

# I N D E X

-: C I V I L :-

## SUBJECT

### SPECIFIC PERFORMANCE OF CONTRACTS

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## INTRODUCTION

1. Specific performance is a remedy developed by the principle of equity. A party to a contract who is aggrieved because the contract is breached by another party has the option to file a suit for specific performance compelling to perform his part of contract. Before an equity court will compel specific performance, however, the contract must be one which can be specifically performed. .

2. In our country, most of the specific performance suits relate to sales of immoveable properties. As the law of specific performance is basically founded on equity, considerations such as conduct of the plaintiff, the element of hardship that may be caused to one of the parties, the availability of adequate alternative relief and such other matters are taken into consideration. It is a discretionary relief.

### **(A) The Defences Available Under Law of Contract** [ Section 9 ]

#### **(a) Various defences available under Law of Contract**

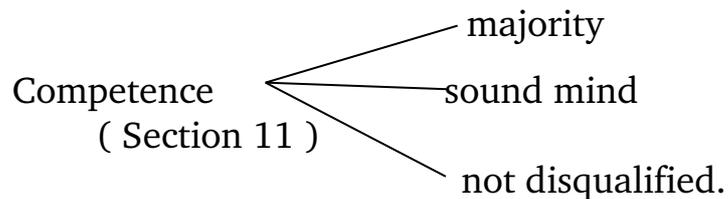
3. Section 9 of the Specific Relief Act provides that a person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contract. Following are the defences, available under Law of contract :-

Sr. No.	Subject	Sections under Contract Act
i)	Incapacity of parties	10,11,12
ii)	Uncertainty of contract	29 under Section 93 of the Evidence Act
iii)	Absence of concluded contract	--

iv)	Fraud	14,17,19
v)	Misrepresentation	14,18 19
vi)	Mistake	14,20,21,22
viii)	Illegality or want of authority to enter into contact	23,24,26,27,28

### (b) Incapacity of parties

4. One of condition for a contract is that the payment should be made by parties competent to contract as provided by section 10 of the Indian Contract Act (for short 'Contract Act' ). Section 11 of the Act provides that a person who is major, of sound mind and not disqualified from contracting by any law to which he is subject, is competent of entering in to a contract. Therefore, it is clear that a person not fulfilling these three conditions would not be a competent person to contract. Such person would be termed as incapable of entering in to a contract. Minority, unsoundness and disqualification from personal law are thus incapacities of parties to enter in to a contract.



5. However, it is to be noted that a guardian on behalf of a minor can enter in to a contract if he is competent and the contract is for the benefit of minor or for the legal necessities of minor. Contract entered by minor and lunatic is void.

6. Section 12 of the Contract Act provides that a person is said to be of sound mind for the purpose of making a contract if, at the time of contract he is capable of understanding it and of forming a rational

judgment as to its effect on his interest. Further, if a unsound mind person occasionally has soundness he may make a contract when he is of sound mind. Similarly, a sound person may not make a contract when he occasionally becomes unsound .

7. The presence or absence of the capacity mentioned in this section at the time of making the contract is in all cases a question of fact. Where a person is usually of sound mind the burden of proving that he was of unsound mind at the time of execution of a document lies on him who challenges the validity of the contract. Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it.

### **(c) Uncertainty of Contract**

8. Section 29 of the Contract Act which is based on the principles of English law enjoins that agreements the meaning of which is not certain, or capable of being made certain are void. There shall be specific description of the subject matter of which the contract is to be executed. Only the certainty would make the agreement valid. In other words, uncertainty of the contract would make it a void contract e.g. an agreement requiring the landlord to “ make all necessary repairs as and where desired” is uncertain because the phrase “necessary repairs is vague and there is nothing to indicate what kind of repairs were regarded by the parties as necessary. Necessity is a very relative concept and what is necessary according to one person may be a luxury according to another.

9. Section 29 of the Contract Act further contemplates that the meaning of the document shall be clear on the face of it.

10. In the case of Panchanan Dhara Vs. Monmartha Nath Maity, 2007 (1) JCR, 226 (SC), the Hon'ble Supreme Court has

observed :-

“If the agreement is vague and uncertain and is not capable of being made certain, there is really no agreement in law and as such the question of enforcing any such agreement can not arise.”

**(d) Absence of concluded contract**

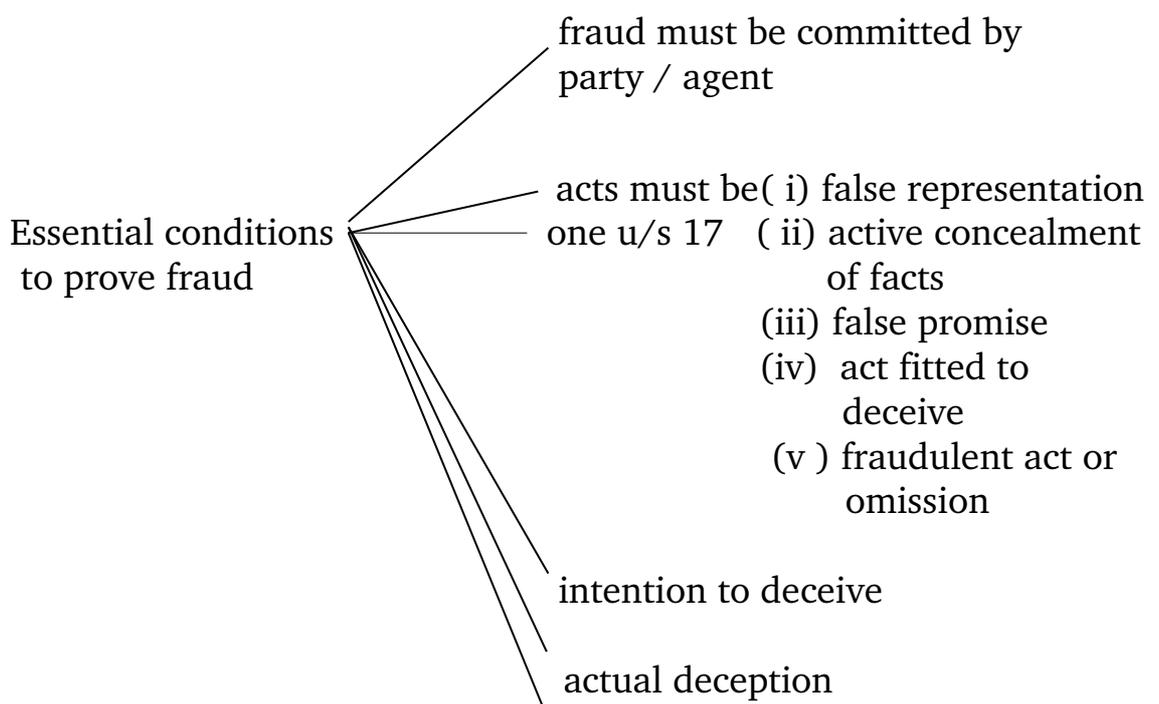
11. For enforcing a contract it must be proved that it is a concluded contract. If a contract is not a concluded contract, then the defendant may make his defence that as the contract is not concluded one it is not specifically enforceable. Where in a auction of Tehbazari contract highest bid of tender accepted and tenderer making part payment of auction money. Held, concluded contract came into existence and tenderer cannot wriggle out of contract on ground of non-execution of agreement.

12. Abdul Salam Vs. Sheikh Mehboon, 2006 ( 2) Mh.L.J. 277. The acts were performed by the plaintiff were only in the nature of negotiations and it is not possible to conclude that there was a bona fide agreement of sale of the suit house by defendant No. 1 in favour of the plaintiff. Simply because the plaintiff had purchased the stamp paper; served notice and also published, a public notice in the newspaper are not sufficient to show that there was a concluded agreement of sale between the parties. Neither the earnest amount was paid nor the agreement of sale was reduced into writing signed by the parties in accordance with the provisions of sections 10 and 25 of the Contract Act. Held, there was no concluded agreement to sell and could not be enforced.

(e) **Fraud**

13. Under section 14 of the Contract Act, there are certain conditions on which it will be determined whether the consent to the contract was free or not. For free consent a contract should not be caused by fraud as defined in section 17 of the Contract Act.

14. Fraud means and includes certain acts committed by a party to the contract with intent to deceive another party or to induce that party to enter in to the contract. Such acts are enumerated in Section 17 of the Contract Act. Said definition is inclusive definition. The definition covers all surprise, trick, cunning and other unfair ways whereby a person is deceived. In order to constitute fraud the person making the statement must have been aware of the falsity of the settlement and the party defrauded remains ignorant of the correct situation. Fraud is committed where one person induces another to enter into some contract or transaction or a false belief by a representation of fact which is not true and which he does not believe to be true.



deceit with party / agent.

15. Fraud is to be pleaded and proved. It must be proved that representation made was false to the knowledge of the party making such a representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. An ambiguous statement can not per se make the representor guilty of fraud.

**(f) Misrepresentation**

16. Another condition for free consent is that there shall not be misrepresentation as defined in section 18 of the Contract Act. Consent given under misrepresentation of facts can not amount to free consent, thereby making the contract void.

17. A misrepresentation is a false statement of fact made by one party to another, which, whilst not being a term of the contract, induces other party to enter the contract. Said definition of misrepresentation is inclusive in nature, meaning there can be such other similar acts as defined therein which would amount to misrepresentation. It is to be noted that misrepresentation of law can not be a defence as every person is supposed to know the law. Therefore, in such cases the contract can not be held as void. Mere silence is not misrepresentation.

18. The onus is on the person, who took plea of misrepresentation to establish the same. Section 19 of the Contract Act states that legal effect of coercion, fraud and misrepresentation in rendering contracts procured by them one voidable. Under the exception to Section 19 of the Contract Act a person who had the means of discovering the truth with ordinary diligence can not avoid the contract on the ground of misrepresentation. No relief can be

granted when the fraudulent or illegal object has been carried out and both parties are in *pari delicto* (both parties equally at fault). Under section 19 of the Contract Act, a party whose consent is caused by fraud or misrepresentation may insist that the contract shall be performed, and that he shall be put in the position which he would have been if the representation made had been true. Apart from the remedies provided in this section the aggrieved party may have the agreement rescinded under section 27 of the Specific Relief Act, or he may refuse to carry out the agreement and defend a suit brought against him for specific performance and/or for compensation.

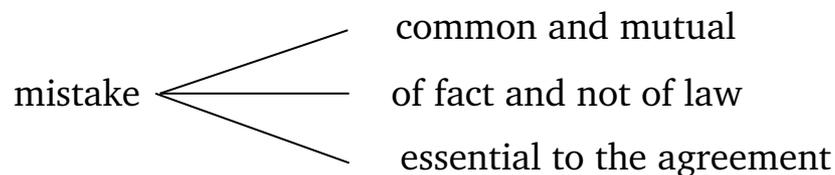
19. Both innocent misrepresentation and fraud are good grounds for successfully defending a suit for specific performance. The general rule is that damages can not be awarded where a contract is vitiated merely by innocent misrepresentation. There are however some exceptions such as breach of condition or warranty etc.

**(g) Mistake**

20. Mistake is of two kinds – of fact or law. Section 20 to 22 of the Contract Act deals with the kinds of mistake. As far as mistake of fact is concerned, where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. However, an erroneous opinion as to the value of the thing which forms subject matter of the agreement is not to be deemed a mistake as to a matter of fact. Section 22 of the Contract Act lays down that a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. Thus, mistake must be mutual and not unilateral. Both the parties must be labouring under such a mistake, then only will the agreement become

void. Thus, a contract is vitiated by a bilateral mistake i.e. common mistakes by both parties.

21. Mistake of law is provided under Section 21 of the Contract Act. It provides that a contract is not voidable because it was caused by a mistake as to any law in force in India. Although a mistake of fact vitiates a contract, a mistake of law does not. This is based on the maxim that ignorance of law is no excuse. In order to render a contract void on the ground of mistake three things must exist i.e.

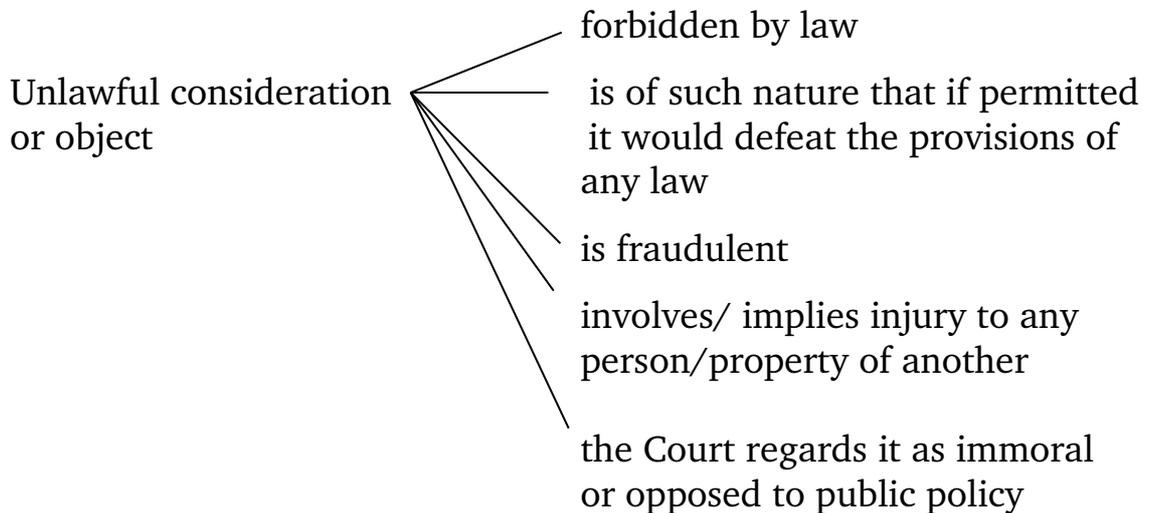


22. As per Section 65 of the Contract Act where the contract is void on account of mistake, a person receiving an advantage under it, is bound to restore it or make compensation for it to the person from whom he received it. So also as per Section 72 of the Contract Act a person to whom money has been paid, or anything delivered by mistake, must repay or return it.

#### **(h) Illegality or Want of Authority to Enter into Contract**

23. Section 11 of the Contract Act speaks about the persons have authority to enter into contract. It is already discussed earlier. Section 20 of the Succession Act provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. The effect of this was that all married women to whose marriages the Act applied became absolute owners of all property vested in, or acquired by them, and their husbands did not by their marriage acquire any interest in such property. By Section 10 of the Contract Act an

agreement is a contract (i.e. enforceable) if only it is made for a lawful consideration and with a lawful subject. Section 23 of the Contract Act declares what kinds of consideration and objects are not lawful.



24. Such an agreement is void and not enforceable. Under Section 24 of the Contract Act a divisive agreement of which consideration or object is unlawful in part would be enforceable for the part of lawful consideration or object. Agreement in restraint of marriage, or trade, or legal proceedings is void as per Sections 26, 27 and 28 of the Contract Act, respectively. Wagering contracts are void as per Section 30 of the Contract Act.

25. For considering defences in such suits, both, Specific Relief Act and the Indian Contract Act are to be conjointly read and interpreted.

### **(B) When can Specific Performance of a Contract be Enforced**

#### **[Section 10]**

26. Chapter II of the Specific Relief Act expressly provides for contracts which can be specifically enforced and contracts which can not be specifically enforced. Provisions touching these two contingencies are spread over Sections 10 to 14 of the Specific Relief Act.

**(a) Contracts when can be Specifically Enforced**

27. Section 10 provides for the cases in which specific performance of contract is enforceable. The clauses (a) and (b) of the said section carve out the categories of contracts which are specifically enforceable. They are as follows :-

- (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.

28. What is unfolded from Section 10 is, that, specific performance should be considered in cases where it is difficult to ascertain loss in monetary terms. As a natural corollary, when non-performance of the agreement can be adequately compensated in terms of money, the Court should not exercise its discretion of granting specific performance.

**(b) When there Exists No Standard for Ascertaining Actual Damage**

29. The clause (a) as stated above covers cases where the subject matter is so unique that it would be impossible to say what it would fetch in the market. A value of affection is seldom appreciated by third persons. All contracts concerning unique or precious articles, paintings etc. as well as contracts for delivery of deeds or instruments whose value to the owner might be priceless and beyond the competency of the Court to decide by application of certain legal rules may be specifically enforced. Where the article is esteemed, not much

for its intrinsic value, but as being an object of attachment or curiosity, specific performance can be granted.

**(c) When Pecuniary Compensation Would not  
Afford Adequate Relief**

30. Specific performance will also be granted when compensation in money is not adequate relief in facts and circumstances of case. Damages may be considered to be an inadequate remedy if it is difficult to quantify them. The explanation to Section 10 provides for two presumptions which are necessary to be taken into consideration while appreciating whether compensation in money for non-performance of contract would afford adequate relief or not. The first presumption is in regard to the contract to transfer immovable property and it shall be presumed that, breach of such contract cannot be adequately compensated in terms of money. The second presumption is in regard to the contract to transfer movable property and it shall be presumed that, breach of such contract can be relieved by compensation in money, except in two cases viz. -

- i) where the movable property is not an ordinary article of commerce or is of a special value or interest to the plaintiff or consists of goods which are not easily obtainable in the market.
- ii) where the movable property is held by the defendant as agent or trustee of the plaintiff.

**(C) Contracts which Can not be Specifically Enforceable**

**[Section 14]**

31. Section 14 of the Specific Reliefs Act deals with different types of contract which cannot be specifically enforceable.

**(a) Compensation in Money an Adequate Relief**

**[Section 14(1)(a)]**

32. The remedy of damages and specific performance are available upon breach of obligations by a party to the contract; the former is a 'substitutional' remedy, and the latter a 'specific' remedy.

33. There is a presumption that compensation would not be adequate in the case of transfer of immovable property, and it would be adequate in case of breach of transfer of movable property. Thus, the party alleging compensation as adequate or inadequate must prove it.

34. In the case of Ashok Kumar Srivastav V/s. National Insurance Co. Ltd, 1998 AIR(SC) (0) 2046, the Hon'ble Supreme Court has observed :-

“The legal position is clear, if the contract is for specific enforcement of a contract of employment, Section 14(1)(a) of the Act makes it clear that a contract of employment is not specifically enforceable since non-performance of it can be compensated by money.”

**(b) Contract which Runs into Minute or Numerous Details.**

**[Section 14(1)(b)]**

35. 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 can not be enforced.

36. For example – A contract for personal service or employment cannot be enforced by or against the employer, only damages can be sought.

37. In the case of Jitendranath Biswas Vs. Empire of India and

Ceylone Tea Company, A.I.R. 1990 SC 255, the Hon'ble Supreme Court has observed :-

“An employee of a Private Company whose services are terminated can not seek the relief of reinstatement and back wages in a Civil Suit as a contract of employment for personal service could not be specifically enforced. At the most he could seek the relief of damages.”

**(b) Contract Determinable.**

**[Section 14(1)(c)]**

38. The term determinable suggests a situation where despite the Court's enforcement; the parties can immediately revert to their original position, thereby making such enforcement futile.

39. For example - Where A and B contract for partnership without providing a defined duration, the partnership cannot be enforced as it could easily be dissolved at once.

40. In the case of Indian Oil Corporation Ltd. Vs. Amristsar Gas Service, 1991 SCC (1) 533, the Hon'ble Supreme Court has observed :-

“A distributorship agreement which contained a clause that entitled either party to terminate the agreement with 30 days prior notice and without assigning any reason was 'determinable' in nature and hence, could not be specifically enforced.”

41. The view in the case of Indian Oil Corporation Ltd. Vs. Amristsar Gas Service, 1991 SCC (1) 533, has further been reaffirmed by the the Hon'ble Supreme Court in the case of Highness Maharani Shantadevi P. Gaikwad Vs. Savjibhai Haribhai Patel, 2001 AIR (SC) 1462, wherein the Hon'ble Supreme Court has observed :-

“An agreement for construction unilaterally terminable before delivery of possession to be 'determinable' in nature”

**(d) Performance of a Continuance Duty which the Court can not Supervise [Section 14(1)(d)]**

42. An agreement of continuous performance of certain acts cannot be specifically enforced by the Court. The word 'continuous' means without interruption.

43. For example - If a subscriber of a telephone sues the telephone department for the improper functioning of telephone, the Court cannot direct the telephone department for proper working of telephone. Such decree cannot be passed as it requires a continuous duty of supervision which Court cannot.

44. In the case of Southern Chemical Works Vs. Mohamed Husein Fakruddin Maniyar, AIR 1970 Bombay 128, the Hon'ble Bombay High Court has observed :-

“In a case where the Court can not specifically enforce the agreement of agency since it would be impossible to supervise the carrying of it, the plaintiff would not be barred from asking damages where the defendant does not carry out contract not because of law prevents it but because he refused to take any action to satisfy conditions before fulfillment of contract”

**(D) What does Discretion and Power of Court mean  
[Sections 20]**

**(a) The Jurisdiction to Decree Specific Performance is Discretionary.**

45. Section 20 (1) of the Specific Relief Act states that, the jurisdiction to decree specific performance is discretionary.

46. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the

plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misled the Court, then such discretion should not be exercised by refusing to grant specific performance.

**(b) The Court is not bound to grant such relief merely because it is lawful to do so.**

47. In the case of Sadar Singh Vs. Kirshna Dev, 1994 SCC (4) 18, the Hon'ble Supreme Court has observed :-

“The circumstances specified in Section 20 are illustrative and not exhaustive. The Court would take into consideration the circumstances in each case, the conduct of the parties and respective interest under the contract.”

**(c) The Discretion of the Court should not be Arbitrary but Sound and Reasonable, guided by Judicial Principles and Capable of Correction by a Court of Appeal.**

48. The cases in which the Court may properly exercise discretion not to decree specific performance has been enumerated in sub-section (2). They are (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 avoidable, 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.

**(d) Alternative relief of refund of Earnest Money (Section 22).**

49. The Section 22 enacts that the person filing a suit for specific performance of the contract for the transfer of immovable property, may ask for appropriate reliefs, namely for possession or for partition, or for a separate possession, including the relief for specific performance. He may also ask for the refund of any earnest money or deposit made by him, in the event of his claim for specific performance of the contract, being rejected by the Court.

50. The Hon'ble Supreme Court in the matter of Rajeshwari Vs. Puran Indoria, (2005) 7 SCC 60 has restated the factors which have to be kept in mind in exercising the power of the discretion under Section 20 of the Specific Relief Act. The said factors are as follows :-

1. Whether the plaintiff was ready and willing to perform his part of the contract in terms of section 16 ?
2. Whether it was a case for exercising of the discretion by the Court for decreeing specific performance under Section 16 ?
3. Whether there were laches on the part of the plaintiff in approaching the Court ?

**(E) Elements that are involved in a Suit for Specific Performance of Contract**

**[a] Valid contract**

51. The remedy of specific performance pre-supposes the existence of a valid contract between the parties to the controversy. The terms of the contract must be definite and certain. This is significant because equity cannot be expected to enforce either an invalid contract or one that is so vague in its terms that equity cannot determine exactly what it must order each party to perform. It would be unjust for a

Court to compel the performance of a contract according to ambiguous terms interpreted by the court, since the Court might erroneously order what the parties never intended or contemplated.

**[b] Unregistered agreement for sale  
(Section 49(c) and 17 of the Registration Act)**

52. Section 17 of the Registration Act, provides that if the agreement to sell is unregistered, it shall have no effect for the purpose of Section 53A of the Transfer of Property Act. It means that agreement to sell which is unregistered cannot be admissible as evidence. Section 53A of the Transfer of Property Act deals with part performance where there must be a contract to transfer for consideration any immovable property between the transferor and transferee and the transferee taken possession of the property or any part thereof or being already in possession, continues in possession in part performance of the contract and the act of transferee has done something in part of the contract or willing to perform his part of the contract then transferor shall be debarred from enforcing against transferee. The main object or intent of this section is to prevent transferor from taking advantages on the account of non-registration of the document.

53. Section 49 of the Registration Act gives legislative sanction to the equitable doctrine of part performance. This Section of the Registration Act is widely accepted on its own merits that a suit for specific performance can lie on the basis of unregistered agreement to sell and can be admissible as evidence.

54. In the case of [K.B. Saha and Sons Private Limited Vs. Development Consultant Limited](#) (2008) 8 SCC 564, the Hon'ble Supreme Court has observed :-

“1. A document required to be registered, if

unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

**(c) Conduct of the parties**

55. A plaintiff seeking specific performance of a contract must have contracted in good faith. If the plaintiff has acted fraudulently or has taken unfair advantage of superior bargaining power in drafting extremely harsh contract terms with respect to the defendant, the plaintiff has thereby contravened the doctrine of clean hands. Under that doctrine, the Court will deny relief to a party who has acted unjustly in regard to a transaction for which that party is seeking the assistance of the court. Equitable relief will be denied to anyone who has acted unjustly or with bad faith in the matter in which he seeks relief, irrespective of any impropriety in the behavior of the defendant.

56. The misconduct does not necessarily have to be of such nature as to be punishable as a crime or to justify any legal

proceedings. Any intentional act concerning the cause of action that violates the standards of fairness and justice is sufficient to prohibit the granting of equitable relief. At all times, a plaintiff must be willing to do equity which means that the plaintiff must fulfill whatever equitable obligations the Court imposes upon him in order to do what is just and fair to the defendant. A person will be granted specific performance only if that person has done, has offered to do, or is ready and willing to do all acts that were required of him to execute the contract according to its terms.

**[d] Readiness and willingness**  
**Section 16(c)**

57. Section 16 is mandatory and imperative provision, because it reads that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove as laid down by it. The word 'aver' and the word 'prove' are entirely two different things. The word 'aver' means that it should be asserted or mentioned in the plaint. The word 'prove' indicates that the said averment which is pleaded in the plaint must be proved by leading evidence, in the course of trial.

58. In view of the requirements of para 3 of the Form No. 47 of Appendix "A" of the First Schedule of the Code of Civil Procedure and in view of the mandate of Section 16 (c) of the Specific Relief Act, it has become obligatory for the plaintiff not only to aver in the plaint, but also to prove by evidence that the plaintiff has always been ready and willing to perform his part of the contract. The first requirement is that he must aver in the plaint. Indeed, the question of evidence of proving a particular fact would come only when there is an allegation in the plaint to that effect. The compliance of requirements of Section 16 (c) of the Specific Relief Act is mandatory and in absence of the necessary

averment in the plaint and in the absence of proof of the same that the plaintiff had been ready and willing to perform his part of the contract, the suit cannot succeed. Though the defendants had not raised any plea to that effect in the written statement nor was there any issue, the mandate of the statute required that the plaintiff must aver in the plaint and must give proof of the fact that he was and has been ready and willing to perform his part of the contract. Merely giving proof of the fact will not be a substitute for the necessary averment in the plaint. The amendment in the plaint in such a case cannot be allowed for two reasons; firstly, because a valuable right has accrued to the defendant and, secondly, because the amendment seeks to bring out a cause of action in the plaint, which was conspicuous by its absence in the plaint as originally filed.

**[e] Time essence of contract.**

59. In matters relating to sale of immovable properties, whether time is or time is not an essence of contract is an important question of law so as to decide upon the question whether obligations undertaken by the parties under the contract are to be performed. This question whether time is an essence of contract is a mixed question of law and fact and has been decided by the Courts on the basis of facts of each case.

60. Section 55 of the Contract Act uses the phrase 'time is essence of contract' and provides that where parties agree to perform a certain act on specified time and parties fail to perform the said act at the said time then the contract becomes voidable at the option of the promisee if it was intention of the parties to make time an essence of contract. The Section further provides that in case where parties to contract do not intend to make time an essence of contract then

promisee is entitled to claim compensation for any loss occasioned to him as a result of such default. Section 46 of the Contract Act further provides that where no time is specified in the contract for the performance of contract then it is to be performed within reasonable time period.

**[f] Essential elements to constitute lis pendens  
(Section 52 of The Transfer of Property Act)**

61. The following are the essential elements to constitute lis pendens principle :-

- i. There must be suit is pending in the competent Court.
- ii. The suit or proceeding must not be collusive.
- iii. The litigation must be one in which right to immovable property is directly and specifically in question.
- iv. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.
- v. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.

**(F) Amendment.  
(Section 21, 22)**

- (a) **The Stage at which an amendment can be allowed.**
- (b) **Amendment as to compensation**
- (c) **Amendment as to partition.**

62. Section-21(1) of the Specific Relief Act, empowers the plaintiff to claim compensation in addition to or in substitution of the relief of specific performance of a contract. However, sub-section (5) of

this section imposes a restriction that without specifically claiming the compensation it shall not be allowed. The proviso clause of sub-section (5) empowers the Court to allow the plaintiff to amend the plaint at any stage of the proceedings on such terms as may be just for including a claim for compensation.

63. Section 22(1) of the Specific Relief Act, empowers the plaintiff to seek the relief of separate possession and partition in addition to specific performance of contract or any other relief to which he may be entitled including refund of earnest money or deposit. Sub-section (2) imposes a restriction to grant such additional reliefs unless those reliefs are specifically claimed. The proviso clause of sub-section (2) empowers the Court to allow the plaintiff to amend the plaint at any stage of the proceedings on such terms as may be just for including claim of such additional reliefs.

64. The addition of relief of compensation, possession, partition, refund of earnest money or deposit in the suit for specific performance of contract does not change the nature of the suit. The expression 'at any stage' of the proceedings empowers the Court to grant amendment not only at the stage of pre-hearing, but also

- (a) after commencement of the evidence,
- (b) prior to pronouncement of judgment,
- (c) at the appellate stage,
- (d) at execution stage.

65. In the case of Kahini Developers Pvt. Ltd. Vs Mukesh Morarji and others, 2013(3) Mh.L.J. 440, the Hon'ble Bombay High Court has observed :-

“Proviso clauses of Section 21(5) and 22(2) of the Specific Relief Act requires that Court shall

allow to amend the plaint even at the stage of the execution. The object is to obviate the multiplicity of proceedings.”

66. Section 22 (2) of the Specific Relief Act requires that the claim for possession must be specifically made. However, it is to be noticed that Section 55(1)(f) of the Transfer of Property Act, provides that the seller is bound to give, in the absence of the contract to the contrary on being so demanded by the buyer or such person as he directs, the possession of the property. It is now settled principle that the decree of specific performance includes everything incidental to be done to complete the sale transaction.

67. In the case of Prataprat Trambaklal Mehta V/s. Jayant Nemchand Shah and others, 1996 (2) Mh.L.J. 885, the Hon'ble Bombay High Court has observed :-

“ A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by Section 55 of the Transfer of property Act. Clause (f) of section 55(1) of the said Act provides that the seller is bound to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits. The delivery of possession is thus a necessary ingredient and part of transfer of ownership. Therefore, where a decree for specific performance of contract is silent as to the relief of delivery of possession, the executing Court is still competent to deliver possession.”

**(d) Applicability of Order VI Rule 17 of the Code of Civil Procedure.**

68. The Order VI Rule 17 of the Code of Civil Procedure confers a very wide discretion on Courts in the matter of amendment of pleadings. As a general rule, leave to amend will be granted so as to enable the real question in issue between parties to be raised in pleadings, where the amendment will occasion no injury to the opposite party and can be sufficiently compensated by costs or other terms to be imposed by the order.

69. It is relevant to note that the Code of Civil Procedure is a general enactment whereas the Specific Relief Act, is a special enactment. Section 22 of the Specific Relief Act begins with a non-obstante clause. Section 22 of the Specific Relief Act has been given overriding effect to any other provision of the Code of Civil Procedure. Although proviso to Order VI Rule 17 was inserted in 2002, i.e. to say after commencement of the Specific Relief Act, yet fact remains that there exists a special provision to allow amendment at any stage in the particular/special law, which has an overriding effect on the provision of the Code of Civil Procedure.

70. In view of the special provision, embodied in Section 22 of the Specific Relief Act, in the cases of this nature, proviso to Order VI Rule 17 Code of Civil Procedure cannot be an impediment in seeking amendment even after commencement of the trial. In such cases, the proviso of Order VI Rule 17 must give way to the amendment sought in the proceedings under the Special Relief Act, provided such relief is

covered under Section 22 of the Specific Relief Act .

71. The Hon'ble Supreme Court in Babu Lal v. Hazari Lal Kishori Lal AIR 1982 S.C. 818 has held that the decree holder was entitled to possession obtaining a decree of specific performance, not only from the original owners, but also from the transferees. The Hon'ble Supreme Court in the above case has observed :-

“ It may not always be necessary for the plaintiff to specifically claim possession over the property since the relief of possession is inherent in the relief for specific performance of the contract of sale. Adverting to the proviso to sub-section (2) of Section 22 of the Specific Relief Act which provides for amendment of the plaint on such terms as may be just for including a claim for such relief "at any stage of the proceedings", the Hon'ble Supreme Court has held in emphatic terms that the word "proceeding" under Section 22 includes execution proceedings also.

72. The observations of the Hon'ble Supreme Court in the above decision leaves no room for any doubt as to the authority and empowerment of the execution court to give full effect to the decree for specific performance by ordering for putting the decree holder, in whose favour a decree for a specific performance was granted in respect of an immovable property, in possession of that property though it is not so specifically provided in the decree. It is profitable and more appropriate to note the following observations of the Hon'ble Supreme Court :-

“ The court when allowing the prayer for specific performance vests the executing Court with all the powers which are required to give full effect to the decree for specific performance. By the decree for specific performance, the Court sets out what it finds to be the real contract between

the parties and declares that such a contract exists and it is for the executing Court to do the rest.”

73. Lastly it is to be noted here that the power of the Court to grant relief under clause (b) under section 22 of the specific Relief Act, is without prejudice to its powers to award compensation under Section 21 of the said Act. Proviso Sub-section (5) of Section 21 and Sub-section (2) of Section 22 of the Specific Relief Act provides that if the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow the plaintiff to amend the plaintiff on such terms as may be just for including claim for such relief. The aforesaid provisions under the Specific Relief Act contain a special rule of pleading with regard to claim of additional relief in a suit for specific performance of contract. Thus, the said proviso has been added with a view to avoid multiplicity of the suits.

**(G) LIMITATION**  
**[Article 54 of the Indian Limitation Act]**

74. In third column of Article 54 of the Limitation Act, it is mentioned that “the date fixed for the performance, or, if no such date is fixed when the Plaintiff has notice that performance is refused”. Therefore, it is itself clear from said provision that this article is divided in two parts. If in a contract time for its specific performance is fixed the first part of this article would be applicable and other cases its second part would be applicable. In absence of fixed date for the performance of the contract the time doesn't start to run until there has been a demand and there is refusal to perform the contract by the party who is bound to perform the contract. The date then commences from the date when the plaintiff got the notice of refusal.

75. Whether a party got notice of refusal or not depends on the facts and circumstances of each case and the evidence put forth by the party to that effect, if no specific evidence is brought before the Court then the Court will have to draw inference from the surrounding facts and circumstances regarding the refusal to perform the contract and subsequently when the limitation period would begin to run.

76. The date mentioned in Article 54 suggests a specified date in the calendar also the word “notice” means intimation, information, cognizance or observance. Notice also indicates knowledge and this knowledge comes from direct perception or from inference reasonably arising out of several facts and circumstances.

77. In a case where no time for performance is fixed the Court is required to find the date on which the plaintiff had notice that the performance had been refused and on finding that date to see whether the suit was filed within three years thereof.

78. The second part of the Article 54 is attracted only when the whole evidence is considered in the Court and the Court on going through the same will have to decide whether the suit had been filed within three years of the date of refusal.

79. In a contract of sale if no date of performance is fixed and there is no demand for performance and also no refusal to perform the contract and no notice or knowledge that the contract was repudiated, cancelled then the question of limitation would not arise as there would not be any specific date or incidence for the limitation period to start for a suit for specific performance. Also the refusal to perform the contract may be in various ways it can be express, implied, it may be gathered from the circumstances for a particular case.

80. In the case of Ahmmadsahab Abdul Mulla (deceased by L.Rs.) Vs. Bibijan & Ors. AIR 2009 S.C. 2193, the Hon'ble Supreme Court has observed :-

“49. The inevitable conclusion is that the expression 'date fixed for the performance' is a crystallized notion. Thus is clear from the fact that the second part "time from which period begins to run" refer to a case where no such date is fixed. To put it differently, when date is fixed it means that there there is a definite date fixed for doing a particular act. Even in the second part the stress is on 'when the plaintiff has notice that performance is refused. Here again, there is a definite point of time, When the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression 'date' used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calender.”

**(b) Extension of Time for Performance by Contract.**

81. The parties to the contract can mutually extend time for performance of such contract. Extension of time can be implied and can be also gathered from the conduct of the parties. There can be contracts in which no time is fixed for performance of a contract. Time is normally not of essence in contracts for purchase of an immovable property. In such cases where extension of time is pleaded or no time is fixed, second part of Article 54 applies and period of limitation begins from the date when the plaintiff has notice that performance has been refused.

82. In Gunwantbhai Mulchand Shaha and others Vs. Anton Elis Farel and others (2006)3 scale(82) : A.I.R.2006 SCW 1377, the Hon'ble Supreme Court has observed :-

"We may straight way say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963. When the enquiry could have been, first, whether any time was fixed for performance in the agreement for sale and if it was so fix, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had noticed that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof."

83. The Limitation Act provides for a limitation period for a suit of specific performance of agreement of sale of immovable property in Article 54 and the said period of limitation is of three years for the purpose of filing the suit for specific performance. The said period of limitation commences from the date fixed for the performances in the agreement or in the event of no such date being fixed, when the plaintiff had noticed that the performance is refused.

84. The purpose of institution of the date for specific performance, two dates are material i.e., i) The date fixed for performance or ii) The date when the plaintiff had noticed that, the performance is refused. It may be noted that, the date of agreement is irrelevant for the purpose of limitation.

85. There can also be situations wherein the original agreements had fixed date for performance, but owing to the subsequent conduct, the parties postponed the performance to a future date without fixing any further date for performance. It would therefore be natural for the performance being extended, although the original agreement may have fixed date for performance.

86. However, these arrangements between the parties to the contract are also permitted under the provisions of Sections 50, 55 and 63 of the Contract Act. These provisions provide for - i) The performance of any promise at any time in the manner which the promisee sanctions. ii) If the promisee accepts the performance of the promise at any time other than that agreed and iii) Every promisee may extend time for the performance of contract.

**(c) Effect of Stipulation of Bringing Permission for Sale for Specific Performance of Contract on Limitation.**

87. The agreements embodying stipulation of bringing permission for sale from concerned authorities are forbidden by law as its object is unlawful within the meaning of Section 23 and are contingent within the meaning of Section 31 of Contract Act. It means fate of such agreements is depend on the contingency (grant or refusal) of permission. If authority grants permission for sale then agreement is contract enforceable by law. If authority rejects permission for sale then agreement is unenforceable at law owing to unlawful object and is void. However, for the grant of decree of specific performance of contract permission of concerned authorities is no bar.

88. In the case of *Rojasara Ramjibhai Dahyabhai Vs. Jani Narottamdas Lallubhai*, AIR 1986 SC 1912., the Hon'ble Supreme Court has observed :-

“There was an agreement for sale of flat which had to be finalized after obtaining permission of authorities to use as village site was a pre-condition for the execution of the sale deed. The suit for specific performance was filed within three years after obtaining permission, it was held to be not barred by limitation.”

89. In the case of *Nirmala Anand Vs. Advent Corporation Pvt. Ltd.*, AIR 2002 SC 2290, the Hon'ble Supreme Court has observed :-

“ When the construction company refused construction on the ground that the original lease of plot was terminated by the municipality and the facts showed that there was a possibility of renewal of lease and revalidation of building plan and the purchaser was ready to perform her part of the contract, then specific performance cannot be refused.”

90. In the case of *Balu Babu Rao Vs. Shaik Akbar*, AIR 2001 Bombay 364, in the context of Section 43 of the Bombay Tenancy and Agricultural Lands Act and Section 20 of the Specific Relief Act the Hon'ble Bombay High Court has observed :-

“When the suit property was not transferable, without prior permission of the collector a decree of specific performance granted subject to sanction of collector cannot be held to be improper.”

### CONCLUSION

91. Inasmuch as the conduct of parties is very much important in a suit for specific performance, the party who seek for relief of specific performance must approach the Court of law with clean hands. Further, while preparing plaint and written statement of the parties,

proper care and caution must be taken and the relief must be clear and specific.

92. It is not disputed that, generally, to a suit for a specific performance of a contract for sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a Court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as in law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it.