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Article

Making specific performance the rule; not the exception

By **Akshita Alok**

Introduction

On March 15th, 2018, the Lok Sabha passed the Specific Reliefs (Amendment) Bill, 2017 ("**Bill**") by a voice vote proposing to amend several provisions of The Specific Reliefs Act, 1963 ("**Act**"). The Bill, introduced by the Ministry of Law & Justice, is yet to face the scrutiny of the Rajya Sabha. It is notable that this is the first time that an amendment has been sought since the promulgation of the Act.

The Act currently offers specific relief in the event of a breach of the contract as an exceptional remedy under limited circumstances and the Bill seeks to amend this position to allow damages only as an exceptional remedy in the event of a breach. The significant changes that the Bill introduces have been discussed below –

1. *Specific performance:* In substitution of the existing Section 10 of the Act, which gives wide powers to the court to exercise its discretion to determine the relief to be awarded, the amended section restricts "specific performance" as the relief that can be awarded subject to provisions of Sections 11(2), 14 and 16 of the Bill. The underlying principles that helped courts to enforce specific performance were (i) that there existed no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; and (ii) when the act to be done is such that compensation in money for its non-performance would not afford adequate relief. Now, pursuant to the Bill, in order to determine the specific performance to be awarded, the court has to examine the circumstances of the suit in light of the following provisions of the Bill –
   (i) Section 11(2), which provides that a contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.
   (ii) Section 14, which provides the kinds of contracts which are not specifically enforceable.
   (iii) Section 16, which lists the reasons due to which specific performance against a person cannot be enforced.

2. *Contracts not specifically enforceable:* In substitution of the existing Section 14 of the Act, which allows awarding compensation for non-enforcement of a contract, the amended section under the Bill provides the following conditions for contracts, which cannot be specifically enforced –
   (i) Where the party has obtained substituted performance.
   (ii) Where the performance of the contract is a continuous duty, which cannot be supervised by the court.
   (iii) Where the contract is so dependent on the personal qualifications of party of which specific performance the court cannot enforce.
   (iv) Where a contract is by nature determinable.

3. *Personal bars to relief:* In substitution to the condition that a contract cannot be specifically enforced in favour of a person who would not be entitled to recover

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compensation for its breach, the amended section under the Bill states that a contract cannot be specifically enforced in favour of a person who has obtained substituted performance of contract.

A big problem that parties faced was not only to prove the readiness and willingness to complete the project from the date of the contract through the decree but also to have a specific plea regarding this in the plaint. Further, the condition to "aver and prove" the readiness and willingness to perform the obligations under the contract has been amended to "proving" the readiness and willingness to perform the obligations only.

4. *Power of Court to engage experts:* A new Section 14A has been included pursuant to the Bill, which allows the court to engage experts at a determined fee, cost, or expense in a given suit to assist the court with their understanding of the subject-matter including evidence, documents, etc. Any opinion of such an expert shall form part of the record of the court in such matter.

5. *Substituted performance of contract:* One of the most significant changes in the Bill is the substitution of the existing Section 20 of the Act concerning the discretion as to decreeing specific performance with "substituted performance". The amended section under the Bill gives the aggrieved party the right to obtain substituted performance of the contract through a third party or his own agency and recover the expenses and other costs from the defaulting party. Such substituted performance can be availed after duly notifying the defaulting party of exercising such option and allowing it to rectify the breach, failing which substituted performance can be invoked. Notably, this restricts the party from claiming a relief of specific performance once the option of substituted performance has been exercised; however, it does not bar the party from claiming compensation for the breach.

6. *Infrastructure projects:* The Bill has accorded special consideration to the 'infrastructure project' contracts, which involve huge capital investment and, thus, demand faster and more effective resolution in case of potential disputes between the parties. The Bill focuses on infrastructure projects and various changes have been proposed for facilitating such projects. Insertion of Section 20A pursuant to the Bill is also such a change, which stipulates that injunction in such projects shall not be granted by a court where granting such an injunction would cause impediment or delay in the progress or completion of such project.

A new Schedule is proposed to be added to the Act providing an exhaustive list of projects that qualify under infrastructure projects under the Bill. "Infrastructure project" means the category of projects and infrastructure sub-sectors as specified in the Schedule of the Bill. There are five categories of projects viz., Transport (with seven more sub-categories), Energy (with six more sub-categories), Water and Sanitation (with seven more sub-categories), Communication (with three more sub-categories) and Social and Commercial Infrastructure (with ten more sub-categories). This Schedule is subject to amendments by way of a gazette notification by the Department of

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Economic Affairs. However, every such notification issued under this Bill shall be laid before each House of the Parliament for any modification on the amendment or its annulment thereof.

Further, the Bill seeks to engage experts to assist courts in cases wherever so required, provided that State Governments has the responsibility to designate one or more civil courts as special courts to try suits under the Act relating to 'infrastructure projects' and, crucially, proposed time-bound disposal of cases by special counts.

7. *Expeditious disposal of suits:* The special courts so designated shall be required to dispose off the matters before it in a fixed time of twelve months from the date of service of summons by the court, extended by a separate application to a maximum period of another six months in aggregate, after the reasons for such an extension by the court is recorded in writing.

Conclusion

The Bill is yet another change towards increasing "ease of doing business" in India by taking away the discretionary power of courts in enforcing specific remedies and limiting the circumstances in which damages may be awarded to the aggrieved party. It is only logical that this paradigm shift has been introduced now, since the process of awarding damages is a complex one requiring fair and correct assessment of damages, and may often result in over-assessment or under-assessment of the quantum to be awarded. Further, the commonly sought remedy of injunction may only sparingly be awarded by the courts in the case of an infrastructure project, once the Bill becomes effective. This has been done with a view to avoid unnecessary delay and hardship to the aggrieved party given the fact that such projects often involve public-private partnerships and huge expenditure and any delay results in a steep reduction in the value of the project itself. The inclusion of "substituted performance" is a welcome change as it reflects the intention that the focus is now on achieving the end objective of the contract, and recognising that monetary damages might not be the ideal remedy available to an aggrieved party. Essentially, once the Amendment is promulgated, the courts shall be able to award three types of reliefs, i.e., specific performance, substituted performance and monetary compensation.

In conclusion, the Bill is a welcome change and it can be expected to take up India's contract enforceability position a few notches higher. On the contrary, it is also a fact that the burden on the civil courts in the country is tremendous and this Bill yet aims to keep court's interference in the process, while taking away its discretionary powers; however, such courts shall be the special courts to dispose cases in a time-bound manner and take necessary support from experts. While the amendments proposed are noteworthy, it remains to be seen how the litigators and courts react to the same, once the Bill is promulgated into an Amendment by the Upper House of the Parliament.

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Notifications and Circulars

Companies (Share Capital and Debentures) Amendment Rules, 2018: The Ministry of Corporate Affairs exercising its powers conferred under Section 469 of the Companies Act, 2013 has notified the Companies (Share Capital and Debentures) Amendment Rules, 2018 *vide* Notification No. G.S.R. 363(E) dated April 10, 2018. The amendment shall come into force with effect from April 10, 2018. This notification removes the inconsistencies between Section 46 of the Act and Rule 5(3) of the Companies (Share Capital and Debentures) Rules, 2014 ("Principal Rules"). The brief contents of the Notification are provided hereunder:

- Rule 5 of the Principal Rules deals with share certificates in cases where the shares are not in demat form. Pursuant to the amendment through the Notification:
  - (a) Every share certificate is mandatorily required to specify about the share it relates to and the paid-up amount on such shares.
  - (b) Further, the share certificate should be signed by either 2 directors or by a director and the company secretary, wherever the company has appointed company secretary.
  - (c) Additionally, the company needs to affix a common seal in the presence of the persons required to sign the share certificate, in case the company has a common seal.
- Further, the amendment provides that in cases of an '*One Person Company ('OPC')*' the share certificate can be signed by a director and the company secretary or any other person authorised by the board of directors of the company for such purpose.
- In addition, an explanation has been provided to the amended Rule 5(3) which states that printed signature on the share certificates would be considered to be deemed signature of the director, however, the signature by a rubber stamp would be considered only upon the personal responsibility of the director affixing his signature.

  In this regard, it is pertinent to note that Section 46 of the Act and Rule 5(3) of the Principal Rules, were identical prior to Companies (Amendment) Act, 2015 which came into effect from May 29, 2015. Pursuant to the Amendment Act, Section 46 of the Act was amended, however, no corresponding amendment was made to Rule 5(3) of the Principal Rules. Therefore, Rule 5(3) of the Principal Rules, between the period of May 29, 2015 up to April 10, 2018, was inconsistent with Section 46 of the Act and accordingly, the Notification has been issued by the MCA.

SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2018: The Securities and Exchange Board of India has notified the SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2018 *vide* Notification No. SEBI/LAD-NRO/GN/2018-18/07 dated April 10, 2018. The Notification was issued in order to encourage more investment opportunities in infrastructure investment trusts ("InvITs"). The brief contents of the Notification are provided hereunder:

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- **Insertion of new clause 2(1)(ya) defining "institutional investor"**: The term "institutional investor" has been defined to mean "*a qualified institutional buyer or family trust or systematically important NBFCs registered with Reserve Bank of India or intermediaries registered with the Board, all with net-worth of more than five hundred crore rupees, as per the last audited financial statements*". The Notification also amends Regulation 14(2)(b) to permit an InvIT to raise funds from institutional investors from the private placement route. Prior to the amendment, an InvIT was allowed only to raise funds from qualified institutional buyers. This amendment will (i) encourage investments in InvITs and (ii) provides wide ambit for systematically important NBFCs and family trusts to make entry into infrastructure market.
- **Amendments to rights and responsibilities of investment manager**: The time period for submitting audited report of annual accounts by the investment manager has been enhanced to 60 days. Prior to the amendment, the investment manager had to ensure that the audit of accounts of the InvIT by the auditor is done not less than once in a year and such report is submitted to the stock exchanges within 45 days of end of financial year ending March 31st of that particular financial year.
- **Requirement to file "final placement document" introduced, in case an InvIT raises funds by way of private placement**: A new sub-clause (f) has been inserted in Regulation 14(2) of the SEBI InvITs Regulations, 2014 to the effect that an InvIT shall file the final placement memorandum with the SEBI within a period of 10 working days from the date of listing of the units issued by the InvIT.
- **Regulations 18(3) and 18(3A) in relation to conditions for investment by an InvIT in infrastructure projects through (i) special purpose vehicles ("SPVs") and (ii) holding companies, has been amended**: Liberty has been given to the InvIT to incorporate clauses in the shareholders' agreement or partnership agreement to provide for an appropriate mechanism for resolution of disputes between the InvIT and the other shareholders or partners in the holding company and/or the SPV. Further, a proviso has been inserted which states that in case of inconsistencies between such agreement(s) and the obligations cast upon an InvIT under the SEBI regulations, the provisions of the SEBI regulations will prevail, thereby keeping a limitation and control over the liberty provided to InvITs.
- **Clause 13 of the Schedule III dealing with title disclosures, litigations and regulatory actions, has been amended**: Prior to the amendment, a InvIT was required to disclose brief description of the material litigations and regulatory actions which are pending, against the InvIT, sponsor, manager or any of their associates and sponsor group(s), the trustee and valuer, if any, in the past 5 years. With the Notification coming into force, all outstanding litigations and regulatory actions against the entities mentioned hereinabove are required to be disclosed **but** the limitation of a 'five year' period has now been deleted. The Notification clarifies the ambiguity surrounding the meaning of "outstanding litigation", since a litigation that is outstanding and deemed to be material is now required to be disclosed. The five year timeframe in this regard is now immaterial and has accordingly been omitted.

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SEBI (Real Estate Investment Trusts) (Amendment) Regulations, 2018: The Securities and Exchange Board of India ("**SEBI**") has notified the SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2018 *vide* Notification No. SEBI/LAD-NRO/GN/2018-18/06, dated April 10, 2018 ("Notification"). The Notification was issued in order to encourage more investment opportunities in real estate investment trusts ("REITs"). The brief contents of the Notification are provided hereunder:

- **Insertion of new clause 2(1)(zj) defining "real estate assets"**: The term "real estate assets" has been defined to mean "*properties held by REIT, on a freehold or leasehold basis, whether directly or through a holdco and/or a special purpose vehicle*". With the amendment coming into force, assets held by the holding company of the REIT have been included under the definition of real estate assets. Prior to the Amendment, the definition of real estate assets was limited to assets owned by an REIT directly or through its special purpose vehicles.
- **Insertion of new clause 2(1)(zn) defining "REIT assets"**: The term "REIT assets" has been defined to mean "*real estate assets and any other assets held by the REIT, on a freehold or leasehold basis, whether directly or through a holdco and/or a special purpose vehicle*". With the amendment coming into force, assets held by the holding company of the REIT have been included under the definition of REIT assets. Prior to the Amendment, the definition of REIT assets was limited to assets owned by an REIT directly or through its special purpose vehicles.
- **Additional conditions imposed on the definition of "sponsor group" with respect to eligibility while applying for a certificate of registration of REITs**: New provisos inserted to the Regulation 4(2)(d) which provides that the SEBI while considering the eligibility of the entities categorised as the sponsor group, only the following persons or entities shall be considered:
  (a) a person or entity who is directly or indirectly holding an interest or shareholding in any of the assets or special purpose vehicles or holding companies proposed to be transferred to the REIT;
  (b) a person or entity who is directly or indirectly holding units of the REIT on post-issue basis; and
  (c) a person or entity whose experience is being utilised by the sponsor for meeting with the eligibility conditions required under the SEBI (REIT) Regulations, 2014. Such eligibility conditions under the SEBI (REIT) Regulations, 2014, require that the sponsor or its associates have a minimum of 5 years of experience in the development of real estate or fund management in the real estate industry, however, in the event the sponsor is a developer, at least 2 projects of the sponsor are required to have been completed.
- **Regulations 18(3) and 18(3A) in relation to conditions for investment by REIT in projects through (i) special purpose vehicles and (ii) holding companies, has been amended**: Liberty has been given to the REIT to incorporate clauses in the shareholders' agreement or partnership agreement to provide for an appropriate mechanism for resolution of disputes between the REIT and the other shareholders or partners in the holding company and/or the SPV. Further, a proviso has been inserted which states that in case of inconsistencies between such agreement(s) and the

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obligations cast upon an REIT under the SEBI regulations, the provisions of the SEBI regulations will prevail, thereby keeping a limitation and control over the liberty provided to REITs.

- **Regulation 18(3)(b) has been substituted with a new clause**: With the Notification coming in force, the manager, in consultation with the trustee, shall appoint at least such number of nominees on the board of directors or the governing board of such SPVs, as applicable, which are in proportion to the shareholding or holding interest of the REIT in the SPV. Prior to the Notification, an investment through SPVs or holding companies was subject to the manager, in consultation with the trustee, appointing the majority of the board of directors or the governing board of such special purpose vehicles or holding company.
- **Regulation 18(5) which provides certain restrictions on investments of REIT assets has been amended**: A new clause (da) has been inserted to Regulation 18(5) to the effect that REITs have been permitted to invest up to 20% of the value of REIT assets in unlisted equity shares of companies which derive not less than 75% of their operating income from real estate activity. However, such investments made in unlisted equity shares of a company, in under construction and/or completed and non-rent generating properties, shall be held by the REIT for a minimum period of three years from the date of completion or from the date of purchase, as applicable.
- **Regulation 18(7) dealing with conditions for investment by a REIT has been omitted**: The requirement that a minimum of 75% of the value of the assets of the REIT shall generate rent has now been omitted under the Notification.
- **Clause 13 of the Schedule III dealing with title disclosures, litigations and regulatory actions, have been amended**: Prior to the amendment, a REIT was required to disclose brief description of the material litigations and regulatory actions which are pending, against the REIT, sponsor, manager or any of their associates and sponsor group(s), the trustee and valuer, if any, in the past 5 years. With the Notification coming into force, all outstanding litigations and regulatory actions against the entities mentioned hereinabove are required to be disclosed **but** the limitation of a 'five year' period has now been deleted. The Notification clarifies the ambiguity surrounding the meaning of "outstanding litigation", since a litigation that is outstanding and deemed to be material is now required to be disclosed. The five year timeframe in this regard is now immaterial and has accordingly been omitted.

Performance disclosure post consolidation/ Merger of Schemes – SEBI clarifies: SEBI has issued disclosure norms to govern new mutual fund schemes post-merger. Circular No. SEBI/HO/IMD/DF3/CIR/P/2018/69 dated April 12, 2018 issued to standardize the disclosure of performance of schemes post-merger, is applicable from May 01, 2018. The brief contents of this Circular are provided hereunder:

The mutual fund entities are required to make the following disclosures:

- When two schemes, having similar features, get merged and the merged scheme i.e., surviving scheme also has the same features, the weighted average performance of both the schemes needs to be disclosed.
- When the scheme of the transferor company gets merged into scheme of the transferee company:
  - (a) in case the features of scheme of the transferee company are retained, the

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performance of the scheme whose features are retained needs to be disclosed.

(b) in case the features of the scheme of the transferor company are retained, the performance of the scheme whose features are retained needs to be disclosed.

(c) in case a new scheme emerges after such consolidation or merger of schemes, the past performance need not be provided.

- Additionally, past performance of the schemes whose features are not retained post-merger may also be made available on request with adequate disclaimer.

Ratio Decidendi

Liquidation of corporate debtor when resolution plan not materialised within time frame

Key point:

If prolonged period of corporate insolvency resolution process ("CIRP") was due to conclude, and the resolution plan for corporate debtor could not be materialized, liquidation of corporate debtor was to be permitted.

Brief facts:

Corporate Debtor having committed a default, filed an application for initiating CIRP with the adjudicating authority under Section 33(1)(a) of the Insolvency and Bankruptcy Code, 2016. The Interim Resolution Professional ("IRP") caused a public announcement and received only one claim from a financial creditor.

Thereafter, once the resolution plan was submitted by the Managing Director of the Corporate Debtor ("Resolution Applicant") to the IRP which was revised subsequently, financial creditor being the sole member of the committee of creditors ("COC") passed a resolution for seeking extension of CIRP as the original period of 180 days was to conclude in 4 days. The National Company Law Tribunal ("NCLT") passed an order granting extension of the period of CIRP for another 90 days after 180 days.

Thereafter by virtue of the notification of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 on 23-11-2017 which prohibited certain people from submitting a resolution plan, the Resolution Applicant became ineligible to be resolution applicant in terms of the Code and accordingly, another resolution plan was formulated and forwarded to the COC for consideration by a new resolution applicant.

The COC rejected the resolution plan on the ground of non-viability of the business. Further, since the extended period of CIRP was to conclude in the next 4 days, it was decided to intimate to adjudicating authority to initiate for liquidation process of Corporate Debtor. The COC had approved the Application within 270 days as prescribed for CIRP, because the resolution plan for the Corporate Debtor could not be materialized.

Observations:

Whether there are sufficient and convincing reasons for initiation of liquidation process under Section 33 of the Code?

Held:

Pursuant to Section 33 of the Code, if before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the CIRP under Section 12 of the Code, the

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adjudicating authority does not receive a resolution plan under sub-section (6) of Section 30, the adjudicating authority shall (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in the Code; (ii) issue a public announcement stating that the corporate debtor is in liquidation; and (iii) require such order to be sent to the authority with which the corporate debtor is registered.

Accordingly, liquidation of the Corporate Debtor was allowed since the resolution plan could not be materialised within the stipulated timeframe for CIRP. [*Raman Ispat (P.) Ltd.,* In RE - 2018 91 taxmann.com 408 (NCLT - Allahabad)]

Application for initiation of CIRP not maintainable when winding up proceedings initiated by High Court

Key point:

In case of a winding up petition remaining pending, before High Court, against a corporate debtor, an application made under Section 9 of the Insolvency and Bankruptcy Code, 2016 for initiating a corporate insolvency resolution process ("CIRP") is not maintainable.

Brief facts:

An application under Section 9 of the Code for initiation of CIRP against Corporate Debtor was filed with the National Company Law Tribunal after the expiry of the prescribed duration from the date of delivery of the notice or invoice demanding payment under the Code.

Pursuant to an order passed on September 18, 2017, the application was dismissed in light of the pending winding up proceedings before the High Court, Delhi against the Corporate Debtor.

Observations:

Whether an application under Section 9 of the Code can be dismissed in case of a pending winding up proceedings against the Corporate Debtor before the High Court?

Held:

Relying upon its earlier decision in the case *Forech India Pvt. Ltd.* v. *Edelweiss Assets Reconstruction Company Ltd. & Anr*. – Company Appeal (AT) (Insolvency) No. 202 of 2017, the Appellate Tribunal held that application under Section 9 of the IBC is not maintainable. The Appellate Tribunal took note of the fact that High Court had already initiated winding up proceedings by admitting the application under Section 433(e) of the Companies Act, 1956.

The Appellate Tribunal in *Forech India* was of the view that there is no provision under the IBC which stipulates that if a 'winding up' or 'liquidation' proceeding has been initiated against the Corporate Debtor, the petition under Section 7 or Section 9 against the said Corporate Debtor is not maintainable. The Appellate Tribunal further noted that once second stage i.e. liquidation (winding up) proceedings has already been initiated, the question of reverting back to the first stage of 'Corporate Insolvency Resolution Process' or preparation of CIRP does not arise.

The Appellate Tribunal in the dispute also referred to an earlier decision in the case of *Unigreen Global (P.) Ltd*. v. *Punjab National Bank* which had held that if any winding up proceeding has been initiated against the Corporate Debtor by the High Court or Tribunal or liquidation order has been passed, in such case the application under Section 10 is not maintainable. It was however held that though appellant is not covered by Section 11 of the I&B Code, ratio laid down in *Unigreen Global Private Limited* is also applicable to the 'Financial Creditor'/'Operational Creditor'. [*Birender Kumar* v. *Adel Landmarks Ltd.* - Company Appeal (AT) (Insolvency) No. 39 of 2018)]

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