaration that a new valuation by a municipality is not void.² Where a defendant is not in possession or not in a position to deliver possession of the suit properties, no "further relief" than a declaration of the right to possession is available to the plaintiff and the proviso to Section 34 is no bar to granting such a relief of declaration.³ It is however to be noted that a contract of personal service cannot normally be enforced. A court in such circumstances would not grant a declaration that the contract subsists and that the employee, even after having been removed from service can be deemed to be in service against the employer's will and consent.⁴ The rule has however the following three exceptions as declared in *Vaish Degree College case* by the Supreme Court.⁵

- (a) In cases where a statutory body acts in contravention of the mandatory provisions of the statutes;
- (b) In cases where a public servant is sought to be removed from service in contravention of Article 311 of the Constitution of India⁶; and
- (c) In cases where a worker is sought to be reinstated on his being dismissed under the Industrial Law.

7. 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 alienates to B property in which A has merely a life interest. The alienation is invalid as against C, who is entitled as a reversioner. In a suit by C, against A and B the court may declare that C is so entitled.
- (c) A Hindu widow in possession of property adopts a son to her husband. The person presumably entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid. (For contra see *Gummalapura Taggina Matada Koituruswami v. Setra Veeravva*⁷).

8. Effect of Declaration (Section 35)

As the section lays down, a decree under this section is binding on the actual litigating parties, the persons litigating through them, and also to the beneficiaries under the trust. The declaration of status obtained under this

1. *Chunilalanath v. Ram Kishen Sahu*, ILR (1888) 15 Cal 460.

2. *Surendranath v. Chairman of the Municipal Commrs. of Mymen Singh*, (1934) 61 Cal 276; AIR 1934 Cal 673; 152 IC 694.

3. *Sunder Singh Mallah Singh Sanatan Dharam High School Trust v. Managing Committee*, (1938) 65 IA 106.

4. *J. Tiwari v. Jwala Devi Vidya Mandir*, AIR 1981 SC 122.

5. *Vaish Degree College v. Laxmi Narayan*, AIR 1976 SC 888.

6. *Mysore SRTC v. Mirza Khasim Ali Beg.*, (1977) 2 SCC 457; AIR 1977 SC 747.

7. AIR 1959 SC 577; 1959 Supp 1 SCR 968.

section though should generally be operative *in rem* but it has been made clear in *Munyaraj case* by the Hyderabad High Court that a declaration made in respect of the adoption of a certain person is not a judgement *in rem*.⁸

8. *Munyaraj v. Venkatapati*, 1955 Hyd 172.

Chapter XXV Injunctions

"By means of its decrees for specific performance the Court of Chancery obtained command of one great province of law, namely, of contracts for the sale of land. It fashioned another weapon, namely, the injunction, which was far more flexible, far more generally applicable and thereby it obtained not merely certain particular fields of justice, but a power of making its own doctrines prevail at the expense of the common law."

—Maitland: *Lectures on Equity*,
p. 318

Injunction is "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".

—A.W. Renton: *Encyclopaedia of the Laws of England*,
Vol. 6, p. 464

No one can be allowed to use his own property in such a manner that it creates a nuisance for his neighbours.

—*Darshan Perm v. Nazar Ram*,
AIR 1989 P&H 253.

SYNOPSIS

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|--|--|
| 1. Text of Sections 36 to 42 | (a) To maintain <i>status quo</i> |
| 2. Preventive Relief | (b) To restrain Judicial Proceedings |
| 3. Injunction: Origin, Nature and Definition | (c) To prevent breach of a duty or an obligation |
| 4. Types of Injunction (Section 36) | (i) Contractual Obligations |
| 5. Difference Between Temporary and Perpetual Injunctions | Injunction to perform Negative Agreements |
| 6. Principles Governing Injunction | (ii) Obligations arising under General Law |
| 7. Temporary Injunctions (Section 37; Order 39, Rules 1, 2, 3) | (1) Trust Obligations |
| 8. Perpetual Injunctions (Section 38) | (2) Civil wrongs or Tort |
| 9. Mandatory Injunctions (Sections 39 and 40) | (3) Any other obligation: Legal or equitable |
| 10. In what cases granted | 11. Injunction when Refused (Section 41) |

1. TEXT OF SECTIONS 36 TO 42

Injunction 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 (5 of 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.

Perpetual Injunctions

38. Perpetual injunctions 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 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 Section 38, or mandatory injunction under Section 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 proceedings, 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 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 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.

42. Injunction to perform negative agreement.—Notwithstanding anything contained in clause (e) of Section 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.

2. PREVENTIVE RELIEF

The principles of Chancery Courts postulated that a man will be punished if he does what his conscience tells him not to do. Consequently, the best and the surest way was to prevent him from doing that act by means of an injunction. These principles arose out of the inadequacy of the Common Law and the general tendency of the contemners of law. For example, when a person had by contractual obligations undertaken not to set up a rival business, or not to encroach upon another's land, equity would restrict or prevent him from doing that act. Injunction is thus a mode of enforcing specific performance of negative agreements. Since the general purpose of injunction is to restrain the commission, continuance or repetition of some wrongful act which one is under an obligation not to do, the relief provided by the Chancery Court at its discretion to the plaintiff is called preventive relief. But at the same time, one cannot fail to note that the preventive relief protects rights arising otherwise than from contracts as is evidenced by the *Swindon Company case*.¹ In this case Swindon Company, a proprietor of a tenement on a river bank collected and diverted the river water for supplying it to a nearby town, to the detriment of the benefit of the lower riparian owners who filed a suit for injunction and the same was granted as the owner of the lands higher up the stream cannot divert water for the benefit of persons unconnected with any part of the stream.

In a recent case² an injunction against proposed location of a cemetery was granted on the same principle. Cemetery in this case was proposed in a crowded residential area and the distance up to the house of the plaintiff was only 78 feet. Consequently there was possibility of noxious gas escaping concrete vaults and obnoxious overflows from underneath cells and pollution of drinking water of the well in the plaintiff's residential compound was not ruled out. It was held that the plaintiff was entitled to injunction as proximity of cemetery to his residence could be a strong and continuous cause for annoyance.³

The Indian Specific Relief Act, 1963, Sections 36 to 42 make provision for this relief by selecting certain leading English principles and incorporating them in the topic.

1. *Swindon Waterworks Co. v. Wilts Berks Canal Navigation Co.*, (1875) 7 HL 697: 33 LT 513 (HL).

2. *St. Joseph Church, Punkumnan v. Velu*, AIR 1989 NOC 124 (Ker).

3. *Ibid.*

3. INJUNCTION: ORIGIN, NATURE AND DEFINITION

Before the Judicature Act, 1873, the cases wherein equity interfered and granted preventive relief fell into two classes: (i) cases to prevent the inequitable institution or continuation of judicial proceedings, and (ii) cases of wrongful acts unconnected with judicial proceedings. Originally the court of chancery alone had this jurisdiction which resulted in duplication of work as where the plaintiff required an injunction to enforce a legal cause of action but now by the Judicature Act, 1925, Section 45, the High Court grants injunction by an interlocutory order in all cases in which it appears to the court to be just and convenient to do so.⁴ The jurisdiction of the court is exercised not on the individual preference of the judge, but "according to sufficient legal reasons or on settled legal principles. It must be 'just' as well as 'convenient'".

Injunction is an order of the court to a party to the proceedings to do or to refrain from doing a specified act. It is granted in cases in which monetary compensation affords an inadequate remedy to the injured party.⁵

As Maitland puts it, injunction "is an order made by the court forbidding a person or class of persons from doing a certain act, or acts of a certain class, upon pain of going to prison as contemners of the court. The penalty, is not mentioned in the injunction, but if knowing of an injunction you break it, then the court has a large discretionary power of sending you to prison and keeping you there".⁶

The object of an injunction, it should be noted, is usually preventive rather than prohibitive.

4. TYPES OF INJUNCTION (SECTION 36)

An injunction is either (i) temporary (Section 37) (ii) perpetual or permanent (Sections 37 and 38), or (iii) mandatory (Section 39).

Temporary or interlocutory injunction is granted before the trial of an action. Its object is to keep matters *status quo* until the question at issue between the parties is determined. As the section explains, 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. They are also called interim injunctions.

Permanent or perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant. As the section goes, 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.

4. Hanbury: *Modern Equity*, pp. 59, 60.

5. *Snell's Principles of Equity*, p. 624; Hanbury: *Modern Equity*, p. 59, See *Encyclopaedia of the Laws of England*, p. 464.

6. Maitland: *Lectures on Equity*, p. 318.

From the point of view of time, the injunctions are interlocutory or permanent but from the viewpoint of nature, injunctions may be divided into prohibitory or mandatory.

An injunction restraining the doing or continuance of some wrongful act is called *prohibitory* or *restrictive*. An injunction to restrain the continuance of some wrongful omission is called *mandatory*. Section 39 explains a mandatory injunction thus: "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 at its discretion, grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts".

An injunction is an order of the court. An order is more authoritative than a direction. A mandate stresses heavily the idea of the highest authority. Prohibition is wholly negative; it is a command not to do; injunction is generally so used, especially as the requirement by legal authority that certain action be suspended or refrained from, pending final legal decision.⁷

Injunction, thus restrains a person's action in future, it is not a remedy for breaches already made or wrongful acts already done before. It may be that assistance of the court is obtained and such actions restrained before the same are committed. But this is rare, generally the court's assistance is sought only after the act is committed. Consequently, an injunction is given for restraining future actions. In such cases, for the acts done in the past compensation is an adequate relief and a proper remedy. But as a measure of precaution in order to stop those acts (e.g., nuisance) so that they may not assume a permanent and a tangible form, a prohibitive injunction from the court is necessary. For example, where A uses B's premises as a shortcut to reach his office, A can be restrained by an injunction to repeat such acts and for the acts already committed by him B may obtain compensation. When an injunction is granted in order to prevent a threatened wrong it is termed as a *quia timet injunction*. Here a person takes a preventive measure before an event takes place.

5. DIFFERENCE BETWEEN TEMPORARY AND PERPETUAL INJUNCTION

(a) The nature of a temporary injunction is provisional, continuing until a specified time or until the further order of the court. A permanent injunction can only be granted by decree made at the hearing and *holds good without any time limit*.

(b) While the former is granted to preserve the *status quo*, the latter is granted to preserve and protect the right established by the plaintiff.

(c) While the former can be granted *at any period of the suit, even ex parte*, without notice to the other party to show cause why it should not be granted, the latter can only be granted after the trial when the plaintiff has established his case and on the merits of the case.

7. Funk and Wagnall: *Standard Handbook of Synonyms Antonyms and Prepositions*, p. 304.

(d) A temporary injunction is an outcome of emergency and therefore it is provisional; *it does not conclude any right*. A perpetual injunction on the other hand *concludes a right*; it is in effect a decree.

(e) Consequently, a temporary injunction restrains the defendant for a *particular time only* (till the date of hearing at the most) while a perpetual injunction restrains him for ever.⁸

(f) Grant of the former is regulated by the Code of Civil Procedure, Order 39, Rules 1 and 2, while the latter is regulated by Sections 38 to 42 of the Specific Relief Act.⁹

(g) A temporary injunction can be dissolved under Order 39, Rule 4 of the C.P.C., or else it terminates automatically when the suit is decided. A permanent injunction cannot be dissolved as it holds good for ever restraining the defendant perpetually from the assertion of a right or from the commission of an act which would be contrary to the right of the plaintiff.

6. PRINCIPLES GOVERNING INJUNCTION

The general principles underlying the grant of an injunction are similar to those involved in granting specific performance of contracts or of enforcement of other positive obligations. The following are the general points which require particular attention:

- (a) Whenever a right exists or is created by contract, by ownership of property or otherwise, cognizable by law, an injunction will be issued to protect a violation of that right and the restraining power of the court extends through the whole range of rights and duties recognised by law and would be applied to every case of intended violation unless there are other reasons of policy or expediency which control and limit its exercise.¹⁰
- (b) Granting of an injunction is a matter of judicial discretion for the court. Though the grant of injunction is discretionary the same must be exercised on settled principles of law to advance the cause of justice.¹¹
- (c) The court granting an injunction must rightly appreciate the facts and apply to those facts the true principles. Then and only then it becomes a sound exercise of judicial discretion.¹² The exercise of discretion is thus not arbitrary or capricious but is based on sound common sense and is regulated by well settled principles.¹³

8. *Apaji Patil v. Apa*, 4 Bom LR 534: ILR (1902) 26 Bom 735; *Lawndes v. Bettle*, (1864) 33 LJ Ch 451: 10 LT 55.

9. *Indu Shekhar v. Fule Devi*, 1968 BLR 268.

10. *Bhawarilal v. S. Jaichand*, (1975) 1 Kant LJ 1: ILR 1975 Kant 127: AIR 1975 Kant 122, 123; *Pritam Kumar v. Nagar Palika (Municipal Committee)*, (1986) 1 CLJ (C&Cr.) 213 P&H.

11. *Surya Nath Singh v. Khedu Singh*, 1994 Supp (1) SCC 561; see also *Tamil Nadu Housing Bd. v. A. Viswam*, (1996) 8 SCC 259.

12. *Subba Naidu v. Haji Badsha*, ILR (1903) 26 Mad 168: 13 Mad LJ 13.

13. *Ganpatlal v. Nandlal Haswani*, AIR 1989 MP 209.

- (a) The court must see that there is a *bona fide* case between the parties.
- (b) And in that case it must also see on which side, in the event of success, will lie the balance of convenience if the injunction does not issue.¹⁴
- (c) If the effect of not granting an injunction will be to deprive the plaintiff for ever of the right claimed by him in the suit, the court should grant a temporary injunction.¹⁵
- (g) If the act complained of can be relieved by compensation the court will exercise its discretion and will not grant injunction. In other words, when an efficacious relief can be obtained by any other usual mode of proceeding, injunction cannot be granted.¹⁶
- (h) Injunction is granted to maintain the *status quo ante*.¹⁷
- (i) Where a plaintiff establishes his right and also a threatened violation thereof by the defendant, injunction follows more or less as a matter of course. But here also if granting of the same is under the circumstances found to be unjust, inexpedient and oppressive, the court in its discretion will refuse it.

The relief of injunction being equitable and discretionary it cannot be issued in favour of a trespasser or a person who gained unlawful possession as against the true owner.¹⁸

- (j) Courts are very slow in granting an injunction against an isolated or occasional breach but in case of a continuous breach or wrong, injunction would be more readily issued.
- (k) When a suit is for a permanent injunction of one kind, interim injunction of a different kind cannot be granted.¹⁹
- (l) No interim injunction can be granted when the suit is for declaration only.²⁰
- (m) A mandatory injunction requires more stronger grounds than those required for obtaining a restrictive injunction.²¹

14. *Ibid.*; *Doherty v. Allman*, (1878) 3 AC 709; 39 LT 129; *S.S.V. Krishnan Pillai v. Kilasathammal*, AIR 1928 Mad 810.

15. *Secretary, Civil Station Sub-Committee, Nagpur v. Govindrao Kashinath Somalwar*, ILR 1937 Nag 313; 170 IC 239; AIR 1937 Nag 137.

16. *Morumal v. Gobindram Bikhchand*, AIR 1933 Sind 176; *Holland-Bombay Trading Co. v. Essardas Dharamchand*, AIR 1925 Sind 175.

17. *L.D. Meston School Society v. Kashi Nath Misra*, AIR 1951 All 558; *E.M. Gopalakrishna Konar v. A. Vilanga Konar*, AIR 1926 Mad 132; 90 IC 819.

18. *Premji Ratansey Shah v. Union of India*, (1994) 5 SCC 547, 550; see also *T.N. Housing Board v. A. Viswam*, (1996) 8 SCC 259.

19. *Zandaram Joitaram v. Prahladrao Vithalrao*, AIR 1963 Guj 160.

20. *Mohammad Ibrahim Khan v. Pateshwari Prasad Singh*, AIR 1960 All 252.

21. *Deutsche Dampschiff-fahrts Gesselchaft Hansa of Bermen v. Firm of Pestonji Bikhaji*, AIR 1925 Sind 347; 21 Sind LR 170; 89 IC 321.

- (n) While granting an injunction the court may in its discretion impose equitable conditions according to the circumstances of each case.
- (o) Injunction rests on the equitable principle that *he who seeks equity must do equity*, and that the plaintiff requesting it must *come with clean hands*. If the plaintiff has acted in an unfair and inequitable manner he cannot have relief.²²
- (p) The court is not bound to grant injunction in every case and an injunction to enforce negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer.²³
- (q) Once a perpetual and mandatory injunction is given and it becomes final, any attempt to circumvent the same cannot be permitted. Its non-compliance would be continuing disobedience entailing penal consequences.²⁴
- (r) Where a plaintiff apprehends encroachment on his land and proves so, he is entitled to permanent injunction restraining the defendant from encroaching or interfering with peaceful possession of his property.²⁵
- (s) Court should not issue an injunction which in operation is contradictory and ineffective.²⁶ Relief under Section 41(h) being a discretionary equitable relief it should not be granted where other equally efficacious relief is obtainable in any other usual mode or proceeding except in cases of breach of trust.²⁷ Similarly court should not easily interfere in the affairs of autonomous bodies, such as educational institutions or clubs.²⁸
- (t) A plaintiff on the strength of his possession can resist interference from persons who have no better title than himself to the suit property.²⁹ Once a suit has been filed by the respondent claiming to be the owner of the land and being in possession of it the suit cannot be treated as a suit based on possession without reference to title.³⁰

Lastly, an injunction cannot be granted against a person to restrain him from discharging his public duties, for, law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do.³¹ Ordinarily proceedings are not to be stayed by injunction unless the court

22. *Basheshar Nath v. Municipal Committee*, AIR 1940 Lah 69: 188 IC 264; *Ganesh Panigrahi v. Jura Sahu*, AIR 1973 Ori 232, 234.

23. *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545: (1995) 84 Comp Cas 618.

24. *Jai Dayal v. Krishna Lal Garg*, (1996) 11 SCC 588.

25. *Kaliappan v. Durai*, AIR 1998 Mad 65.

26. *H.M. Kamaluddin Ansari & Co. v. Union of India*, (1983) 4 SCC 417: AIR 1984 SC 29: 1983 ALT 1104.

27. *Muni. Corpn. of Delhi v. Suresh Chandra Jaipuria*, (1976) 4 SCC 719.

28. *Shyamlal Yadav v. Kusum Dhawan*, (1979) 4 SCC 143: AIR 1979 SC 1247.

29. *M. Kalappa Setty v. M.V. Laxminarayan Rao*, (1973) 2 SCC 358: AIR 1972 SC 2299.

30. *Nagar Palika v. Jagat Singh*, (1995) 3 SCC 426: AIR 1995 SC 1377: (1995) 3 Punj LR 224.

31. *Palapatti Raghudu v. Nallagadda Erraiya*, AIR 1938 Mad 881: 1938 Mad WN 806.

where they are to be stayed is subordinate to the court wherefrom injunction is sought. As held by the Supreme Court injunction is passed for the purpose of being carried out, not for the fun of passing it.³² It cannot be demanded as a matter of right.

7. TEMPORARY INJUNCTIONS (SECTION 37)

Section 37 of the Specific Relief Act speaks of temporary injunctions. The granting of this type of injunction is governed by Order 39, Rules 1 and 2. As the rules go, temporary injunction may be granted in the following cases:

1. Where in every suit it is proved by affidavit or otherwise—
 - (a) that 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
 - (b) that the defendant threatens or intends, to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the waste, damage, alienation, sale, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders.

Since we have discussed before the difference between temporary and perpetual injunction and also the general principles governing the grant of injunction it is unnecessary to repeat them, but it would suffice to note here that a temporary injunction is granted until the disposal of the suit or until further orders. In such a case it comes to an end when the suit is disposed of. The effect of a temporary injunction is explained in Rule 2(3).

(2) (1) In any suit for restraining the defendant from committing a breach of contract or other injury of *any kind*, whether compensation is claimed in the suit or not, the plaintiff may, at any time *after the commencement of the suit*, and either *before or after judgment*, apply to the court for a temporary injunction to restrain the defendant from committing the breach of the contract or injury complained of, or any breach of a contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise as the court thinks fit.

(3) In case of disobedience or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the

32. *H.M. Kamaluddin Ansari & Co. v. Union of India*, (1983) 4 SCC 417, 428, 429, 432.

property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

It will be seen that the effect of disobedience of an injunction is attachment of the property of the defendant and six months' civil detention. At this juncture one has to note that the transaction of sale or mortgage of property transferred in breach of a temporary injunction is *not void*. But the alienator incurs the penalty prescribed under Rule 2(3) above. The penalty of "attachment" of property under the rule has a different effect from a "void" contract. In view of Section 64 of the C.P.C., any private transfer contrary to the attachment is void against all claims enforceable under the attachment.³³ Moreover, the court has inherent powers under Section 151 of the C.P.C. to issue injunction in cases not falling within Order 39, Rule 1 and Rule 2, as decided by the Supreme Court of India in *Manohar Lal's case*.³⁴ If the breach continues within the period of attachment which will not remain in force for more than one year, the property attached may be sold under Rule 4 and the court may award compensation out of the proceeds thereof to the plaintiff. The State also may be proceeded against under this rule as the State is a person within this rule.³⁵

*Principles governing temporary injunctions*³⁶

It must be made clear again that temporary injunctions to restrain a breach of contract are regulated by the present Rule 2, Order 39 of the C.P.C., while perpetual injunctions to restrain the breach of a contract are regulated by Sections 38 to 42 of the Specific Relief Act. The main consideration as provided by Section 38(2) is that a perpetual injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. Now the performance of a contract is not specifically enforced where damages would afford adequate relief. However that may be, the following rules seem to govern all cases on the subject.

(a) *The case to be one for a perpetual injunction or for specific performance.*—As decided in *Chand Sultana v. Khurshid Begum*³⁷, if a suit is brought for a specific performance of a contract and for an injunction to restrain the defendant from committing a breach of the contract, and the plaintiff applies for a temporary injunction to prevent the breach of the contract until the suit is disposed of, the court will decline to grant a temporary injunction if the plaintiff and the affidavits filed by the parties show on the face of them that the case is not one for a perpetual injunction or for specific performance.

(b) *Irreparable injury or inconvenience.*—Consequently, to justify a case for temporary injunction not only must the case be such that an injunction is the

33. *Beli Ram and Brothers v. Ram Lal*, ILR (1925) 6 Lah 380: AIR 1925 Lah 644 (2); *Delhi and London Bank Ltd. v. Ram Narain*, ILR (1887) 9 All 497: 7 All WN 107.

34. *Manohar Lal Chopra v. Rai Bhadur Rao Raja Seth Hiralal*, 1962 Supp 1 SCR 450: AIR 1962 SC 527.

35. *State of Bihar v. Rani Sonabati Kumari*, (1961) 1 SCR 728: AIR 1961 SC 221.

36. Mulla: Civil Procedure Code, Order 39, Rule 2, pp. 802-803.

37. AIR 1963 AP 365.

appropriate relief but there must be a further ingredient that unless the defendant is restrained forthwith by a temporary injunction, irreparable injury or inconvenience may result to the plaintiff before the suit is decided upon its merits.³⁸ But if a case is a proper one for specific performance, and irreparable injury is likely to be caused unless the breach of the contract is forthwith restrained, the court will grant a temporary injunction to restrain the breach of contract. However, the converse of rule (a) above is not always true.

Rule 3.—As per Rule 3 of Order 39, the court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

(c) *Balance of convenience.*—The applicant must therefore show a *prima facie* case for entitling him to the prayer which if not granted would cause him *irreparable injury*.³⁹ However, the court always looks to the *balance of convenience*⁴⁰ which must be in favour of granting the injunction in favour of the plaintiff.

In urgent cases or cases of great emergency where irreparable damage would ensue if the act complained of is not restrained, injunction *ex parte* may be issued. Such an injunction is also called an *ad interim* injunction because it is issued without issuing a motion to the opposite party and continues in force only up to the time the motion is heard. When an injunction is issued after hearing the motion, it is called an *interlocutory* injunction. Thus, *prima facie* case, irreparable injury and balance of convenience are the three important conditions for obtaining an injunction.⁴¹

8. PERPETUAL INJUNCTIONS (SECTION 38)

When the plaintiff has established his right, a perpetual injunction is issued after the trial. It holds good for ever, restrains the defendant for ever, and since it concludes a right it is in effect a decree. It is granted where there is a question of substantial damage which cannot be compensated by money and where a legal duty is broken. In granting it, the court will look to the plaintiff's conduct and the balance of convenience and consider the question from the viewpoint of preventing multiplicity of judicial proceedings.

When granted

A perpetual injunction will be granted in the following cases:

- (i) to prevent the breach of an obligation,
- (ii) in cases of preventing the breach of obligations arising from contract,
- (iii) to prevent the invasion or threat of invasion to plaintiff's right to property or to its enjoyment.

38. *Nanabhai Ganpatrao Dhairygvan v. Janardhan Vasudev*, (1888) 12 Bom 110; Mulla: *Indian Contract Act and Specific Relief Act*, pp. 263-264, citing Collette on Specific Relief Act.

39. *Mogul Steamship Co. v. M' Gregor Gow & Co.*, (1885) 15 QBD 476; 53 LT 268.

40. *Doherty v. Allman*, (1878) 3 AC 709; 39 LT 129.

41. *U.P. Avas Vikas v. N.N. Rajgopala*, (1989) All WC 494.

Though in case of waste or ouster an injunction may be granted against the manager of a joint Hindu Family at the instance of the Coparcener, but nonetheless a blanket injunction restraining permanently from alienating the property of the Joint Hindu Family, even in case of a legal necessity, cannot be granted.⁴²

Once a perpetual injunction is granted and becoming final, any attempt to circumvent the same cannot be permitted. Its non-compliance would be a continuing disobedience, entailing penal consequences.⁴³

While granting the same, the court will consider the following and satisfy itself as to the conditions laid down in Section 38(3). Where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion, where the invasion is such that compensation in money would not afford adequate relief, and where injunction is necessary to prevent multiplicity of judicial proceedings, a perpetual injunction will be granted.

9. MANDATORY INJUNCTIONS (SECTIONS 39 AND 40)

These injunctions are granted to prevent the breach of an obligation and also for the purpose of compelling specific performance of certain acts which the court is capable of enforcing. The principles underlying these injunctions are the same as those underlying perpetual injunctions.⁴⁴

Two things have to be considered by the court before it proceeds to grant a mandatory injunction, (i) what acts are necessary to be done in order to prevent the breach of an obligation, and (ii) the requisite acts must be such as the court is capable of enforcing. Such acts may be of various kinds. It must be noted that a mandatory injunction can be granted even after the injury has been completed provided the plaintiff has not lost his right to relief by delay or by acquiescence.

Where A, by the construction of new buildings obstructs light 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 obstructs B's light.

Section 40 provides that in a suit for perpetual injunction (Section 38) or mandatory injunction (Section 39) the plaintiff may claim damages either in addition to or in substitution for such injunction but the plaintiff must demand it. It rests within the discretion of the court to allow the plaintiff to amend his plaint for this purpose at any stage of the proceedings, but in so allowing it may impose just and equitable terms on the plaintiff. Once his suit to prevent the breach abovesaid has been dismissed, that will bar his right to sue for damages for such breach, as provided by the section.

42. *Sunil Kumar v. Ram Prakash*, (1988) 2 SCC 77: AIR 1988 SC 576: (1988) 1 HLR 573.

43. *Jai Dayal v. Krishan Lal Garg*, (1996) 11 SCC 588.

44. *Smith v. Smith*, 1875 LR 20 Eq 500: 32 LT 487.

10. IN WHAT CASES GRANTED

Looking to the list of twenty-six [(a) to (z)] examples as appended to the unamended Specific Relief Act, 1877, Section 54, it will be clear that in a variety of cases injunctions are available, as (i) when there is a breach of an obligation, either arising from contract or (ii) arising from a tort, (iii) in case of a breach of trust, or (iv) in case of a breach of other obligations. In this connection the observations and revelations of the Karnataka High Court⁴⁵ are very valuable in that whenever a right exists or is created by contract, by ownership of property or otherwise, cognizable by law, an injunction will be issued to protect a violation of that right and the restraining power of the court extend through the whole range of rights and duties recognised by law and would be applied to every case of intended violation unless there are other reasons of policy or expediency which control and limit its exercise.

(a) *To maintain status quo*.—Mainly, the object of an injunction is to maintain status quo ante. This is achieved by interlocutory or temporary and mandatory injunction. This we saw before while discussing the difference between temporary and perpetual injunction.

(b) *To restrain judicial proceedings*.—The English law, before 1873, granted “common injunctions” to restrain proceedings opposed to principles of equity, started in Common Law courts. This it did on the extension of the principle contained in the maxim “equity acts *in personam*”. Equity had thus a longer arm than that of the Common Law and it used this device to restrain unconscientious proceedings even if it were started in a foreign court when an action on the same matter was pending in an English court. The rest of the injunctions granted by courts of equity were termed as “Special injunctions”. The Judicature Act, 1925, Section 41 enacts to this purpose and in result the High Court has still power to restrain the proceedings in a court inferior to it. In India, we have no separate courts and the question of ‘common’ injunction therefore does not arise. However, *to restrain the multiplicity of judicial proceedings*, Section 10 of the Civil Procedure Code and Section 38 of the Specific Relief Act make provisions. The object of Section 10 of the C.P.C. is to prevent courts of concurrent jurisdiction from *simultaneously* trying two *parallel* suits in respect of the same matter in issue. For example, *B* residing at Calcutta has an agent *A* at Calicut employed to sell his goods there. *A* sues *B* in Calicut claiming a balance due upon an account in respect of dealings between him and *B*. During the pendency of the suit in the Calicut court, *B* institutes a suit against *A* in Calcutta for an account and for damages caused by *A*'s alleged negligence. Here both the suits are between the same parties and the matter in issue in *B*'s suit is directly and substantially in issue in *A*'s suit. The Calicut court being a court wherein a suit for the purpose is instituted prior in point of time, that suit alone must be proceeded with. Proceedings with the Calcutta court must therefore be stayed. The section applies to courts in India and a suit

45. *Bhawarilal v. S. Jaichand*, AIR 1975 Kant 122, 123: ILR 1975 Kant 127.

in a foreign court does not provide a ground for staying a subsequent suit in a court in India.⁴⁶

(c) *To prevent breach of a duty or an obligation.*—(i) *Contractual Obligations.*—Many cases of injunction fall under this category. In this class of cases, obligations arise by express or implied agreement, i.e., by a contract between the parties. While granting an injunction under Section 38 and Section 42 the court will look to the provision under Section 41(e) also wherein it is expressly stated again as under Section 38(2), that in such cases the court is guided by the rules in Chapter II regarding specific performance of contracts. That is to say, (1) no injunction can be granted in case of contracts, the specific performance of which cannot be granted. However, Section 42 allows it in certain cases. Accordingly, those contracts could be ordered to be specifically performed wherein money compensation is not an adequate relief; and such cases are those where the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property. Perpetual injunctions will be granted in such cases. Conversely, where the breach is such as can be compensated by money, injunction will be refused. Similarly, contracts involving personal skill, violation, etc., and those contracts the specific performance whereof gain for the plaintiff an unfair advantage over the defendant and indefinite contracts will not be specifically enforced and consequently no injunction would be granted. (2) But an injunction can be granted against a person who aids a breach of contract.⁴⁷ (3) Injunction, as follows from Section 38(2) and (3), will be granted in almost all cases falling under clause 3(a) to 3(d) where the plaintiff proves his right to or enjoyment of the property and its breach, actual or threatened, by the defendant. Consequently, against the breach of a patent right, copyright and trade mark⁴⁸, it is granted as it is a breach of property right. Against libel, wrongful expulsion from a club-membership⁴⁹, for invasion of airspace and continuing trespass⁵⁰, for causing injury to plaintiff⁵¹, for causing him annoyance⁵², for breach of easementary rights⁵³ and for wrongful exclusion from the affairs of partnership, injunction will be granted. For breach of trust and waste of property and against prevention of crime, where the act involves injury to property injunction, can be granted.

Injunction to Perform Negative Agreements (Section 42).—A contract may contain positive as well as negative terms. When the question of specific performance is raised it becomes important to discuss whether all the terms of a contract will be specifically enforced or only the positive or negative terms. Section 42 solves this problem. For example, A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere without his

46. See Mulla: *Civil Procedure Code*, p. 20 and also O. 41, R. 5 for stay of execution proceedings.

47. *Rookes v. Barnard*, 1964 AC 1129; (1964) 1 All ER 367 (HL).

48. *Exite Laboratories v. A.A. Products (Ind.)*, AIR 1989 NOC 218 (Del).

49. *Lawlor v. Union of Post Office Workers*, 1965 Ch 712; (1965) 1 All ER 353 (Ch D).

50. *Moolchand v. Chhoga*, AIR 1963 Raj 25.

51. *Darshan Ram v. Nazar Ram*, AIR 1989 P&H 253.

52. *St. Joseph Church v. Velu*, AIR 1989 NOC 124 (Ker).

53. *Prem Devi v. Sohanlal*, AIR 1989 NOC 176 (Raj).

written permission. Thereafter, A makes a breach of the contract. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.⁵⁴

Against this judgment there has been much criticism and the English authorities have distinctly refused to go so far, saying that an affirmative agreement does not of itself imply for this purpose a negative agreement to do nothing inconsistent with it⁵⁵; and whether an express agreement is affirmative or negative is a matter of substance and not of verbal form.⁵⁶

In India, in the case of negative covenants, even in cases where the service is not of special or specialised character, injunctions are granted in suitable cases.⁵⁷ In *Vinod Chandra Hiralal Gandhi v. Vivekanand Mills Ltd.*⁵⁸, the Gujārat High Court has held that a negative covenant must be distinct and a mere affirmative stipulation is insufficient to comply with such a negative term. Consequently, a term in a contract of employment to serve for a particular number of years does not imply not serving anyone else during that period. But the Madras High Court has differed from this view.⁵⁹ But one thing has to be noted here that the remedy of injunction is discretionary and cannot be claimed as a matter of right. Where the plaintiff has entered into a contract under circumstances which give him an unfair advantage over the defendant within the meaning of Section 20(2)(a), injunction will not be granted.⁶⁰ Moreover, no injunction will be granted in case of an express negative covenant relating to contracts for personal service if its effect is to compel the performance of the service or to remain idle.⁶¹

It must be said therefore that in India provisions of Section 42 are far more ahead of the English principle as expressed in *Lumley v. Wagner*. It does not require a negative agreement to be express as in *Lumley v. Wagner*. Such an agreement may be implied as in *Burn & Co. v. McDonald*⁶², wherein the defendant agreed diligently and to the best of his ability to devote himself to the duties incumbent on him as a draftsman etc. for a period of five years. It was held that though there was no negative condition in terms in the contract, a negative covenant could properly be implied under this section and an injunction to restrain the defendant from serving any other person during the period was granted.

54. *Lumley v. Wagner*, (1852) 1 De GM&G 604; 22 LJ Ch 898.

55. *Whitewood Chemical Co. v. Hardman*, (1891) 2 Ch 416; 64 LT 716.

56. *Metropolitan Electric Supply Co. Ltd. v. Ginder*, (1901) 2 Ch 799; 84 LT 818.

57. *Sunilchand C. Mazumdar v. Aryodaya Spg. & Wvg. Mills Co. Ltd.*, AIR 1964 Guj 115; ILR 1963 Guj 891.

58. AIR 1967 Guj 255.

59. *Mac Laboratories (P) Ltd. v. V.R. Nathan*, (1967) 1 Mad LJ 353 cf. *V.N. Deshpande v. Arvind Mills Co. Ltd.*, ILR 1946 Bom 89; AIR 1946 Bom 423.

60. *Callianji Harjivan v. Narsi Tricum*, ILR (1895) 19 Bom 764.

61. Pollock and Mulla: *Indian Contract Act and Specific Relief Act*, pp. 963-964. See also *Lalbhai Dalpatbhai & Co. v. Chittaranjan Chandulal Pandya*, AIR 1966 Guj 189; *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd.*, AIR 1967 SC 1098, 1104.

62. ILR (1909) 36 Cal 354; 1 IC 829.

Even in cases not arising out of contracts of personal service negative stipulations have been implied and injunctions granted. But it all depends upon the Court's discretion and considerations of fairness, as expressed in a value-judgment by Bhagwati, J. in *Lalbai Dalpatbhai & Co. v. Chittaranjan Chandulal Pandya*.⁶³

Summing up the topic we may say that (i) 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 court may be unable to enforce the positive or affirmative part of it by specific performance because of personal service or qualifications etc. required for its performance. (ii) But the court will enforce the negative agreement not to do a certain act. (iii) As per English law, the negative part could be enforced only if it is clear and distinct as was the case in *Lumley v. Wagner*, but (iv) if the terms are implied injunction cannot be granted. That is to say, in England if the negative terms are implied in the positive terms of a contract, injunction for the breach of a negative term cannot be given. This is the limit of the English law and the courts there, are not prepared to go further. (v) But in India Section 42 of the Specific Relief Act goes further than this and provides that "the circumstance that the court is unable to compel the specific performance of the affirmative agreement shall not preclude the court from granting an injunction to perform negative agreement", and the negative terms may be express (as insisted upon by English law) or it may be implied (as provided by our law).⁶⁴ This is the present situation and the solution finally rests within the court's discretion.

(ii) *Obligations arising under General Law.*—In this class one comes across (1) cases regarding obligations arising under a trust, (2) obligations arising out of a breach which amounts to a tort which in turn includes a number of civil wrongs⁶⁵, and (3) any other obligation legal or equitable.

(1) *Trust obligations:* As we have seen in previous chapters a trust is a matter of obligation and the duty lies heavily on a trustee who undertakes the responsibilities that he should not make a breach of trust. A trustee may consequently be restrained by an injunction from selling trust property where it is not necessary to do or where he is not authorised by law or by an instrument of trust. In such cases the question of adequate compensation for the breach complained of may not arise. A breach of confidence can well be restrained as was ruled in a number of English and Indian cases. As expressed by Hanbury⁶⁶, there are examples of the issue of an injunction to restrain a breach of an equitable obligation. Trustees have been restrained from distributing an estate inconsistently with the terms of the instrument⁶⁷ or from selling for a price

63. AIR 1966 Guj 189. See also *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd.*, AIR 1967 SC 1098.

64. *Burn & Co. v. McDonald*, ILR (1909) 36 Cal 354: 1 IC 829.

65. Torts affect a person, his reputation and his property. There are also torts affecting both a person and his property.

66. *Modern Equity*, 9th edn., 1969, pp. 74-75.

67. *Fox v. Fox*, (1870) IR 11 Eq 142: 23 LT 584.

below that offered firmly by a prospective purchaser⁶⁸ and an injunction was granted to restrain a bankrupt executor from acting⁶⁹ and to restrain the publication by students of the unpublished lectures of a university professor⁷⁰, and at the instance of a shareholder to restrain a company from disposing of an exceptionally large sum for the benefit of employees.⁷¹ Old Section 54 of the Specific Relief Act, 1877, illustrations (b) to (h) supply enough like examples as where an injunction can be issued for a threatened breach of trust against the trustees, and against the directors of a company paying dividend out of capital or borrowed money or when they undertake a new adventure in a different line of business, against an executor's misconduct and against an advocate threatening to reveal his client's⁷² secret.

(2) *Civil wrongs or Torts*: As Maitland remarks, "a very large part of the whole province of tort is a proper field for injunction. I should say that the only torts which lie outside the field of injunctions are assault and battery, false imprisonment and malicious prosecution. I do not think that an injunction has been used or could be used to prevent these torts, which if they be torts will also at least in most cases be crimes. Here there are other remedies. If you go in fear of a man you can have him bound over to keep the peace, while if you are wrongfully imprisoned the writ of habeas corpus with its rapid procedure should serve your turn. A civil court again must not prohibit a man from instituting criminal proceedings; the Attorney General's *nolle prosequi* should be sufficient preventive check on criminal of an obviously vexatious kind".⁷³ Nuisance⁷⁴, trespass, waste of property and defamation in this connection are the fields wherein this remedy is often resorted to. Generally damages are recovered but where necessary, in suitable cases, injunctions can be availed of as a safeguard against future wrongs i.e., *quia timet action*.

(3) *Any other obligation Legal or Equitable*: Under this class may be included the obligations arising by virtue of membership of an association. Thus injunctions have been granted to professional men who have been dismissed contrary to the rules of their profession, though usually only where improper motive or bad faith can be shown⁷⁵ and to members expelled by social clubs. In the latter case, however, the courts seem prepared to interfere not only where rules have been broken, but also where a club has acted in breach of natural justice. In *Labouchere case*⁷⁶ the general meeting of a club, summoned without

68. *Buttle v. Saunders*, (1950) 2 All ER 193 (Ch D).

69. *Bowen v. Phillips*, (1897) 1 Ch 174: 75 LT 628.

70. *Caird v. Sime*, (1887) 12 AC 326: 57 LT 634 (HL).

71. *Parke v. Daily News Ltd.*, (1961) 1 WLR 493: (1961) 1 All ER 695 (Ch. D).

72. *Fraser v. Evans*, (1969) 1 All ER 8: (1969) 1 QB 349 (CA); *District Board v. Kailash Nath Kapoor*, ILR 1946 All 21: AIR 1946 All 234; *National Broach & Machine Co. v. Churchill, Gear Machines Ltd.*, (1965) 2 All ER 961 (CA).

73. Maitland: *Lectures on Equity*, 1969, p. 325.

74. *Darshan Ram v. Nazar Ram*, AIR 1989 P&H 253; *St. Joseph Church v. Velu*, AIR 1989 NOC 124 (Ker).

75. *Weinberger v. Inglis*, 1919 AC 606: 121 LT 65 (HL).

76. *Labouchere v. Wharnccliffe (Earl)*, (1879) 13 Ch D 346: 41 LT 638; cf. *Dawkins v. Antrobus*, (1881) 17 Ch D 615: 44 LT 557 and see *Young v. Ladies' Imperial Club*, (1920) 2 KB 523:

proper notice, expelled the plaintiff without full inquiry, without giving him notice of any definite charge and by a resolution carried by an insufficient majority. The court granted an injunction against such purported expulsion.⁷⁷ In such cases important considerations that weigh with the court granting injunction are those incorporated in clause (3)(b), (c) and (d) of Section 38.

11. INJUNCTION WHEN REFUSED (SECTION 41)

The provisions of S. 41 in this regard are clear. As observed in *Cotton Corporation of India Ltd. case*⁷⁸, the equitable principle underlying Section 41(b) is that access to the Court in search of justice according to law is the right of a person who complains of infringement of his legally protected interest and afortiori therefore, no other court by its action impede access to justice, except the Superior Court, which can injunct a person by restraining him from instituting or prosecuting a proceeding before a Subordinate Court. Section 41(b) was enacted in order to avoid multiplicity of proceedings. It must therefore receive such interpretation as would advance the intendment and thwart the mischief it was intended to suppress and keep the path of access to justice through court unobstructed. S. 41(b) covers perpetual as well as temporary injunctions.⁷⁹

In the following cases injunctions are refused:

- (i) to restrain judicial proceedings,
- (ii) to stay proceeding in a court not subordinate to the one issuing injunction,
- (iii) to stay proceedings in a criminal court by civil court,
- (iv) to restrain persons from applying to any legislative body,
- (v) to prevent breach of a contract not specifically enforceable,
- (vi) to restrain on act which is not clearly a nuisance,
- (vii) to prevent a continuing breach wherein plaintiff has acquiesced,
- (viii) where plaintiff has equally efficacious remedy,
- (ix) where plaintiff's conduct disentitles him, and
- (x) where the plaintiff has no personal interest in the matter.

Section 43 is an amendment to the Arbitration Act and Section 44 repeals the Specific Relief Act, 1877.

123 LT 191 (CA) and *Lawlor v. Union of Post Office Workers*, 1965 Ch 712: (1965) 1 All ER 353 (Ch D).

77. Hanbury: *Modern Equity*, pp. 80-81.

78. *Cotton Corporation of India Ltd. v. United Industrial Bk. Ltd.*, (1983) 4 SCC 625: AIR 1983 SC 1272.

79. *Ibid.*

Grant of injunction may be refused where the defendant's act cannot be construed as an act of dispossession.⁸⁰

A civil court has no jurisdiction to try and adjudicate upon an industrial dispute, if it concerned enforcement of certain rights or liability created only under the Industrial Disputes Act. It therefore cannot grant an injunction.⁸¹

80. *M.S. Baliga (decd. by L.Rs.) v. Mangalore City Corpn.*, AIR 1998 Kant 76.

81. *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke*, (1976) 1 SCC 496; 1976 SCC (L&S) 70; AIR 1975 SC 2238.