

## **Courts in Pakistan administrate injunctions, specific performance, Compensation, rescission, rectification as equitable remedies.**

The law of “specific relief” as administered in Pakistan is primarily contained in the **Specific Relief Act, 1877**. It was promulgated on the 7<sup>th</sup> of February, 1877 in British-India, prior to Partition in 1947. Even before the codification of **Specific Relief Act**, specific relief had been administered in British-India based on the principles of fairness, equity, justice and good conscience.

With the passage of time, courts have been recognizing remedies such as retribution, restoration and compensation. In other words, a wrongdoer can make up for the wrong committed, by either suffering in person or by restoring the deed. Specific relief is about this last form of expiation and has been defined as relief *in specie* which means relief in exact form instead of compensation.

When it comes to civil law or the enforcement of civil rights arising out of a breach of duty or non-performance, remedies available are either compensatory or specific. Compensatory remedy includes damages, while specific remedy is enforced by directing a person to do or forbear the very thing which he or she is under an obligation to do or forbear. The remedy of specific relief may also be awarded in the shape of a declaration when no person is at fault. Compensatory remedies are sometimes either useless or inadequate; useless where a person decreed against has become insolvent, thereby making damages ineffectual; and inadequate where a contract is for the transfer of a particular house or piece of land or any movable property or good to which any special interest is attached.

Specific remedies generally enforced in Pakistani courts include the following:

- i. Taking possession of certain property,
- ii. Directing parties to perform the very act which they are under an obligation to perform,
- iii. Preventing parties from doing something which they are not under an obligation to do,
- iv. Rectifying instruments,
- v. Rescinding contracts in writing,
- vi. Cancelling instruments,
- vii. Determining and declaring the rights of parties to a status or property,
- viii. Appointing a receiver,
- ix. Taking an account of the property of a deceased person and administering the same,
- x. Taking accounts of a trust and administering trust property,
- xi. Foreclosing the right to redeem or sell mortgaged property,
- xii. Redemption of property, and
- xiii. Dissolving a partnership, rendition and realization of accounts, and compelling partners to pay balance due.

The specific remedies from *ix* to *xiii* are governed by the **Code of Civil Procedure 1908, Succession Act 1925, Trust Act 1882, Transfer of Property Act 1882** and **Partnership Act 1932**, while the remaining specific remedies are governed by the **Specific Relief Act 1877**.

Compensatory remedies are to some extent governed by the **Contract Act 1872**. The **Specific Relief Act 1877** deals with compensatory relief as a supplement or alternative.

The **Specific Relief Act** deals with both paramount as well as consensual obligations. Having a paramount obligation, a law abiding citizen of Pakistan is bound to respect the rights of other citizens and fellow Pakistanis who have vested in property. Consensual obligation is when a person agrees to act lawfully and comes under an obligation to carry it out.

The **Specific Relief Act** is divided into three parts:

- The first part contains preliminary matters. **Section 5** of the **Act** states how specific relief is given. **Section 7** states that specific relief cannot be sought for the mere purpose of enforcing penal law.
- The second part contains provisions for the kinds of relief (from the above given numbers viz. *i, ii, iv, v, vi* and *vii*).
- The third part contains provisions preventing relief (referred to in number *iii* above).

**Chapter I** of the second part of the **Specific Relief Act 1877** provides for recovery of possession, whether belonging to movable or immovable property. It contains provisions for proprietary as well as possessory remedies. Proprietary remedies are those which protect title or ownership, while possessory remedies are those which assist in securing possession even against ownership or title. **Section 8** of the **Act** provides to a person on the basis of title, the remedy of possession of specific immovable property. **Section 9** provides remedy to a wrongfully dispossessed person, irrespective of ownership or title of property. The purpose to protect possession is two-fold. First, possession is considered as evidence of ownership and second, to discourage parties from taking the law into their hands. **Section 10** deals with the recovery of specific movable property. **Explanation 2** and **illustrations d** and **e** in the **Act** show that not only may the persons entitled to a specific movable property recover it, a person who has temporary or immediate right of possession may also recover the same. **Section 11** provides a remedy for the recovery of specific movable property on grounds similar to **Section 9** for specific immovable property.

**Chapter II** is the most important part of the **Specific Relief Act**. It contains the provision for specific performance of a contract. The heading of **Chapter II** is “OF SPECIFIC PERFORMANCE OF CONTRACT” and refers to the concept that “a contract is an agreement enforceable by law”, maintaining that it deals with agreements not under question on grounds of consent, coercion, undue influence, fraud or misrepresentation. Thus, the only consideration for the court in contract cases falling within **Chapter II** is whether they can be specifically enforced. The heading also shows that the term “specific relief” is wider than the term “specific performance”. The remedy of specific relief may also be given in the shape of rectification or cancellation of instrument or rescission of a contract, in case the agreement is void or voidable or denied for want of consent, coercion, undue influence or misrepresentation.

It is widely believed that the granting of specific performance is at the discretion of the court. This so-called discretion is controlled by the rule that it has to be exercised soundly, reasonably, not arbitrarily and in harmony with judicial principles. It is not to be exercised to confer unfair

advantage upon any party claiming specific performance or put the party defending a claim of specific performance in unforeseen hardship. Matters in which specific performance may be granted are those where the act agreed to be done is in the performance of trust, no standard exists for ascertaining actual damage, pecuniary compensation is inadequate, or where there is a probability of compensation not being obtained.

**Sections 13, 14, 15 and 16** of the **Specific Relief Act 1877** provide for the part performance of a contract as far as it can be performed, and compensation as far as performance is impossible. These provisions stand in exception to the general rule of equity contained in **Section 17** of the **Act** which requires that specific performance of a contract must be in its entirety. The noticeable thing is that the party at default for non-performance of the entire contract may seek specific performance where a part unperformed is small, but cannot seek compensation. Again, it cannot have specific performance where a part unperformed is large. A party not at fault may seek performance with compensation when a part unperformed is small, but it can only seek specific performance without compensation where a large part of the contract has been left unperformed.

**Section 18** of the **Act** provides for the specific performance of a contract entered into by a vendor or lessor with imperfect title, who subsequently acquires an interest in the property. Such corresponding provisions are contained in **Section 24** of the **Act** and **Section 43** of the **Transfer of Property Act**. The difference between **Sections 18** and **25** of the **Act** is that the former provides the right of a purchaser to be enforced against a vendor or lessor with an imperfect title, while the latter provides defenses which a purchaser may maintain against a vendor or lessor with imperfect title.

**Section 19** of the **Act** permits a person suing for the specific performance of a contract to also sue for compensation for its breach in addition or in substitution. The object of this provision is obvious and two-fold; first, to prevent multiplicity of proceedings and second, to do complete justice between the parties. Other similar provisions which may be confusing are contained in **Sections, 4(b), 24(c), and 29** of the **Act** and **Order II, Rule 2, Code of Civil Procedure 1908**. The difference between these provisions is that **Section 4 (b)** saves the ordinary right of seeking compensation for breach of contract, if one does not opt for specific performance dealt by the **Act**. While on one hand **Section 19** permits a person to seek compensation in addition to or substitution of breach of contract, on the other hand it empowers the court to grant it when concluding that a person is not entitled to specific performance, despite finding that a contract between parties has been broken. Such a conclusion would entitle the aggrieved party to compensation. According to **Section 24 (c)** of the **Act**, where a party to a contract has already chosen a remedy other than specific performance, it is not entitled to specific performance. **Section 29** of the **Act** and **Order II, Rule 2, Code of Civil Procedure 1909** bars a plaintiff from filing a fresh suit after the dismissal of the first one based on the same cause of action. A considerable difference between the last two provisions is that the former extinguishes the very right to relief while the latter only bars the remedy.

**Section 21** of the **Act** provides instances of contracts which are not enforceable. **Section 23** describes persons entitled to specific performance. **Section 24** covers personal bars to relief. **Section 24** of the **Act** is different from other provisions in the chapter concerning defenses as it provides defenses by the default of a party and not arising out of the contract itself. **Section**

**26** covers cases in which specific performance cannot be enforced except with variation. This **section** with its corresponding provision contained in **Article 103** of the **Qanun-e-Shahadat Order, 1984** stands in exception to the general principle according to which, where terms of contract have been reduced into writing, a party cannot give oral evidence to set out a defense. This **section** only provides a defense to the party defending specific performance of a contract on grounds of fraud or misrepresentation. A party claiming specific performance with variation may enforce its right through the remedy of rectification provided in **Chapter III** of the **Act** on similar grounds. **Sections 27** and **28** of the **Act** cover persons against whom specific performance may or may not be enforced respectively.

**Chapter III** of the **Act** contains provisions for the rectification of instruments founded on the principle according to which ‘defect in expression should not be allowed to defeat the intention of parties’. If a contract has been entered into with true intent by the parties, but gets a defect due to some fraud or mistake, then enforcing it without rectifying the defect would injure at least one party, while rescinding it altogether would injure both.

**Chapters IV** and **V** of the **Act** provide for the rescission of a contract and the cancellation of an instrument respectively, almost on similar grounds, whereby the contract or instrument will be void or voidable at the option of one party. It is necessary to point out two major differences between these two chapters. Firstly, **Chapter IV** provides for rescission of contract while **Chapter V** provides for cancellation of instrument. The latter is wider in scope than the former as the term ‘instrument’ also includes ‘contracts’. The second noticeable difference is the court conferring the power of rescission upon itself to declare its own decree void, where a vendee or lessee defaults in the payment of purchase money or any other sum due. This provision contained in **Section 35(c)** of the **Act** renders every decree passed by the court for specific performance of contract as preliminary.

**Chapter VI** of the **Act** deals with declaratory decrees and in essence differs from all other remedial provisions of the **Act** which culminate into executory decrees. This remedy regarding a declaratory decree is founded upon two principles; one, to remove cloud from title and two, to perpetuate the testimony. It is not exhaustive of all declarations, which a civil court is competent to entertain and adjudicate upon, but is limited to legal character i.e. a position recognized by the law or any right recognized and enforced by the law for a property in existence.

**Chapter VII** of the **Act** deals with the appointment of a receiver pending litigation in order to secure the property. This **section** has its corresponding provisions in **Order XL** of the **Code of Civil Procedure, 1908**.

The **Act** deals with preventive relief in **Chapters IX** and **X** of **Part III**. It governs the provision of preventive relief in the form of temporary, permanent and mandatory injunctions respectively. Temporary injunction is intended to simply preserve the *status quo* pending litigation. Temporary injunction is treated in the nature of the procedure, which is the reason why it is also regulated by **Order XXXIX** of the **Code of Civil Procedure, 1908**. Perpetual injunction may be granted to prevent the breach of an obligation in favour of the party seeking it. Where such obligation arises from contractual obligation, the court is guided by provisions contained in **Chapter II** of the **Act** related to the specific performance of a contract. Another peculiarity

attached with perpetual injunction is that it is granted in form of a decree at the hearing and upon the merits of the case. Lastly, mandatory injunction is granted where, besides preventing the breach of an obligation, circumstances of a case compel the performance of a certain act, for example, if a person has raised a wall in breach of an obligation in favour of the other party, circumstances will not only require preventing of the breach of obligation but also the undoing of the raised wall.

Some more specific remedies have also found their place in other statutes. In a mortgage contract, a mortgagee may sue for foreclosure or sale. At the same time the mortgagor may sue for redemption of property. These remedies are governed by provisions under the **Transfer of Property Act 1882** and the **Code of Civil Procedure 1908**. If a partnership is dissolved or wound up, its accounts are to be taken into account and its assets realized, while each of its partners may be compelled to discharge his or her liability by paying the balance due from him or her. The law regarding taking an account of property of a deceased person and administering it is contained in the **Succession Act 1925**. Matters regarding the administration of trust property are dealt with by the **Trust Act 1882**.