



## India: Recent Amendments To The Specific Relief Act, 1963: An Analysis

Last Updated: 16 October 2019

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### Short Title (Abstract)

Guided by established principles of Common Law that view damages as the presumptive remedy and specific performance as an alternate, discretionary remedy, the Specific Relief Act 1963<sup>1</sup> ('Act') has sought to protect civil and contractual rights in the event of breach of contract. However, the new Amended Act<sup>2</sup> (introduced in October 2018), seemingly deviating from these principles in an attempt to create a more business-friendly and secure environment, makes a significant change worthy of speculation: It seeks to enforce specific performance as a rule and damages as an alternative remedy. Moreover, in the absence of transitional or savings provisions, the Amended Act has sparked debate regarding its nature (Substantive v. Procedural) and application (Retrospective v. Prospective), which is significant in order to assess the real – time impact of the Amendment.

### Introduction

Certain conceptual differences exist between legal systems which, *inter alia* influence the principles guiding the remedies available upon breach of contract. While damages and specific performance are both remedies available upon breach, Common Law views the former as 'substitutional' remedy and the latter as 'specific' remedy granted by way of exception upon the exercise of judicial discretion.<sup>3</sup> In contrast, the presumptive remedy for breach under Civil Law systems is that of specific performance, which is encouraged and ensured using pressure tactics such as, by seizure of goods and delivery; or by imposing fine/imprisonment on the defaulting promisor; or by having the act performed by a third party at the expense of the defaulting promisor. Agreeably, the Common Law approach is meritorious in its own right,<sup>4</sup> however, it has been critiqued for failing to account for notions of contract sanctity and the resulting moral obligation to honour one's promise.<sup>5</sup>

It seems that the latter view is also shared by the Expert Committee, set up on 28 January 2016 by the Central Government to examine and suggest amendments to the Specific Relief Act, 1963. According to the 2016 Expert Committee Report, the Un-amended Act could no longer keep pace with the scale of India's rapid economic development and industrial expansion; extensive reforms are required to facilitate enforcement of contracts and speedy settlements, which are essential to the creation of a business-friendly environment.<sup>6</sup> Thus, by doing away with discretionary powers of the Court, enforcing specific performance and allowing for substituted performance, the Amendment resultantly increases the moral obligation to uphold one's promise in order to secure the aforementioned goals.

Through the course of this article, we shall trace the development of the laws regulating specific relief; undertake a comparative analysis of the nature and scope of the Amended Act vis-à-vis the un-Amended Act; and discuss the implications and application of the Amended Act, in order to assess the Amended Act's ability to meet the desired objectives.

### Historical development of the law regulating Specific Relief

In contrast to damages, which provide pecuniary compensation for non-performance or breach, Specific Performance is an equitable relief that enforces on the promisor the duty of doing what they promised to do. Due to several reasons, there was a restricted expansion of the remedy of Specific Performance under Common Law; The erstwhile English Equity Courts recognised specific performance as a normal remedy only in limited cases e.g. for immovable property (sale or letting of land)

and an exceptional remedy for all other forms of contracts. This doctrine of specific performance was inherited by the Specific Relief Act, 1877, which, according to the 9th Law Commission Report, 1958 on the Specific Relief Act, 1877, was "originally drafted upon the lines of the draft New York Civil Code, 1862 and its main provisions embody the doctrines evolved by the English Equity Courts."<sup>7</sup>

The 9th Law Commission Report, 1958 sought to remove some of the weaknesses of Common Law that had been retained by the 1877 Act, and suggested certain substantive, but mainly linguistic, changes to the legislation. Amongst the former included *inter alia* the categorisation of equitable remedies made available by the Act (such as recovery of possession of property, declaratory decrees, injunctions etc.), distinguishing specific performance from specific delivery, specification of the cases wherein specific performance would be enforceable and recognition of rights of affected third-parties to sue in exceptional circumstances. The Specific Relief Act, 1963 was promulgated on the basis of these suggestions.

While recommendations for changes to Specific Relief Act, 1963 were called for by the 147th Law Commission Report, 1993<sup>8</sup>, it was, in fact, the recommendations of the 2016 Expert Committee Report that were mainly utilised in bringing about the Amendment [Specific Relief (Amendment) Act, 2018<sup>9</sup>]. Consequently, there is a paradigm shift in approach from damages being the rule and specific performance being the exception, to specific performance being the rule, and damages being the alternate remedy.

### Nature and Scope of Amendment(s)

As per the Expert Committee Report, the Un-amended Act was not in tune with the rapid economic growth and industrial expansion happening in our country, which prompted business-friendly reforms to facilitate enforcement of contracts and settlement of disputes in speedy manner. Thus, the Amended Act *inter alia* does away with the wide discretionary powers of the judiciary, enforces specific performance and introduces substituted performance.

The Un-amended Act provided for specific performance as a limited right, given by a court at its discretion, in the following circumstances: (i) when monetary compensation was inadequate; or (ii) when monetary compensation could not be easily ascertained (with specific exceptions), as per s.10 of the Un-amended Act. However, s.10 has now been amended to remove these conditions as well as the discretionary powers of the Court and enforce specific performance as the general rule subject to provisions contained in s.11(2), s.14 and s.16 of the Amended Act.

The Amended Act also provides for an alternative remedy of substituted performance. S.14 and s.20 of the Amended Act give an affected party (i.e. a party whose contract has not been performed by the other party) the option to arrange for performance of the contract by a third party or by his own agency (substituted performance), and seek compensation from the party who failed to perform his part of contract.

An underlying assumption of the Expert Committee, reflected by the amendments in the Act pertaining particularly to specific performance, is that an increased strictness exercised over promisors' performance shall act as a deterrent to uncertain and undesirable contractual behaviour; Greater certainty of contract shall contribute towards making India a more attractive destination for foreign and indigenous investments, which shall in turn help boost the economy. Thus, the Amended Act corrects the weaknesses inherited by Common Law: It seeks to observe contract sanctity, through minimising judicial intervention and adapting a more formalistic approach.<sup>10</sup>

### Application of the amendments

Generally, transitional/savings provisions are required "to make special provision for the application of legislation to circumstances which exist at the time when the legislation comes into force."<sup>11</sup> In the absence of such provisions in the Amended Act, uncertainty surrounds the question of extent of remedial rights of individual contractors, and a debate arises regarding the prospective vs. retrospective application of the Specific Relief (Amendment) Act, 2018.

The general position of law is that amendments to substantive law do not apply to pending proceedings and apply only prospectively, while amendments to procedural law can apply to pending proceedings (see *KS Paripoornan v. State of Kerala*, (1994) 5 SCC 593 and *Garikapati Veeraya v. N. Subiah Choudhary*, 1957 SCR 488). Hence, an important element in the examination of whether the Amendment is prospective or retrospective in its application is to understand whether the amendments are substantive in nature, i.e., if they affect the vested right of any party, or are procedural, i.e., adjective and supplemental in nature.

The judgement of the Division Bench in *Hazara Singh v. Custodian of Evacuee Property AIR 1960 P&H 133* sought to distinguish procedural law from substantive and laid down the basis for the retrospective application of procedural law. It was held that "*Statutes relating to procedure form another exception to the general rule that statutes are to be construed prospectively only. Procedural law includes within its meaning whatever is embraced by the three technical terms "pleading", "evidence" and "practice." Thus, statutes which change the rules of pleading, change the rule as to parties to actions, make, modify and repeal rules of evidence, and grant or transfer jurisdiction of cases may be construed retrospectively.*" Further, "*A statute or amendment which furnishes a new remedy without disturbing vested rights or which prescribes a new procedure,*

*applies not only to actions which may be commenced after its enactment but also to actions which have already accrued or which are already pending. Its retrospective operation is not obnoxious to the spirit and policy of the law."*

The view that Specific Relief is a form of judicial redress and thus, belongs to the law of procedure [*Moulvi Ali Hossain Mian v Rajkumar Haldar* AIR 1943 Cal 417<sup>12</sup>; *Hanumantrao Deskhmukh v. Krishnabai (1986) 1 Bom CR 50*], is one that has been repeatedly held by the Indian courts. Further, amendments to the Specific Relief Act, 1877 (which led to the promulgation of Specific Relief Act, 1963) have also been held to apply retrospectively by virtue of the Act being a procedural law; In *Radheshyam Kamila v Kiran Bala* AIR 1971 Cal 341, it was held that "after the enforcement of the 1963 Act, the 1963 Act would apply to pending proceedings instituted under the Specific Relief Act 1877."

In *Adhunik Steels Ltd. v. Orissa Manganese & Minerals Pvt. Ltd. (2007) 7 SCC 125*, The Supreme Court of India ascribed two reasons to the procedural status of the Specific Relief Act, 1963:

- a. The 1963 Act was intended to be "an Act to define and amend the law relating to certain kinds of specific reliefs" and;
- b. Specific relief is a form of judicial redress. The Court noted that since the 1963 Act purports to primarily define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts, the Act would not deal with remedies connected with compensatory reliefs except to a limited and incidental extent.

While some may argue that since the Un-amended Act placed the obligation on the plaintiff to fulfil certain conditions before attempting to seek specific performance, the plaintiff's obligation may be construed to be the defendant's corresponding privilege or right. Thus, as per s.6 of the General Clauses Act, the Specific Relief (Amendment) Act, 2018 would affect a substantive right and have a prospective, rather than retrospective affect. However, as argued by *Pollock and Mulla*, "the mere right to take advantage of the provisions of an Act is not an accrued right".<sup>13</sup> This view has also been reflected in the judgement of *Hazara Singh v. Custodian of Evacuee Property* AIR 1960 P&H 133, wherein it was held that "*Remedial statutes do not create new or take away vested rights, but they give a party a remedy where he had none or a different one before. They operate in furtherance of the remedy or confirmation of rights already existing. The right to a particular remedy is not a vested right.*" Thus, such an argument for the prospective application of the Amended act cannot hold.

Moreover, more recently, in *Church of North India v. Ashoke Biswas C.O. No. 863 of 2019* The Calcutta High Court sought to ascertain the applicability of the SRA Amendment to the facts of the case, wherein the Amendment came into force during pendency of the suit. In its ruling, it held that the language of section 14 of the 1963 Act indicates that the relevant date for determining the applicability of the Amendment would be the date of passing of the decree, since Section 14(1) commences with the phrase, "the following contracts cannot be specifically enforced..." Had the relevant date been that of filing the suit, the language of Section 14(1) would be something akin to: "no suit can be filed for specific performance of the following contracts ...." Hence, the 2018 Amendment was held to be applicable to the present case, thereby strengthening the case for its retrospective application.

Yet another distinct argument for the retrospective application of the Amended Act arises from the judgement in *Gottumukkala Venkata Krishnamraju v. Union of India 2018 SCC OnLine SC 1386*, which undertakes a literal interpretation of Statute, distinguishing between the terms "amendment" and "substitution" in amending acts, in so far as usage of the latter connotes an absolute obliteration of the old provision so as to enable a retrospective effect of the new provision: "*Ordinarily wherever the word 'substitute' or 'substitution' is used by the legislature, it has the effect of deleting the old provision and make the new provision operative....we do not think that it is a universal rule that the word 'substitution' necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps....However, the aforesaid general meaning is to be given effect to, unless it is found that legislature intended otherwise.*" It is pertinent to note that Sections 3 and 5 of the Specific Relief (Amendment) Act 2018 substitutes the old provision. Collectively viewing the judgements in *Gottumukkala* and *Church of North India*, in light of the absence of legislative intent proving otherwise, there seems to be a strong and lucid case for the retrospective application of the Amended Act.

## Conclusion

It is settled law that an amendment to a procedural enactment is always presumed and treated to have retrospective effect, except when intended otherwise, expressly or impliedly, through the legislation itself. In view of the above authorities, it is clear that Specific Relief Act and amendments thereto have to be viewed as **procedural**. Thus, Specific Relief (Amendment) Act, 2018 shall apply retrospectively i.e., to all actions after the date it came into force even if an action may have preceded its enforcement or be based on a claim of an anterior date.

While this may settle the debate on the more practical ramifications of the Act, the amendment does raise certain far-reaching, overarching questions. The Amendment signifies a move away from Common Law principles of remedies towards those of civil law system, wherein the presumptive remedy for breach is specific performance. Consequently, there is a restriction of judicial discretion and increase in codification of law. While increased codification of laws arguably increases certainty, it is also accompanied by the possible risk of hindering the development of the law – will, and if so, how shall the law accommodate for novel situations/grey areas with a limited judicial discretion?

Ultimately, only the reaction of economic players, foreign and indigenous, as well as that of the judiciary, in the time to follow shall be the measure of the Amendment's success in meeting its objectives of regulating contractual behaviour to create a more 'business-friendly' environment and keep pace with India's rapid economic and industrial expansion.

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## Footnotes

1. Specific Relief Act 1973
2. The Specific Relief Act 1973 as amended by the Specific Relief (Amendment) Act 2018
3. F. Pollock and D.F. Mulla, *The Indian Contract Act & Specific Reliefs Act* (Vol 2, 15th edn, LexisNexis 2017) 1828
4. For example, proponents of the theory of efficient breach, such as *Smith*, argue that sometimes it is economically efficient for contracts to be broken – thus, by limiting itself to damages, the law encourages parties to break the contract when the cost of performance is greater than the value of performance (see Stephen Smith, 'Performance, Punishment and the Nature of Contractual Obligation' [1997] *The Modern Law Review* 60(3), 360-377. Retrieved from <http://www.jstor.org/stable/1097241>)
5. Introductory note to Chapter 16 of the Restatement (2d) 'Contracts'
6. Government of India, Ministry of Law and Justice (Legislative Department), 'Report of the Expert Committee on the Specific Relief Act, 1963' (26 May 2016)
7. Law Commission of India, 'Report on the Specific Relief Act, 1877' (Report No. 9, 1958) Retrieved from <http://lawcommissionofindia.nic.in/1-50/Report9.pdf>
8. Law Commission of India, 'Report on the Specific Relief Act, 1963' (Report No. 147, 1993) Retrieved from <http://lawcommissionofindia.nic.in/101-169/Report147.pdf>
9. Enforced w.e.f. 01.10.2018 by Ministry of Law and Justice vide notification no. S.O. 4888(E) dated 19th September 2018
10. Theoretically, as argued by *C. Fried*, such a change would positively impact contractual behaviour as there's a consequent increase in the moral obligation on the promisor to uphold his promise.
11. H. Xanthaki, *Thornton's Legislative Drafting* ( 5th ed, Bloomsbury Professional, 2013)
12. n 3, 1771
13. n 3, 1781

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