

UPDATE

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Can a Share Purchase Agreement be specifically enforced?

A. *Introduction*

A Share Purchase agreement is an agreement entered into between parties for sale of shares of a company. The same contains clauses governing the purchase and sale of shares by the purchaser from the seller. The same contains several conditions precedents, i.e. pre-requisites which have to be fulfilled before the shares are transferred. Accordingly, it contains clauses which allows parties to terminate the same either at the happening of a certain event (breach of the contract by either of the two parties, non-fulfillment of a condition precedent etc.) or without any breach of the contract.

Execution of a Share Purchase Agreement happens pursuant to identification of the target company, due diligence, including legal due diligence, is undertaken by the purchaser, reaching an agreement on the purchase price etc. All these steps involve incurring substantial efforts and costs on the part of the purchaser in light of the commercial interest in the transaction. A purchaser is interested in the consummation of the transaction in light of the commercial gains in the future. A seller is interested in consummation of the transaction for the value that would be added to the enterprise pursuant to the induction of the purchaser in the company. These interests would be invaluablely hindered if the parties only have an option of claiming damages in case of termination of an agreement by the other party. Accordingly, specific performance of such an agreement assumes significance as it ensures that the parties to a transaction perform their obligations agreed under it.

B. *Specific Performance under Special Relief Act, 1963*

Specific performance of an agreement is governed under the provisions of Specific Relief Act, 1963 ("**Specific Relief Act**"). Section 10 of the Specific Relief Act provides as follows:

"¹ [10. Specific performance in respect of contracts.—The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16."

Section 14 of the Specific Relief Act provides as follows:

¹ Subs. by Act 18 of 2018, s 3, for section 10 (w.e.f. 1-10-2018).

²[14. **Contracts not specifically enforceable.**—The following contracts cannot be specifically enforced, namely:—

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

It is pertinent to note that the aforementioned sections were substituted pursuant to the Specific Relief (Amendment) Act, 2018 (“**SRA Amendment Act**”). Before the enactment of the SRA Amendment Act, the relief of specific performance of a contract was granted at the discretion of the court and was granted in rare situations, for eg: wherein damages could not be computed for the loss suffered by a party due to a breach on the part of a party.

Post the enactment of the SRA Amendment Act, grant of the relief of specific performance is no longer left at the discretion of the court. Section 10 of the Specific Relief Act mandates that the court ***shall specifically enforce*** a contract unless the same falls under exceptions provided under other clauses of the Specific Relief Act. One of the exceptions to granting specific performance of a contract is determinable contracts. Specific Performance is not granted for contracts which are determinable in nature. Further, in such contracts, the relief of injunction is not available “to prevent the breach of a contract the performance of which would not be specifically enforced” in light of the prohibition contained under Section 41(e) of the Specific Relief Act. Similarly, in cases of determinable contracts, the courts have refused to grant interim reliefs for specific performance under Section 9 of the Arbitration and Conciliation Act, 1996.³ Therefore, it becomes imperative to understand how courts have interpreted ‘determinable contracts’.

C. *Interpretation of Determinable Contracts*

In *Indian Oil Corporation v Amritsar Gas Service & Ors.*⁴, it was held by the Hon’ble Supreme Court that specific performance of a contract could not be granted in that case as the contract provides an option to the parties to terminate the contract by giving a 30 days’ notice to the other party, without any default by the other party.

In *Overnight Express Limited v. Delhi Metro Rail Corporation*⁵, it was held by the Hon’ble Delhi High Court that “license agreement between the parties are by their nature determinable because the said agreement under clause 12.1 gives right to the petitioner to surrender or terminate this Agreement and clause 12.3

² Subs. by Act 18 of 2018, s 3, for section 14 (w.e.f. 1-10-2018).

³ *Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperative Vennootschap Met Beperkte Anasprakelijkheid, O.M.P. (I) (COMM.) 273/2019*, decided by the Hon’ble Delhi High Court on 13.01.2020; *Adhunik Steels Ltd. v Orissa Manganese & Minerals Pvt. Ltd.*, 2007 (7) SCC 125.

⁴ (1991)1SC C 533.

⁵ (2020) 271 DLT 422.

gives the same right to the respondent. Hence, both parties to the licensed agreement have equal right to either surrender or terminate the agreement.” In the said agreement, a lock in period of 4 years was provided, any termination during which would have attracted forfeiture of the security deposit. The agreement was terminated during the said period. In spite of the provision of the lock-in period, the said agreement was held to be determinable in nature.

In *T.O. Abraham v Jose Thomas*⁶, the Hon’ble Kerala High Court held the share purchase agreement was not determinable and accordingly, upheld the order of the granting specific performance of the same. In the said agreement, the clause provided that in case there is a breach of the agreement due to reasons not expected in the normal course, then the advance amount would be refunded by the sellers to the buyer with interest. Further, the Hon’ble Court observed that *“For a contract to become determinable, it has to be first shown by the defendant that its clauses and terms are such that it would become possible for either of the parties to determine and terminate it without assigning any reason.... In order to see if a particular contract is inherently determinable or otherwise, we have to first see whether the parties to the said contract have the right to determine it or to terminate it on their own without the junction of any other party and without assigning any reason.”*

The said judgment was relied upon by the Hon’ble Bombay High Court in *Narendra Hirawat & Co. v Sholay Media Entertainment Pvt. Ltd. & Anr.*⁷ to hold that a contract which can be terminated at the option of a party without assigning any reason, i.e. breach of the other party or otherwise would be a determinable contract under Section 14(d) of the Specific Relief Act. Further, the Hon’ble Court held that a contract which is terminable at the occurrence of an event is not in its nature determinable as the same is determination depends on an eventuality and the same may or may not occur.

In *Jumbo World Holdings Limited & Anr. v Embassy Property Developments Private Limited*⁸, the Hon’ble Madras High Court categorized contracts into five categories to analyse determinability of the same under Section 14 of the Specific Relief Act. The five categories are:

- (i) Contracts that are unilaterally and inherently revocable or capable of being dissolved such as licences and partnerships at will. The same was held to be determinable in nature;
- (ii) Contracts that are terminable unilaterally on “without cause” or “no fault basis”. The same was held to be determinable in nature;
- (iii) Contracts that are terminable forthwith for cause or that cease to subsist for cause without provision for remedying the breach. The same was held to be not determinable in nature. However, the grant of specific performance in such a case would depend upon relative ease of determinability;
- (iv) Contracts that are terminable for cause subject to a breach notice and opportunity to cure the breach. The same was held to be not determinable in nature; and

⁶ (2018) 1 KLJ 128.

⁷ 2020 (5) MLJ 173.

⁸ (2020) 2 Arb LR 276.

- (v) Contracts without a termination clause, which could be terminated for breach of a condition but not a warranty as per applicable common law principles. The same was held to be not determinable in nature.

D. Analysis

Specific Performance of a contract is a substantial relief under law available to a party for ensuring performance of obligations by a party under the contract. This holds significance in light of the burgeoning number of commercial contracts and investments being made in different companies in India. It may be futile to enter into an agreement if the only remedy available to a party for any breach of the contract by another party is compensation. As elucidated above, there is a stark divergence in the interpretation by different High Courts in India of whether contracts which provide for termination due to breach by the opposite party would constitute determinable contracts under Section 14 (d) of the Specific Relief Act. The interpretation by Hon'ble Madras High Court/Hon'ble Bombay High Court/Hon'ble Kerala High Court provides clarity in the interpretation pursuant to the SRA Amendment Act and aids trade and commerce. Consistent interpretation of the same would go a long way in providing the much needed clarity to ensure that contracts are performed and the ease of doing business is further strengthened.

Accordingly, in case of a dispute between parties to a share purchase agreement which is determinable in nature, the remedy of specific performance of the contract, i.e. ensuring that the other party performs its obligations under the agreement, would not be available. Further, in case the share purchase agreement is not determinable in nature, the right of a party to seek specific performance of the agreement from the other party is protected under the SRA.

In light of the significance of the remedy of specific performance of a share purchase agreement, it is imperative that such agreements are drafted in a manner to accurately capture the intention of the parties. If the intention of the parties is to ensure that the parties perform their obligations under the agreement, then the share purchase agreement should provide for such clauses. For eg: a clause in the agreement which provides for termination only in case of a breach of the contract by a party, which has not been rectified by the party within 30 days would render that contract as determinable in nature. On the other hand, if the parties intend that the share purchase agreement can be terminated by either party by providing a 30 days' notice without any breach, whatsoever, on the part of any party, then such an agreement shall be held to be determinable in nature and the remedy of specific performance of the agreement would not be available.

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