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SPECIFIC RELIEF (AMENDMENT) ACT, 2018

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INTRODUCTION

The Specific Relief (Amendment) Act, 2018 (Amendment Act) was published in the official gazette on 1 August 2018. The Amendment Act has been introduced with the primary intent of introducing greater certainty in enforcement of contracts and enabling faster and easier enforcement of contracts and resolution of contractual disputes. The Amendment Act was introduced pursuant to the recommendations of the Expert Committee's Report on the Specific Relief Act, 1963 (SRA), which was constituted to suggest measures to ensure that the law relating to specific relief is made more business friendly and enhance the ease of doing business. Provisions of the Amendment Act will come into force on such dates as may be notified by the Central Government.

HIGHLIGHT OF THE AMENDMENT ACT

- Mandatory enforcement of contract by specific performance: Previously, specific performance of a contract was a remedy that courts had the discretion to grant, only when, (i) the actual damage caused due to the non-performance of the action could not be ascertained; or (ii) when monetary compensation would not be adequate relief for the non-performance of contract. However, the Amendment Act now makes it mandatory for a court to grant specific performance of a contract (including those relating to performance of an action agreed to be done in performance of a trust), unless: (i) a contract was made by a trustee in excess of his powers or in breach of trust; (ii) the contract for which specific performance is sought, falls with the categories of contracts specified in Section 14 of the SRA (*discussed below*); or (iii) specific performance is to be enforced in favour of a person who falls within the category of persons listed in Section 16 of the SRA (*discussed below*). Section 21 of the SRA has further been amended to clarify that specific relief can be sought in addition to compensation and does not have to be in substitution of specific performance.
- Contracts which cannot be specifically enforced: Section 14 of the SRA has now been amended to state that the following categories of contracts cannot be specifically enforced: (i) where an aggrieved party has obtained substituted performance of the contract (*as discussed below*); (ii) where the contract involves performance of a continuous duty which cannot be supervised by the court; (iii) where the contract is dependent on personal qualifications of an individual, such that enforcement of the material terms is not possible; and (iv) the contract is determinable by its nature.

- Persons in favour of whom specific performance cannot be enforced: Section 16 of the SRA has been amended to provide that specific performance cannot be enforced in favour of a person:
 - (i) who has obtained substituted performance of the contract (*as discussed below*);
 - (ii) who himself (a) has become incapable of performing the contract; (b) has violated essential terms of the contract; (c) has not performed his part of the contract; (d) acts in fraud, wilful variance and in subversion of the contract; or
 - (iii) who fails to prove that he has performed or has been ready and willing to perform the essential terms of the contract, other than those terms which were waived / prevented by the defendant.

The Amendment Act has also amended Section 16 of the SRA to suggest that a party seeking specific performance, only has to “prove” that such party has performed or has been ready and willing to perform the essential terms of the contract and an averment to such effect in the pleadings is no longer mandatory when seeking specific performance. Therefore, in case the courts can infer that a party seeking relief has performed or has been ready and willing to perform the essential terms of the contract, courts can still grant specific relief, even if the pleadings do not contain an averment to such effect.

- Substituted performance of contracts: Section 20 of the SRA now permits a party suffering from a breach of contract, to have the contract performed by a third-party or through its agent and recover the costs and expenses incurred in substituting such performance, from the defaulting party (unless agreed otherwise under the contract). However, before substituting such performance, the non-defaulting party will be required to provide a 30 days’ prior notice to the defaulting party, requiring the defaulting party to perform the contract within a specified time frame and notifying the defaulting party that the non-defaulting party intends to have the contract performed by substitution. In case a non-defaulting party exercises the option of such substituted performance, then, such party can no longer seek any specific performance of contract; although such party will still be entitled to claim damages from the defaulting party on account of the defaulting party’s breach of contract.
- Infrastructure projects: Pursuant to the Amendment Act, courts are not permitted to grant an injunction in respect of infrastructure projects (listed in the schedule to the Amendment Act), if such injunction would cause an impediment or delay in the progress or completion of the infrastructure project or interfere with related facility or services that are a part of such a project. The Amendment Act also mandates state governments to designate civil courts as special courts to try suits under the SRA pertaining to infrastructure project contracts. The aforesaid amendment is intended to minimise court intervention in infrastructure projects and to ensure that contracting parties do not wriggle out of contractual commitments, especially in large infrastructure projects where public interest is intrinsic.
- Expert opinion: The Amendment Act permits courts to engage experts on specific issues as determined by it, and the court *inter alia* has the power to direct persons to give documents, information and access for inspection, to the expert and also has the power to examine the expert or the expert’s report in open court. Also, courts can direct disputing parties to bear the fee payable to such expert, as it may appoint in relation to such proceedings.

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- Limited liability partnerships: The resulting limited liability partnership formed by the amalgamation of two limited liability partnerships, has been included as a party in favour of or against whom specific performance may be granted as a relief. This change merely seeks to update the SRA as similar provisions existed for amalgamating companies.
- Mandatory time period for disposal of suits: The Amendment Act provides that suits filed under the SRA are required to be disposed of within a period of 12 months from the date of service of summons, extendable for an aggregate period of 6 months for reasons to be recorded in writing.

COMMENT

The Amendment Act seeks to provide greater certainty in enforcement of contracts, by compulsorily requiring courts to grant relief of specific performance, except in specific identified circumstances. Additionally, mandating timely enforcement of contracts would aid in reducing time taken in enforcement of contracts in India.

As noted by the Expert Committee on the SRA, a decree of compensation does not compensate fully as the compensation is calculated with reference to the date of the breach and does not take into account the events after the breach and until the execution of the decree. In such a scenario, specific performance can give the aggrieved party the fullest relief possible.

While the Amendment Act intends to prevent contracting parties from avoiding performance of their contracts the Amendment Act continues to maintain the earlier position that contracts which are determinable by their nature, cannot be specifically enforced. Over the years, courts have interpreted that the mere presence of a termination provision in a contract, can mean that such a contract is determinable by their nature (and hence not specifically enforceable). It remains to be seen whether the existence of this provision even after the Amendment Act will impair its intended objective.

It would also be interesting to see if the jurisdiction of the special courts envisaged to be set up for adjudication of contract relating to infrastructure projects under the SRA would overlap with the jurisdiction of the commercial courts setup under the Commercial Courts Act, 2015 over commercial disputes relating to construction and infrastructure contracts.

The Amendment Act seeks to provide aggrieved parties with speedy relief by bringing in a time bound manner of redressal and the ability to choose their own remedy instead of leaving it to the discretion of the court.

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