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YOUNG LEGAL TALENT AT THE



UNDER 40 2021
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RISING Stars



EDITION



SPECIFIC PERFORMANCE OF CONTRACTS IN NEW INDIA

UNLEARNING OLD CONCEPTS



The exceptional use of the power to grant specific performance and/or injunction against termination seems to be attributable to the fact that the jurisprudence and law relating to specific performance has remained static and settled for decades

The Specific Relief Act, 1963 ("SRA") was amended with effect from 1st October 2018¹ ("2018 Amendment").

THE OLD REGIME

Prior to the 2018 Amendment, SRA conferred wide discretion upon courts to enforce or to refuse specific performance of contracts². This discretion received further impetus from Section 41(e) as per which an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced.

¹ Specific Relief (Amendment) Act, 2018 [Act 18 of 2018]

² Sections 10 & 14 (before the 2018 Amendment).

Consequently, in a majority of cases, courts would award damages as a rule and grant specific performance or an injunction against termination as an exception. Broadly, courts often exercised this discretion to refuse specific performance in cases (i) when the contract was, in its nature determinable; and (ii) when compensation in money was an adequate relief to remedy non-performance of the contract.

Indeed, some exceptions were carved out in cases where the contract contained an element of public interest, or if the party terminating the contract was a government entity which had acted arbitrarily or when the contract was for a unique commodity/project³. However, by and large, the exercise of discretion to grant specific performance was rarely used.

LEGISLATURE STEPS IN

The wide discretion to refuse specific performance was, as viewed by the legislature, adversely affecting commercial activities such as public private partnerships, foreign direct investments and public utilities infrastructure developments etc. These activities had prompted extensive reforms in related laws to facilitate enforcement of contracts.

The legislature thus felt that SRA was not in tune with the rapid economic growth happening in the country. It therefore, introduced the 2018 Amendment to do away with the wider discretion of courts and to make specific performance of contract a general rule than exception (subject to certain limited grounds)⁴.

THE NEW REGIME

By way of the 2018 Amendment, the legislature introduced significant changes in Sections 10 & 14 of SRA⁵.

- Section 10 was amended to do away with the discretion of courts; and to make specific performance a rule (except if covered under Sections 11 (2), 14 & 16); and
- Section 14 was amended such that 'a contract for the non-performance of which compensation in money is an adequate relief' no longer remained a ground to refuse specific performance.

WORKING OF THE NEW PROVISIONS

Despite the amendments in Sections 10 and 14, specific performance of a contract or an injunction against termination are frequently opposed on the premise that compensation in money is an adequate relief – even though this ground is no longer available.

Additionally, a ground that 'contract is determinable' continues to be employed like a cliché to oppose an injunction against termination or to oppose specific performance.

“Despite the amendments in Sections 10 and 14 of SRA, specific performance of a contract or an injunction against termination are frequently opposed on the premise that compensation in money is an adequate relief – even though this ground is no longer available. Additionally, a ground that ‘contract is determinable’ continues to be employed like a cliché to oppose an injunction against termination or to oppose specific performance.”

The decisions in Amritsar Gas⁶, Classic Motors⁷ and Rajasthan Breweries⁸, though rendered decades ago, are so deeply embedded in our jurisprudence that the moment there is a prayer for specific performance or a prayer for injunction against termination, these decisions are routinely cited to oppose these prayers.

In Amritsar Gas, the Hon'ble Supreme Court set aside an arbitral award which directed restoration of a distributorship agreement on the ground that the agreement was in its nature determinable and that compensation would constitute an adequate remedy.

³ Atlas Interactive (India) Pvt Ltd v. BSNL: 126 (2006) DLT 504; Pioneer publicity Corporation v. Delhi Transport Corporation: 103 (2003) DLT 442; Old World Hospitality v. Indian Habitat Center 73 (1998) DLT 374; KSL & Industries Ltd. vs. National Textiles Corporation Ltd. : 2012 SCC Online Del 4189

⁴ The Statement of Object & Reasons in the Specific Relief Amendment Bill,

⁵ Though some other provisions were also amended, for the purposes of the present article and theme, only these provisions are being highlighted.

⁶ Indian Oil Corporation Ltd. v. Amritsar Gas Service: (1991) 1 SCC 533

⁷ Classic Motors Ltd. v. Maruti Udyog Ltd.: (1997) 65 DLT 166

⁸ Rajasthan Breweries Ltd. v. Stroh Brewery Company : AIR 2000 Delhi 450



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In *Classic Motors*, the Hon'ble Delhi High Court held that all private commercial contracts, by their very nature, could be terminated even without cause, by giving reasonable notice.

In *Rajasthan Breweries*, the Hon'ble Delhi High Court (after noting the judgments in *Amritsar Gas & Classic Motors*), held that even in the absence of a specific clause authorizing either party to terminate the agreement (on the happening of the events specified therein), from the very nature of the agreement (which is private commercial transaction), the same could be terminated without assigning any reason by simply serving a reasonable notice.

The result of the above judgments was that all private commercial agreements could be terminated with or without any 'cause' or 'clause'. And this facet was (and is continued to be) used to oppose an injunction against termination or to oppose specific performance on the ground that the contract is 'determinable'.

MEANING AND ESSENCE OF 'DETERMINABLE' CONTRACTS

The word 'determinable' is not defined in SRA. The Hon'ble Delhi High Court has held that the word 'determinable' used in SRA means a contract which can be put to an end⁹.

However, what is significant is that in SRA, the expression 'determinable' is qualified by the words 'in its nature'. Therefore, merely because a contract can be terminated should not mean that the contract is 'in its nature determinable'. This distinction has been recognized by the Hon'ble Bombay, Kerala and Madras High Courts¹⁰ by holding that 'a contract which is in its nature determinable', means that the contract is determinable at the sweet will of a party to it, that is to say without reference:

- to the other party; or
- to any breach committed by the other party; or
- to any eventuality or circumstance.

In other words, these courts have held that the expression 'in its nature determinable' contemplates a unilateral right in a party to a contract to determine the contract without assigning any reason or, for that matter, without having any reason. It is also held that if an agreement is determinable at the happening of an event or on the occurrence of an exigency, then it is on such event or exigency happening or occurring alone that the contract would stand determined¹¹.

In contrast, the Hon'ble Delhi High Court has held that any contract that could be terminated (with or without cause, breach or eventuality) would be a determinable contract as per Section 14 of SRA¹².

⁹ *Turnaround Logistics (P) Ltd. v. Jet Airways (India) Ltd.*: 2006 SCC Online Del 1872 & *Kashyap's v. Bata India Ltd.* (2013) 137 DRJ 39

¹⁰ *Narendra Hirawat vs Sholay Media Entertainment Pvt. Ltd.*: (2020) 5 Mah LJ 173; *T.O. Abraham v. Jose Thomas*, (2018) 1 KLJ 128; *Jumbo World Holdings Limited vs. Embassy Property Developments Private Limited*: 2020 SCC OnLine Mad 61

¹¹ *T.O. Abraham v. Jose Thomas*, (2018) 1 KLJ 128

Use of the words 'in its nature' before determinable by the legislature must hold some significance. Contracts that can be terminated at will/ convenience or by simply giving notice should be the contracts that are by their very nature determinable. But contracts which can be terminated only for cause or on happening of specific events should not generally be treated as contracts which are 'in their nature' determinable.

In the backdrop of the purpose and intent of the 2018 Amendment – i.e. to make specific performance the rule and not an exception - the view thus taken by the Hon'ble Bombay, Kerala and Madras High Courts seems more reasonable and appropriate. Else, it would be impossible to obtain the relief of specific performance, no matter how deserving the facts.

CONCLUSION

The exceptional use of the power to grant specific performance and/or injunction against termination seems to be attributable to the fact that the jurisprudence and law relating to specific performance has remained static and settled for decades. A vast majority of us are conditioned by our training

and long practised approach that (i) specific performance will not be granted if compensation in money is an adequate relief; and (ii) any contract which can be terminated is 'determinable' and therefore not specifically enforceable. It is time we unlearn these concepts and view the remedy of specific performance and injunction on termination with a fresh perspective and outside the clutches of the past. It is only then that contracts will have the sanctity they deserve. And it is only then that the parties will have the confidence to conduct business and make significant investments in India.

¹² Beoworld Pvt. Ltd. v. Bang & Olufsen Expansion: I.A. Nos. 3837 and 4434/2020 in CS (COMM) 122/2020 decided on 28 July 2020. See also: Turnaround Logistics (P) Ltd. v. Jet Airways (India) Ltd: 2006 SCC Online Del 1872 & Kashyap's v. Bata India Ltd. (2013) 137 DRJ 39. Pertinently, the decisions in TO Abraham & Narendra Hirawat, though cited were not accepted by the Hon'ble Delhi High Court in the Beoworld judgment.

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