



HARDSHIP & SUBSTITUTED PERFORMANCE AS DEFENCES AGAINST SPECIFIC PERFORMANCE: CRITIQUE OF THE RECENT DEVELOPMENTS

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Abstract For a long time, contract law in India has been regarded as being plagued with inefficient contract enforcement mechanisms. The consequence has been that projects remained incomplete for several years, thereby increasing project completion costs and fostering litigation. All these factors have resulted in a weak regime on contract enforcement. To address these deficiencies, the Government constituted an expert committee and based on the recommendations of the said committee, introduced amendments to the Specific Relief Act, 1963 which are now in force. The amended provisions enable the promisee obtain specific performance irrespective of legitimate situations where it is not possible for the promisor to perform or where substitutes are reasonably available. This paper argues that such a legal position will lead to unjust results for the promisors/contractors and that judicial interpretation should take into account their legitimate interests.

I. INTRODUCTION

Edward Fry in his epochal work on Specific Performance prophesied:

“It may be suggested that [] a perfect system of jurisprudence ought to enforce the actual performance of contracts of every kind and class, except only when there are circumstances which render such enforcement unnecessary or inexpedient, and that it ought to be assumed that every contract is

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specifically enforceable until the contrary be shown. But so broad a proposition has never, it is believed, been asserted by any of the judges of the court of chancery, or their successors in the high court of justice, though, if prophecy were the function of a law writer, it might be suggested that they will more and more approximate to such a rule”.¹

His prophesy has come true in India. The Specific Relief (Amendment) Act, 2018 (‘2018 Act’ or ‘Act’), which has been brought into force from October 1, 2018,² makes contracts specifically enforceable, excepting extraordinary circumstances.³

The 2018 Act makes far-reaching changes in the law on contract remedies. It provides a basket of remedies to a promisee whose contract has been breached. Before the enactment of the 2018 Act, specific performance was ordered by the court only as an exceptional remedy in respect of specific categories of agreements,⁴ and against specific parties.⁵ Specific performance, whose origins could be traced to equity in English law,⁶ was granted only at the discretion of the court.⁷ The 2018 Act does away with all these and modifies the law substantially so much that the Specific Relief Act, 1963 (‘Act’ or ‘1963 Act’) as amended hardly resembles English law.

¹ WILLIAM DONALDSON RAWLINS & EDWARD FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 21 (5th ed. 1911).

² Ministry of Law & Justice, Notification No. S.O. 4888(E) dated Sep. 19, 2018, <http://egazette.nic.in/WriteReadData/2018/189830.pdf> (last visited Nov. 8, 2018).

³ The Specific Relief Act, § 14 (1963), as amended reads: “*The following contracts cannot be specifically enforced, namely:*

- (a) *where a party to the contract has obtained substituted performance of contract in accordance with the provisions of S. 20;*
- (b) *a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;*
- (c) *a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and*
- (d) *a contract which is in its nature determinable.”*

⁴ The Specific Relief Act, § 14(1) (1963), as originally enacted read: “(1) *The following contracts cannot be specifically enforced, namely:*

- (a) *a contract for the non-performance of which compensation 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; and*
- (d) *a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.”*

⁵ The Specific Relief Act, § 16 (1963), as originally enacted in its relevant portions read: “*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.”*

⁶ NILIMA BHADBHADRE, POLLOCK AND MULLA, THE SPECIFIC RELIEF ACT 1963 4 (14th ed., 2015).

⁷ The Specific Relief Act § 20(1) (1963), as originally enacted, began with the phrase: “*The jurisdiction to decree specific performance is discretionary”*

For a long time, contract law in India has been regarded as being plagued with inefficient contract enforcement mechanisms. The consequence has been that projects remained incomplete for several years, thereby increasing project completion costs and fostering litigation.⁸ All these factors have resulted in a weak regime on contract enforcement.⁹

Although the amendments in the 2018 Act seek to address these problems, they completely ignore legitimate situations where it is not possible for the promisor to perform. Virtually all nuanced systems of contract law take into account such situations and strike a balance between varied interests of the parties by allowing substituted performance or restricting the promisee's range of remedies to damages or substituted performance.¹⁰ Unfortunately, the 2018 Act does not take this path, thereby creating a regime akin to strict liability of the promisor to complete the contract. This paper argues that such a legal position will lead to unjust results for the promisors/contractors and that judicial interpretation should take into account their legitimate interests.

The paper proceeds as follows: Part II, titled "The Specific Relief (Amendment) Act, 2018" briefly discusses how the 2018 Act came to be enacted. The legislative history of the 2018 Act is important because it gives an idea as to the manner in which the law was enacted and as to whether concerns such as the one that this paper raises were discussed in the Parliament. Part II of the paper also discusses the provisions relating to substituted performance and specific performance in the 1963 Act as amended by the 2018 Act. Part III titled "Specific Performance When Substituted Performance is Available" critically evaluates the new Section 14(a) which allows specific performance even if substituted performance is reasonably available to the promisee but is not opted for. Part IV concludes by suggesting that specific performance should not be allowed in a situation where the promisor is unable to perform due to legitimate reasons and substituted performance is reasonably possible.¹¹

⁸ See, for instance, INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT/WORLD BANK, *DOING BUSINESS 2015: GOING BEYOND EFFICIENCY* 192 (12th ed., 2014), <https://goo.gl/yZuXuu> (last visited Nov. 8, 2018) (where India stood at an abysmal 186th place among 189 countries with respect to contract enforcement); Ramanuj Mukherjee, *How Does India Plan on Solving its Crippling Contract Enforcement Problem?*, THE WIRE, Mar. 22, 2018, at <https://thewire.in/business/how-does-india-plan-on-solving-its-crippling-contract-enforcement-problem>; Pradeep S. Mehta, *When Nothing is Resolved in Court*, THE BUSINESS LINE, Jul. 9, 2015, at <https://goo.gl/VRdrfX>.

⁹ As in 2016, contract enforcement in India was expensive (about 39.6% of the claim amount) and time consuming (it took about 1420 days, or about 3.8 years) for obtaining a decision from the trial court for enforcing a contract. See, INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT/THE WORLD BANK, *DOING BUSINESS 2016: MEASURING REGULATORY QUALITY AND EFFICIENCY* 208 (13th ed., 2016), <https://goo.gl/N7FpVM> ("Doing Business 2016") (last visited Nov. 7, 2018).

¹⁰ See, Part III of the paper, titled "Specific Performance when Substituted Performance is Available".

¹¹ The legal position discussed in this paper is as on Mar. 31, 2019.

II. THE SPECIFIC RELIEF (AMENDMENT) ACT, 2018

A few years back, India was pegged as one of the worst performing countries in the way in which it facilitated businesses: it stood at the 130th rank in the World Bank's Ease of Doing Business report published in 2016.¹² The report measures ease of doing business on the basis of quantitative indicators concerning eleven areas affecting businesses, one of which is contract enforcement.¹³ The ability of the legal system to efficiently enforce contracts has a significant impact on the economic development and sustained growth.¹⁴ Although its ranking on the overall parameters in the ease of doing business was 130 in 2016, India's ranking on contract enforcement¹⁵ was even worse: it stood at the 178th position among 189 countries, lower than several underdeveloped countries.¹⁶

Given India's bleak performance in contract enforcement, the Government constituted a committee of experts¹⁷ ('Expert Committee') to recommend reforms to the 1963 Act with a view to improve contract enforcement and to increase India's rankings in the Ease of Doing Business reports.¹⁸ The Expert Committee submitted its report in May 2016 suggesting a slew of amendments to the Specific Relief Act.¹⁹

In its report, the Expert Committee recommended introducing a provision on substituted performance in the 1963 Act. Substituted Performance or risk and cost contracting enables the promisee to complete the complete the

¹² *Doing Business 2016: Measuring Regulatory Quality and Efficiency*, p. 5.

¹³ *Doing Business 2016: Measuring Regulatory Quality and Efficiency*, p. vi.

¹⁴ INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT/THE WORLD BANK, DOING BUSINESS 2019: TRAINING FOR REFORM 53 (16th ed. 2018), <https://goo.gl/Htffct> (last visited Nov. 7, 2018).

¹⁵ The methodology of assessment of contract enforcement is available at International Bank for Reconstruction and Development/ The World Bank, *Enforcing Contracts Methodology* (2018), <http://www.doingbusiness.org/en/methodology/enforcing-contracts> (last visited Nov. 2, 2018).

¹⁶ Countries which are classified as the least developed countries were placed at rankings higher than India in respect of contract enforcement (rankings are indicated in bracket): Cambodia (174), Ethiopia (84), Lesotho (85), Madagascar (153), Rwanda (127), Tanzania (64), and Zambia (134). See *2016 Report*, pp. 183-246.

¹⁷ The Expert Committee consisted of: (1) Mr Anand Desai, Managing Partner, DSK Legal, New Delhi - Chairperson; (2) Mr Amit Kapur, Senior Partner, J. Sagar Associates, New Delhi - Member; (3) Mr Akshay Chudasama, Managing Partner - West, Shardul Amarchand Mangaldas & Co., New Delhi - Member; (4) Dr Arghya Sengupta, Vidhi Centre for Legal Policy, New Delhi - Member; (5) Dr Nilima Bhadbhade, Associate Professor, ILS Law College, Pune - Member; and (6) Dr Mukulita Vijayawargiya, Additional Secretary, Legislative Department, Ministry of Law and Justice - Member Secretary.

¹⁸ The Law Commission of India had suggested reforms to the said Act previously in the Law Commission's 147th Report. See, Commission of India, *One Hundred and Forty-Seventh Report on the Specific Relief Act, 1963* (1993), <http://lawcommissionofindia.nic.in/101-169/Report147.pdf> (last visited Sep. 13, 2018).

¹⁹ Government of India: Ministry of Law & Justice, *Report of the Expert Committee on Specific Relief Act, 1963* (May 26, 2016), <https://goo.gl/KhufAM> (last visited Aug. 25, 2018) ("Expert Committee Report").

contractual obligations left unfulfilled by the promisor and entitles the promisee to claim the increase in cost of such completion from the promisor. Previously, the legal framework of such risk and cost contracting was not clear, leading to inconsistent approaches by courts in deciding such cases. Further, absence of risk and cost contracting or substituted performance as a statutory right meant that the promisee could invoke it only as a matter of contract. Recognising this, the Expert Committee recommended that substituted performance should be recognised as a statutory right and advised introduction of Section 20A for the purpose.

The Committee also suggested a comprehensive revision of Section 14, which dealt with the grounds for refusing specific performance. The Committee suggested that specific performance should be refused where the party seeking specific performance could “reasonably obtain substituted performance from another source on comparable terms, including price and time”.²⁰ In this regard, the Committee observed that law should encourage the victim to obtain substituted performance.²¹

Another ground for refusal of specific performance recommended by the Committee was hardship,²² though hardship was pegged at a relatively higher threshold²³ and had to be determined with reference to the circumstances existing at the time of entering into the contract.²⁴

The recommendations of the Expert Committee were far-reaching but attempted to strike a balance between the need for enhancing the efficacy of

²⁰ § 14(1)(b) as recommended by the Expert Committee.

²¹ The Committee observed: “*The law should also encourage him to do so because this course of action will achieve for the promisee the completion of his task, leaving him free to claim compensation if his loss is substantial enough to warrant filing litigation.*” *Expert Committee Report*, p. 54.

²² § 14(1)(g) as recommended by the Expert Committee stated: “(1) *The Court may refuse to grant specific performance or injunction in the following cases, and in no others ... (g) Where the performance of the contract would involve some hardship on the defendant which was not foreseeable at the time of entering into the contract, whereas its non-performance would involve no such hardship on the plaintiff.*”

²³ Explan. (i) to § 14 excluded the following from the purview of hardship: “*It is hereby clarified that — (i) mere inadequacy of consideration, or any rise or fall in prices or market value or any change in circumstances after entering into the contract unless otherwise agreed in the contract, 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 (f) or hardship within the meaning of clause (g).*”

²⁴ Explan. (ii) to § 14(1) proposed by the Expert Committee stated: “(ii) *The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (g) 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 entering into the contract.*”

contract enforcement mechanisms and protecting the legitimate interests of the parties.²⁵

Subsequently, on December 21, 2017, a bill titled the Specific Relief (Amendment) Bill, 2017 ('Bill' or '2018 Bill') was introduced in the Lok Sabha. The Statement of Objects and Reasons to the 2018 Bill stated, among other things, that the 1963 Act conferred wide discretionary powers on courts to decree specific performance due to which awarding damages was the general rule and granting specific performance was the exception, that by enacting the 2018 Bill it was proposed to do away with the discretion so as to make specific performance as the default/general remedy and that the alternative remedy of performance through third party would be the exception. The relevant portions of the Statement of Objects and Reasons for the 2018 Bill are extracted below:

“[The 1963 Act] also confers wide discretionary powers upon the courts to decree specific performance and to refuse injunction, etc. As a result of wide discretionary powers, the courts in majority of cases award damages as a general rule and grant specific performance as an exception... In view of the above, it is proposed to do away with the wider discretion of courts to grant specific performance and to make specific performance of contract a general rule than exception subject to certain limited grounds. Further, it is proposed to provide for substituted performance of contracts, where a contract is broken, the party who suffers would be entitled to get the contract performed by a third party or by his own agency and to recover expenses and costs, including compensation from the party who failed to perform his part of contract. This would be an alternative remedy at the option of the party who suffers the broken contract.”²⁶

The Bill was taken up in the Lok Sabha for discussion on March 15, 2018.²⁷ Despite the substantial changes that the Bill sought to achieve, there was hardly any discussion in the Lok Sabha on it, except for certain amendments suggested by Mr N.K. Premachandran from Kollam. The amendments suggested by Mr N.K. Premachandran were negatived and the Bill was passed on the same date, that is, March 15, 2018, with a few minor changes.²⁸

²⁵ The Expert Committee report on the amendments was not released in the public domain but was disclosed pursuant to an application under the Right to Information Act, 2005 filed by the author.

²⁶ Specific Relief (Amendment) Bill, 2017.

²⁷ See, The Lok Sabha Debates, Mar. 15, 2018, <http://164.100.47.194/Loksabha/Debates/Result16.aspx?dbsl=13405> (last visited Nov. 1, 2018).

²⁸ *Id.*, Minor changes included amending the year of the Bill from 2017 to 2018.

Thereafter, the Bill came up for discussion in the Rajya Sabha on July 23, 2018.²⁹ The discussions on the Bill could not have been substantial considering that the Chairman indicated during the discussions that the total time allocated for discussion of the Bill was one hour.³⁰ While some concerns relating to constituting separate courts and the absence of the power of the State Governments to notify infrastructure projects under Section 20A were raised, there was hardly any detailed discussion on the implications of the various provisions in the Bill. On the same day, the Rajya Sabha passed the Bill. The 2018 Bill was assented to on August 1, 2018 and was brought into force on October 1, 2018.³¹

Section 10 of the 2018 Act substitutes the existing Section 20³² with a new Section 20 containing four sub-sections. The new Section 20 is titled ‘Substituted performance of contract’. Section 20(1) states that where the contract is broken due to non-performance of promise by any party, the victim of the breach shall have the option of substituted performance through a

²⁹ The verbatim (uncorrected) debates in the Rajya Sabha on the Specific Relief (Amendment) Bill, 2018 are at <http://164.100.47.5/newdebate/246/23072018/Fullday.pdf> (last visited Nov. 1, 2018).

³⁰ *Id.* at 56.

³¹ Ministry of Law & Justice, Notification No. S.O. 4888(E) dated Sep. 19, 2018, <http://egazette.nic.in/WriteReadData/2018/189830.pdf> (last visited Nov. 8, 2018).

³² The Specific Relief Act § 20 (1963), as enacted prior to the 2018 amendments, read: “(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; or*

(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 party.”*

third party or by the victim's own agency. It further states that the victim can recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

Section 20(2) proscribes substituted performance without complying with the below conditions:

- The victim has to give a written notice of a minimum of thirty days to the perpetrator of breach.
- The notice should call upon the perpetrator to perform the contract within time specified in the notice, which shall not be less than thirty days.
- The perpetrator should have refused or failed to perform the contract within such time.

On satisfaction of the above conditions, the victim can get the contract performed through a third party or by his own agency. The proviso to Section 20(2) clarifies that unless the contract is performed through a third party or by his own agency, the victim will not be entitled to recover the expenses and costs mentioned in Section 20(1). Section 20(3) talks about events happening after the completion of the work by the third party or by the victim. It states that once this happens, the victim cannot claim specific performance. Section 20(4) states that the right of substituted performance will not prevent the victim from claiming compensation from the perpetrator for loss caused due to the breach.

Section 14 enumerates contracts that cannot be specifically enforced. Section 14(a) states that where the promisee has obtained substituted performance of the contract as per Section 20, the contract is not specifically enforceable. Section 16(a) provides that specific performance cannot be enforced in favour of a person who has obtained substituted performance of contract.

As regards sale of goods, Section 58 of the Sale of Goods Act, 1930, permits the court to decree, on application, specific performance in suit for breach of contract to deliver specific or ascertained goods. This is made subject to Chapter II of the Specific Relief Act, 1877, which has been replaced by the 1963 Act. Chapter II of the 1963 Act contains provisions relating to when specific performance would be available and would not be available. After the 2018 Act, the new Section 20 (substituted performance of contract), contained in Chapter II, would also apply to sale of goods. Consequently, Section 58 of the Sale of Goods Act, 1930 would be subject to the amended Sections 10, 14(a), 16(a), and 20 of the 1963 Act. The implication of this is that in the

case of sale of goods, the remedy of specific performance would be available, except in circumstances provided under Section 14 and 16 of the 1963 Act, as amended.

Thus, specific performance is not available to a promisee³³ or to a contract where the contract is completed through substituted performance under Section 20.³⁴ The expression “has obtained substituted performance of contract” in Section 14(a) conveys the meaning that specific performance is not allowed only when the promisee has actually opted for substituted performance and has completed the contract through it.

III. SPECIFIC PERFORMANCE WHEN SUBSTITUTED PERFORMANCE IS AVAILABLE

A. Damages versus Specific Performance: Contextualising the Issue

Prior to addressing the issue of specific performance when substituted performance is available, it would do well to deal, albeit in brief, with the theoretical foundations of the issue of damages versus specific performance.

Specific performance is not available when damage is an adequate remedy. Common law systems regard damages as the default remedy and specific performance as the exception, available only in certain recognised cases or when damages will not adequately compensate the victim of the breach.³⁵ Several justifications have been given for prioritising damages over specific performance.³⁶ Law’s intervention in private law is restricted to the minimum possible extent and at the same time, it works towards protecting the interests of the victim of breach.³⁷ An award of specific performance forcing the breaching party to perform is against the voluntary nature of a contract, when the victim can be afforded an adequate remedy.³⁸ This is especially true in personal contracts. At the same time, it is argued, with some justification, that damages is often under-compensatory, that the victim of breach would be in the best position to judge whether damages or specific performance would be the appropriate remedy, and that the victim would have better information as compared to the courts on the issue of adequacy of damages.³⁹ There are points and coun-

³³ § 16(a), as amended.

³⁴ § 14(a), as amended.

³⁵ JONATHAN MORGAN, *GREAT DEBATES IN CONTRACT LAW* 307 (2nd ed., 2015).

³⁶ See, EWAN MCKENDRIK, *CONTRACT LAW: TEXT, CASES, AND MATERIALS* 946 (5th ed., 2012), for a summary of the justifications prioritising damages over specific performance.

³⁷ Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 *MODERN L. REV.* 360, 363 (1997).

³⁸ EWAN MCKENDRIK, *CONTRACT LAW: TEXT, CASES, AND MATERIALS* 946 (5th ed. 2012).

³⁹ Alan Schwartz, *The Case for Specific Performance*, 89 *YALE L. J.* 271, 275-277 (1979).

ter-points, including arguments based on the efficient breach theory⁴⁰ and jurisdictions often vacillate between these two approaches without taking extreme positions.⁴¹

India has since long adopted the common law position. The Specific Relief Act, 1963, prior to the 2018 amendments, reflected the general preference to damages as against specific relief.⁴² Section 14 of the Specific Relief Act stated that specific relief would not be available when compensation is an adequate relief for non-performance. Further, Section 10 of the said Act provided that specific performance of a contract may be enforced where there existed no standard of ascertaining actual damages caused by non-performance of the promise or where monetary compensation would not afford adequate relief for non-performance.⁴³

A detailed analysis of the legal position in India on the grounds where specific performance could be granted prior to the 2018 amendments is not dealt with here.⁴⁴ However, Indian courts seem to have been leaning in favour of the appropriateness test rather than the adequacy test: thus, specific performance would be ordered where it is appropriate to do so.⁴⁵

⁴⁰ See, Gregory Klass, *Efficient Breach*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 362-387 (Gregory Klass et al. eds., 2014) (for a detailed discussion on the theory and its relation to specific performance). See also, JONATHAN MORGAN, GREAT DEBATES IN CONTRACT LAW 305-347 (2nd ed. 2015).

⁴¹ For a discussion on the debate, see, MINDY CHEN-WISHART, CONTRACT LAW 550- 552 (4th ed. 2012).

⁴² This was the case with the earlier law, The Specific Relief Act 1877.

⁴³ The Specific Relief Act § 10 (1963) as enacted prior to the 2018 amendments read: “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 actual damage caused by the non-performance of the act agreed to be done; or
- (b) when the act agreed to be done in 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; and
 - (b) where the property is held by the defendant as the agent or trustee of the plaintiff.”

⁴⁴ For a detailed treatment of the subject, see, V. Niranjan, *Specific and Agreed Remedies for Breach of Contract in Indian Law: A Code of English Law?*, in STUDIES IN THE CONTRACT LAWS OF ASIA I: REMEDIES FOR BREACH OF CONTRACT (Mindy Chen-Wishart et al. eds., 2016).

⁴⁵ *Id.*

B. Substituted Performance, Hardship, and Specific Performance

The availability of substitutes for fulfilling a contractual obligation further justifies the principle that specific performance should not be granted when the victim has other means to be put in a position as if the contract is performed.

The 1963 Act as originally enacted contemplated hardship as a ground against specific performance. Under Section 20(2)(b), specific performance could not be decreed “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...”⁴⁶

At times, courts while decreeing specific performance, have modified the consideration taking into account the hardship that the defendant would suffer if specific performance is ordered in terms of the agreement. For instance, in *K. Prakash v. B.R. Sampath Kumar*,⁴⁷ the Supreme Court held that although rise in price of the property could not be treated as a ground for refusing specific performance, courts could balance equities by ordering specific performance at a higher consideration. In this case, taking into account that then prevailing price was at least five times of the agreed price, the court ordered specific performance but substantially increased the consideration.⁴⁸

Substituted performance primarily offers the following benefits to the promisee. It puts the promisee in a position as if the contract is performed. This is the objective of awarding damages under contract law. The second benefit is that it provides a concrete method to compute losses suffered owing to non-performance or failure by the promisor to perform the contract.⁴⁹ Instead of proving the market price as on the date of breach, damages is computed as the difference between the expenditure that the promisee has reasonably incurred in actually completing the contract through substituted performance and that would have been incurred in completing the contract through the promisor. Recognising substituted performance as a substantive statutory right is a reform in the right direction.

As regards providing the option to avail the remedy of specific performance, there is nothing wrong *per se* in amending the law, given the prevailing Indian scenario. The efficiency and effectiveness of satisfaction of expectation interests of the promisee through damages holds true in a scenario where

⁴⁶ See, for instance, *Nirmala Anand v. Advent Corpn. (P) Ltd.*, (2002) 8 SCC 146, ¶ 6; *Patel Harji Shamji v. Dharmshi Meghji Shivla*, (2019) 60 (1) GLR 67.

⁴⁷ (2015) 1 SCC 597.

⁴⁸ *Id.* at ¶ 22-23. See also, *Damacherla Anjaneyulu v. Damcherla Venkata Seshaiyah*, 1987 Supp SCC 75, where a similar approach was undertaken by the Supreme Court.

⁴⁹ THE AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW SECOND: CONTRACTS 2D: OFFICIAL TEXT & COMMENTS* (1979), Formatted for Electronic Media (William H. Widen), Comment to §360, p. 539.

substantial costs and time are not incurred in enforcing contracts. This, as data go to show, is not the case in India.⁵⁰ Therefore, the efficient breach theory⁵¹ or the argument that it would be bad faith for a promisee to insist on specific performance since it would give him the benefit that he did not pay for⁵² would not apply in India.

The problem, however, is in allowing specific performance even where substituted performance is a possible and reasonable remedy but the promisee does not avail of it for reasons extraneous to protection of his expectation interests. The amended Section 14 of the 1963 Act provides that a contract cannot be specifically enforced where a party to the contract has obtained substituted performance of the contract as per the new Section 20.

In this connection, the discussions regarding substituted performance in the Rajya Sabha make an interesting read.⁵³ The intent behind enactment of the provision on substituted performance and contract enforcement is reflected in the observations of the Law Minister during the debates:

“What is important is, what kind of India do we want to create? It is very good for good contractors who perform their obligations in time, and it should be very strong for bad contractors who don’t perform and run away for the money. That is what the essence of Section 20 is. Therefore, when the matter came to me, I said, ‘No’, we must give a proper provision for notice. If you are not performing, give a notice of one month. If you perform, okay. If you don’t, try to perform and run away, then, I will get the work done by other agency and take the money from you. What is wrong with this? We are trying to make India’s execution of contract more sober and more responsible.”⁵⁴

Although the Law Minister stated that if the contractor is not able to perform, the promisee could go for substituted performance, the text of Section 14(a) goes much beyond and allows the promisee to force the promisor to perform the contract, irrespective of any irreparable injury that could be caused to the promisor, and irrespective of a reasonably available substitute.

⁵⁰ See, for instance, *Doing Business 2016: Measuring Regulatory Quality and Efficiency*, p. 208.

⁵¹ See, for instance, Klass, *supra* note 40, at 362.

⁵² See, for instance, Daniel Markovits, *Good Faith as Contract’s Core Value*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 281 (Gregory Klass et al. eds., 2014).

⁵³ The verbatim (uncorrected) debates in the Rajya Sabha on The Specific Relief (Amendment) Bill, 2018 are at <http://164.100.47.5/newdebate/246/23072018/Fulllday.pdf> (last visited Nov. 1, 2018), at 73.

⁵⁴ *Id.*

A promisor may breach a contract for several reasons. Some of these reasons might go to the root of the promisor's existence as a commercial entity. For instance, a construction contractor might be suffering from serious cash flow issues which could prevent him from completing a contract. The law as it stood prior to the 2018 Act allowed the promisor to terminate the contract with the construction contractor, get the work completed at the construction contractor's cost, and make the construction contractor liable for increased expenses or damages. This enabled all the parties get what they wanted: the promisee could complete the project and recover increased expenses, the original construction contractor had to merely bear the increased expenses, and the new construction contractor could get the price for the work he completed.⁵⁵

The 2018 Act does away with the general rule in contract law that damages will be the default remedy and specific performance will be the exception. It alters the legal position which has been in vogue in the common law world for a long time.⁵⁶ Although several jurisdictions have specific performance as a default remedy,⁵⁷ damages is the normal remedy in common law jurisdictions. The present amendments do not merely prioritise specific performance over damages; they go a step further than the recommendations of the Expert Committee by holding that specific performance would be available if substituted performance is possible but was not opted by the promisee. The possibility of availability of specific performance in this context which could result in serious injustice to the promisor has already been noted above.

Consider the below hypothetical scenario:

In a village, Ramu, a mango retailer, promises to deliver 100 kg of mangoes to Gowri for Rs. 1000 (Rs. 10/kg) on a particular date. Ramu thinks he will invest Rs. 800 that he has with him for buying mangoes from the wholesale market, sell it to Gowri, and get Rs. 200 as profit (at Rs. 2/kg). On the date when he is supposed to go to the wholesale market, his child falls sick and is admitted in the hospital. Ramu expects that he will have to spend about Rs. 700 for the hospital. So he tells Gowri that he will not be able to perform the contract. Gowri is furious at Ramu and threatens to teach him a lesson. Gowri enquires with another retailer Shyamu who agrees to sell the mangoes at Rs. 1100 (at Rs. 11/kg). Still angry at Ramu, she complains to the village Panchayat. The elders of the Panchayat summon both Ramu and Gowri and a sitting is held on a sunny Sunday. Ramu, whose daughter's surgery is scheduled held the next day attends the sitting.

After hearing both the parties, the Panchayat says that even the Parliament of India has amended the Specific Relief Act, 1963, to give the option to the

⁵⁵ In practice, however, several projects remained incomplete for various reasons.

⁵⁶ See, for instance, *Harnett v. Yielding*, (1805) 2 Sch & Lef 549.

⁵⁷ *Expert Committee Report*, p. 49.

victim of breach to decide on whether the victim wants specific performance or damages. So the elders ask Gowri what she wants. Gowri says she wants specific performance. Ramu implores with Gowri to forgive him and his cries that unless he pays up Rs. 700 to the hospital, his daughter will not be operated on and might die fails to move Gowri. Suddenly, Priya jumps up and says she'll provide a solution. She says if Gowri buys Shyamu's mangoes at Rs. 11/kg and if Ramu pays to Gowri that Rs. 1/kg extra that Gowri has to shell out to Shyamu, Gowri will get the mangoes, Shyamu will make a profit (at Rs. 3/kg) and Ramu will have to shell out Rs. 1/kg (Rs. 100), which he will be able to do even after paying up for his daughter's surgery. Priya says if the solution she proposed is adopted, Shyamu, Gowri and Ramu will all get what they want. What should the Panchayat do?⁵⁸

Notice how unjust it is for the breaching party (Ramu, in the above example) to be asked to perform the contract.⁵⁹ As opposed to the Committee's recommendations, the Act goes a long way in providing an unfettered option to the victim (Gowri) to compel the breaching party to perform, irrespective of whether substituted performance was possible for the victim. It is in such cases that substituted performance can play a significant role in ensuring protection of interests of all the parties.

The 2018 Act does not distinguish between commercial and non-commercial situations in its applicability. If the above parties are substituted for a wholesaler and a retailer in a commercial context, the injustice caused would not be much different. Consider the situation where the wholesaler is unable to supply the goods contracted for owing to a bad business decision in another context, but the retailer-buyer has alternatives available. Would it not be unjust for the wholesaler-seller to be ordered to perform a transaction which would ruin him financially when the retailer-buyer will have alternatives? Therefore, hardship in case of commercial contexts should also be a good ground for ordering damages instead of specific performance, provided the buyer has substitutes available.

None of the prominent international instruments on contract law contain a provision similar to the amended Section 14(a). For instance, Article 7.2.2 of the UNIDROIT Principles of International Commercial Contracts ('UNIDROIT PICC') contains grounds on which specific performance could be refused. Grounds (b) and (c) provide:

⁵⁸ This illustration is based on the following posts of the author: Badrinath Srinivasan, *Ghost Provisions: Who Will Exorcise Them Out?*, LAW AND OTHER THINGS (Sep. 4, 2018), <https://goo.gl/MvoHin>; Badrinath Srinivasan, *Why Should Specific Performance not be the Default Remedy: Critique of the Recently Proposed Amendments*, PRACTICAL ACADEMIC BLOG (May 3, 2018), <https://goo.gl/W1junT>.

⁵⁹ Although the above hypothetical scenario is fact-specific, situations where promisors are unable to perform the contract due to serious cash flow problems or other serious reasons are not uncommon.

“Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

...

- (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
- (c) the party entitled to performance may reasonably obtain performance from another source;⁶⁰

These clauses show that specific performance is not available when the promisee can go for substituted performance or replacement transaction or where specific performance would be unreasonably burdensome or expensive to the promisor. Article 7.2.2(c) requires that in order to refuse specific performance replacement transaction or substituted performance should not only be possible, it should be reasonably available as a remedy to the promisee.⁶¹

Similarly, Article 9:102 of the Principles of European Contract Law (‘PECL’) entitles the aggrieved promisee to specific performance except where the performance would cause the promisor unreasonable effort or expense,⁶² or where the promisee may reasonably obtain performance from another source.⁶³

Article 2-716 of the Uniform Commercial Code in the USA also provides for specific performance in the context of sale of goods, “if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing.” Traditionally, under American law, specific performance is not available when goods contracted could be obtained from the open market.⁶⁴ American courts have regarded the replace

⁶⁰ UNIDROIT PICC art. 7.4.5 provides for substituted performance or replacement transaction: “Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.”

⁶¹ INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 245-246 (2016).

⁶² PECL art. 9:102(2)(b) provides: “Specific performance cannot, however, be obtained where:... (b) performance would cause the obligor unreasonable effort or expense...”

⁶³ PECL art. 9:102(2)(d) states: “Specific performance cannot, however, be obtained where:... (d) the aggrieved party may reasonably obtain performance from another source.”

⁶⁴ See, for instance, Hogan v. Norfleet, 113 So 2d 437, 439 (Fla Dist Ct App 1959); Heidner v. Hewitt Chevrolet Co., 166 Kan 11 : 199 P 2d 481, 483 (1948); Poltorak v. Jackson Chevrolet Co., 322 Mass 699 : 79 NE 2d 285 (1948); Jaup v. Olmstead, 334 Mich 614 : 55 NW 2d 119, 120 (1952); Likens v. Sourk, 263 SW 2d 462, 465 (Mo App 1953); Boeving v. Vandover, 240 Mo App 117 : 218 SW 2d 175, 177-178 (1949); Paullus v. Yarbrough, 219 Or 611 : 347 P 2d 620, 635 (1959); Cochrane v. Szpakowski, 355 Pa 357 : 49 A 2d 692, 694 (1946); Thompson v. Virginia, 197 Va 208 : 89 SE 2d 64, 67 (1955), cited in Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F Supp 923 (ND Cal 1970).

ability or the right to cover as central in determining the availability of specific relief⁶⁵ although it appears that the law tilts in favour of enforcing the promise.⁶⁶

Likewise, the Restatement of the Law (Second) Contracts provides that, “[s]pecific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party”⁶⁷ and that “[i]n determining whether the remedy in damages would be adequate... (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages” is an important circumstance.⁶⁸

In English law, one of the landmark cases on the point is that of *Coop. Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*⁶⁹ Here, Argyll Stores entered into a lease agreement with the landlord, Co-operative Insurance Society Ltd. (‘CIS’), for running a supermarket in a shopping centre. Argyll Stores was losing money and therefore decided to close up shop in that location. This was in breach of the lease agreement with CIS. CIS initiated legal action. The trial court awarded damages but refused an order of specific performance. On appeal, the Court of Appeal ordered specific performance by Argyll Stores to continue to keep open the supermarket. Although Argyll Stores ultimately assigned the lease and the proceedings between the parties were only with regard to determination of costs, the House of Lords (now the UK Supreme Court) deemed it fit to address the issue. The House of Lords had to decide whether an order of specific performance would lie against the defendant for continuing of business, even when it is running under loss. The court noted that implementation of such an order would require constant court supervision. The court held that ordering a party to perform the contract would mean forcing the party to run the business with the threat of action pursuant to contempt of court although there were no economic reasons to run the business and that such a constant supervision would also entail expensive litigation.

On the question as to whether specific performance could be ordered to continue the business even if defendant would suffer loss, the court noted that such an order would amount to allowing the plaintiff to enrich the plaintiff at the defendant’s expense. According to the court, even if the defendant, by his own conduct, put himself in an unfortunate position, contract law does not or should not aim at punishing the defendant; rather it should seek means to put the plaintiff in the position as if the contract is performed. The court observed:

⁶⁵ See, for instance, *Magellan International Corpn. v. Salzgitter Handel GmbH*, 76 F Supp 2d 919 (ND Ill 1999).

⁶⁶ Michael A. Schmitt & Michael Pasterczyk, *Specific Performance under the Uniform Commercial Code — Will Liberalism Prevail?*, 26 DEPAUL L. REV. 54, 71-72 (1976).

⁶⁷ § 359.

⁶⁸ § 360.

⁶⁹ 1998 AC 1; (1997) 2 WLR 898; (1997) 2 All ER 297; 1997 UKHL 17.

“It is true that the defendant has, by his own breach of contract, put himself in such an unfortunate position. But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust. From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle... An award of damages, on the other hand, brings the litigation to an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal”.⁷⁰

Although the view of the court as regards damages may not altogether apply in the Indian context, where it takes several years for courts to decide commercial cases and to recover damages even if awarded, the observations regarding exploring plausible alternatives by which the plaintiff can be put in a position as if contract is performed are valid.⁷¹

English courts have refused to order specific performance on the ground of hardship even in cases such as those related to land where specific performance is the default remedy. One such case is that of *Patel v. Ali*,⁷² where a decree of specific performance was refused since it would have resulted in great hardship and injustice.

The position in Singapore also appears to be similar. Courts have recognised that specific performance would not be ordered where it would result in considerable hardship to the promisor or a third party.⁷³

In civil law countries, which are traditionally regarded as granting specific performance freely, there appears to be a trend towards convergence with common law remedies.⁷⁴ Countries such as Denmark, Germany, and France do not readily order specific performance when substituted performance is possible.⁷⁵

⁷⁰ *Id.*

⁷¹ EDWIN PEEL, TREITEL, *THE LAW OF CONTRACT* 21-030 (14th ed. 2015).

⁷² 1984 Ch 283 : (1984) 2 WLR 960 : (1984) 1 All ER 978.

⁷³ ANDREW B.L. PHANG & GOH YIHAN, *CONTRACT LAW IN SINGAPORE* 724 (2012); *EC Investment Holding Pte. Ltd. v. Ridout Residence Pte. Ltd.*, (2012) 1 SLR 32, ¶ 110.

⁷⁴ Henrik Lando & Caspar Rose, *The Myth of Specific Performance in Civil Law Countries* 2 (2003), <<https://ssrn.com/abstract=462700>> (last visited Mar. 31, 2019); KONRAD ZWEIGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (1998).

⁷⁵ Lando, *supra* note 74, at 7, 11.

Empirically, it appears that parties prefer damages to specific performance.⁷⁶ At the same time, civil law countries seem to lean in favour of substituted performance even in construction contracts.⁷⁷ In respect of delivery of existing goods, civil law countries seem to readily order specific performance as compared to common law countries.⁷⁸

All the same, Civil law countries seem to recognise hardship as a defence against specific performance, in cases where performance would require an effort from the debtor that is grossly disproportionate to the creditor's right to receive performance.⁷⁹

IV. CONCLUSION

In a situation where the promisor avoids the contract on the ground of hardship or other such reasons, forcing the promisor to perform the contract only adds fuel to conflict. Law should ensure that conflict is either resolved, or at the least, avoided. When specific performance is sought in such situations, the conflict is neither avoided nor resolved but the promisor and the victim are put in a conflict zone, which deepens the conflict.⁸⁰

That Indian law does a miserable job of protecting the expectation interest of the victim is no excuse for putting the parties in the hostile zone by ordering specific performance even when the defendant would be put to serious hardship in performing the contract and the plaintiff can reasonably obtain substituted performance.⁸¹

The purpose of contract law is not to punish the promisor who breached the contract but to ensure that the promisee is put in a position as if the contract is performed. An order granting specific performance where the promisor is legitimately unable to perform and where substitutes are available, would amount to punishing the promisor and may be a legal means of extorting performance from the promisee.

The new Section 14(a) should have been worded such that specific performance would not be available where a party to the contract can reasonably

⁷⁶ *Id.* at 13. *See also*, Zweigert and Kolt, *supra* note 74, at 472-473 (summarising the German law regarding grant of specific performance and procedure for enforcement of such remedies).

⁷⁷ Zweigert and Kolt, *supra* note 74, at 484.

⁷⁸ *Id.* at 476-479 (discusses the French concept of penal damages or *astreinte* where penalty is imposed till the contract is performed). *Also see*, Marco Torsello, *Remedies for Breach of Contract*, in JAN M. SMITS, ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 618 (2006).

⁷⁹ Torsello, *supra* note 78, at 617.

⁸⁰ *Coop. Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*, 1998 AC 1: (1997) 2 WLR 898 : (1997) All ER 297 : 1997 UKHL 17.

⁸¹ The standard for determining hardship or availability of substitutes is not dealt with in this paper. The argument is that law should at least provide some scope for the operation of hardship and reasonable availability of substitute as exceptions to specific performance.

obtain substituted performance. But it is too late for that as the law has been enacted and is now in force. The Government can move an amendment to iron out the problematic areas in the 2018 Act. Given the injustice that is likely to be caused to promisors with legitimate excuses owing to Section 14(a), there are chances that courts would liberalise the threshold of impossibility in Section 56 of the Indian Contract Act, 1872. This may not be wholly desirable as it would become a means for non-performance of contracts.

Alternatively, courts could construe the amended Sections 14(a) and 16(a) to provide that specific performance likely to cause irreparable injury to the promisor will not be available where a reasonable substitute to complete the contract is available to the promisee. This would entail construing “has obtained” as “can obtain or has obtained”. However, this would amount to doing violence to the statute, but surely the law cannot be construed to reach unjust results unless the statutory intent in doing so is clear and manifest. The amendments in the 2018 Act, after all, do not do away with equitable principles altogether: Equity and justice still permeate specific relief law.