

RIGHTS, REMEDIES AND RETROSPECTIVITY: THE CURIOUS CASE OF THE SPECIFIC RELIEF (AMENDMENT) ACT, 2018

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The Specific Relief (Amendment) Act, 2018 has fundamentally amended the law of specific performance in India by subordinating damages to specific performance as a contractual remedy. In 2023, the Supreme Court, in Katta Sujatha Reddy v. Siddamsetty Infra Projects Pvt. Ltd., held that the amendment applies prospectively. While the Court recently recalled the decision on merits, the finding on the applicability of the amendment was not dealt with and continues to remain good law. This article argues that the Court’s reasoning is unconvincing, both theoretically and doctrinally, and undermines the legislative intent to make specific performance a more widely available remedy. It is demonstrated that treating rights and remedies as interchangeable concepts results in inconsistent judicial approaches regarding the applicability of the Amending Act. Relying on theoretical literature distinguishing rights and remedies (with a distinctive focus on specific performance), as well as Indian doctrine, it is argued that specific performance ought to be treated as a remedy and not a right. Consequently, this article proposes an appropriate analytical framework for courts to decide the applicability of the Amending Act.

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I. INTRODUCTION

The Specific Relief (Amendment) Act, 2018 (‘Amending Act’) has rightly been considered a ‘paradigm shift’ in the statutory framework governing specific performance in Indian law.¹ The amendment of §§10, 11, 14 & 16, and the omission of the erstwhile §20 and its wholesale substitution in the Specific Relief Act, 1963 (‘Act’), create an altogether distinct regime.² For instance, the requirement that damages would not be an adequate remedy, in principle perhaps the most significant bar to an order of specific performance, has been done away with.³

Prior to the Amending Act, the Act codified a conventional common law approach to specific performance — the primary remedy for breach of contract was an award of damages,⁴ and in certain circumstances, as set out in the Act, an award of specific performance ‘could’ be granted by the court in its discretion.⁵ §20 of the Act clarified that even if the statutorily prescribed circumstances existed in a particular case, the court was not bound to order specific performance, but could exercise a principled discretion to refuse the remedy.⁶ In addition to removing the adequacy of damages bar, as noted above, the Amending Act also removed this principled discretion available to the court by deleting §20 in its entirety.⁷ It is, therefore, no exaggeration to say that the Amending Act has made fundamental changes to the Act.

For all the salience of the Amending Act, however, a crucial question arises — to what cases will it apply? The Supreme Court in *Katta Sujatha Reddy v. Siddamsetty Infra*

¹ *Global Music Junction Pvt. Ltd. v. Shatrughan Kumar*, 2023 SCC OnLine Del 5479, ¶38 (‘Global Music’).

² See The Specific Relief Act, 1963, §§10, 11, 14, 16, 20.

³ §14(1)(a) of the Act, prior to amendment, read: “The following contracts cannot be specifically enforced, namely: (a) a contract for the non-performance of which compensation is an adequate relief.” This bar to specific performance has been deleted from §14 by the Amending Act, described by the Delhi High Court in *Global Music* as a “glaring instance” of the difference in approach introduced by the Amending Act. For a critique of the removal of this adequacy bar (and other aspects of the Amending Act), see Ajar Rab, *Comparing Specific Performance Under the Specific Relief (Amendment) Act 2018 with the CISG and the UNIDROIT Principles: The Problems of the “Un-common Law” in India*, Vol. 7(1), NLS BUSINESS L. REV., 83, 84 (2021); V. Niranjan, *The Action for the Agreed Sum and Specific Performance in Indian Law* in FOUNDATIONS OF INDIAN CONTRACT LAW, 387, 408–411 (Krishnaprasad et al. eds., Oxford University Press, 2024).

⁴ See The Indian Contract Act, 1872, §73.

⁵ The Specific Relief Act, 1963, Ch. II.

⁶ §§20(1) & (2), prior to the Amending Act, read as follows:

“20. Discretion as to decreeing specific performance-

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.”

⁷ §20 of the Act, after amendment, deals with an altogether different subject matter: the remedy of substituted performance. This allows the party seeking specific performance to have the contract performed by a third party or their own agency at the cost of the defaulting party, in addition to any compensation that may be recoverable from the defaulting party. For a detailed account of this remedy, see Kanishk Thakur & Dushyant Thakur, *Improving Substituted Performance in India: Attending to the Loopholes*, Vol. 43(1), STAT. L.R., 109 (2022).

Projects Pvt. Ltd. (‘Sujatha Reddy’),⁸ while determining this exact question, held that the Amending Act “is prospective and cannot apply to those transactions that took place prior to its coming into force”.⁹ The Amending Act came into force on October 1, 2018,¹⁰ and the Supreme Court’s ruling, therefore, indicates that it will not apply to transactions preceding this date. Recently, the Court allowed a review petition filed against the decision and recalled the decision on merits.¹¹ However, citing the limited nature of review jurisdiction, the finding on the applicability of the Amending Act was not dealt with and continues to remain good law.¹²

In this context, this article argues that the Court’s reasoning in *Sujatha Reddy* is unconvincing, both theoretically and doctrinally, and undermines the legislative intent to make specific performance a more widely available remedy.¹³ In particular, it seeks to demonstrate that the court’s distinction between substance and procedure obscures a more important distinction between rights and remedies. Indeed, this is hinted at in the Court’s cryptic observation that “specific performance, which stood as a discretionary remedy, is now codified as an enforceable right”.¹⁴

This article seeks to demonstrate that treating rights and remedies as interchangeable concepts has resulted in a confused judicial approach, affecting the applicability of the Amending Act. For this, the article proceeds as follows — Part II briefly discusses the decision in *Sujatha Reddy*, highlighting the procedural history of the case by examining the decisions of the Telangana High Court and the Supreme Court. Part III examines the theoretical literature on rights and remedies, focusing on specific performance, and shows why it is theoretically apposite to treat it as a remedy. Part IV then considers the case law interpreting the Amending Act since it came into force and demonstrates that these cases rightly reflect a common doctrinal approach in treating specific performance as a remedy rather than a right, contrary to the decision in *Sujatha Reddy*. Part V concludes by examining the impact of the decision in *Sujatha Reddy* and suggesting the appropriate analytical framework that courts ought to adopt while deciding the applicability of the Amending Act.

II. THE DECISION IN SUJATHA REDDY

The case before the Supreme Court arose from a suit filed by the purchaser, *Siddamsetty Infra Projects Pvt. Ltd.*, seeking specific performance of two agreements to sell on March 26, 1997, and March 27, 1997, by virtue of which the sellers had undertaken to convey the disputed land.¹⁵ Pursuant to the agreements to sell, the purchaser had paid part of the sale consideration.¹⁶ However, the balance consideration had admittedly not been paid within the stipulated time, and the sale was therefore not completed.¹⁷ After issuing two legal notices to the sellers, which yielded no results, the purchaser filed a suit seeking an order of specific performance.¹⁸

⁸ *Katta Sujatha Reddy v. Siddamsetty Infra Projects Pvt. Ltd.*, (2023) 1 SCC 355 (‘*Sujatha Reddy*’).

⁹ *Id.*, ¶59.

¹⁰ Govt. of India, Ministry of Law and Justice, F. No. 11(2)/2015-Leg. III (September 19, 2018).

¹¹ *Siddamsetty Infra Projects (P) Ltd. v. Katta Sujatha Reddy*, 2024 SCC OnLine SC 3214 (‘*Sujatha Review*’).

¹² *Id.*, ¶32.

¹³ *Statement of Object & Reasons of The Specific Relief (Amendment) Bill, 2017*, ¶3; *See also* D. V. SADANANDA GOWDA COMMITTEE, *Report of the Expert Committee on the Specific Relief Act, 1963*, 47, ¶¶11, 11.1 (May 26, 2016) (‘*Gowda Committee*’).

¹⁴ *Sujatha Reddy*, *supra* note 8, ¶48.

¹⁵ *Id.*, ¶5.

¹⁶ *Id.*, ¶6.

¹⁷ *Id.*, ¶7.

¹⁸ *Id.*, ¶7.

The lower court dismissed the suit both on limitation and merits.¹⁹ As the judgment was rendered in 2010,²⁰ the Court had no occasion to consider the applicability of the Amending Act. However, a significant finding (recorded in the decision of the Telangana High Court in appeal) was that the plaintiff fell afoul of the ‘clean hands’ doctrine on account of its false plea that it was in possession of the land, along with a delay in filing the suit for specific performance.²¹ This is significant because, under the amended provisions of the Act, it would be immaterial whether the plaintiff’s conduct was equitable.²² The plaintiff appealed against the decision in 2010, but the appeal was heard by the Telangana High Court only in 2021.²³ Accordingly, one of the issues before the High Court was whether the Amending Act would apply to the case.²⁴

The Telangana High Court reversed the decision of the trial court both on limitation²⁵ and merits,²⁶ and examined in considerable detail whether the Amending Act was applicable. The court held that in so far as specific performance is concerned, the Amending Act applies retrospectively.²⁷ The High Court reasoned that §§10, 14 and 20 of the Act were substituted with entirely new provisions and not merely amended, reflecting an intention to interpret the Act as if these sections had always been worded as the Amending Act provides.²⁸ The Court further held that the Act is part of the law of procedure, and no litigant has a vested right in procedural law.²⁹ It applied the settled principle that procedural legislation is ordinarily construed to apply retrospectively and noted that the Amending Act does not confer or abrogate any rights or privileges conferred on litigants and only curtails the discretion previously available to the Court under the Act.³⁰ Lastly, to address the fact that the Amending Act came into force during the pendency of the appeal (and could therefore not have been applied by the lower court even retrospectively), the High Court held that an appeal is a continuation of a suit, and an appellate court must therefore consider a change in law between the date of the decree and the hearing of the appeal.³¹

The High Court’s decision was challenged by both the sellers and the purchaser before the Supreme Court of India. The issue of the applicability of the Amending Act was given considerable importance by the Supreme Court, as it sought to determine whether specific performance could be awarded mandatorily or if it was a matter of judicial discretion.³² However, it is surprising to note that the Court’s analysis was restricted to broad assertions regarding the nature of specific performance and expressed disagreement with the reasoning of

¹⁹ *Id.*, ¶¶9–13.

²⁰ *Hyderabad Potteries Pvt. Ltd. v. Debbad Viveswara Rao*, 2021 SCC OnLine TS 3590, ¶1 (‘Hyderabad Potteries’).

²¹ *Id.*, ¶¶28, 30, 55. The ‘clean hands’ doctrine, in essence, provides that a plaintiff seeking an equitable remedy must not base their case on false allegations, and doing so disentitles them from claiming equitable relief. For further information on the ‘clean hands’ doctrine, see *S.P Chengalvaraya Naidu v. Jagannath*, (1994) 1 SCC 1, ¶5; *Yashoda v. Sukhwinder Singh*, (2022) 17 SCC 307, ¶30.

²² §20 of the Act, prior to the Amending Act, conferred discretion upon the court to refuse specific performance on a number of grounds, all related to whether the plaintiff’s conduct was equitable or the hardship that would be caused to the defendant. For an understanding of the unamended provision, see *supra* note 6.

²³ *Hyderabad Potteries*, *supra* note 20.

²⁴ *Id.*, ¶17.

²⁵ *Id.*, ¶¶19–29.

²⁶ *Id.*, ¶¶67, 68.

²⁷ *Id.*, ¶100.

²⁸ *Id.*, ¶¶71–77.

²⁹ *Id.*, ¶¶78–82.

³⁰ *Id.*, ¶¶83–97.

³¹ *Id.*, ¶¶98, 99.

³² *Id.*, ¶43.

the High Court. The judgment itself contains little in-depth engagement with the remedy of specific performance.³³ Most strikingly, given the divergent views that different High Courts had expressed prior to this decision,³⁴ it was extremely pertinent for the Supreme Court to have engaged with these views in detail.

The Supreme Court held that the High Court's conclusion that specific relief belongs to the law of procedure and the Amending Act should, therefore, be given retrospective effect was erroneous, as the Amending Act introduced a radical approach to specific performance, converting it from a 'discretionary remedy' into an 'enforceable right'.³⁵ The Supreme Court reasoned that the Amending Act creates new substantive rights and obligations and cannot apply retrospectively unless expressly stated by the legislature and concluded that the Amending Act "is prospective and cannot apply to those transactions that took place prior to its coming into force".³⁶

A necessary implication of the Supreme Court's reasoning is that the 'enforceable right' to specific performance arises on the date the contract ('transaction') is entered into. As discussed subsequently,³⁷ this is a contentious claim which does not hold on closer scrutiny. In any event, based on its finding that the Amending Act would not apply to the case, the Supreme Court went on to hold that the purchaser, in this case, was not entitled to specific performance, as they had failed to pay the sale consideration on time, which was of the essence of the contract, and the relief of specific performance was barred by delay, laches, and limitation.³⁸ Interestingly, the Court also found that the conditions of §16, which require the plaintiff to prove readiness and willingness to perform their part of the contract, were not met.³⁹ Given that, under the Amending Act, the grant of specific performance continues to be subject to §16, it is probable that the Supreme Court's decision on merits would have been the same even if it had decided that the Amending Act applies.

An important similarity between the decisions of the High Court and the Supreme Court is the focus, almost exclusively, on whether the law of specific relief can be considered procedural or substantive. However, as demonstrated subsequently, the High Court considered previous decisions on the point and thereby engaged in greater depth with the nature of specific performance. While the distinction between substance and procedure may, in certain contexts, be legally significant (for instance, when a court decides whether a particular foreign law is procedural, in which case the law of the forum is said to apply), it is argued in Part III that when it comes to the question of specific performance, this distinction turns out, to be a red herring. In fact, this misleading dichotomy obscures a far more foundational distinction in private law: the distinction between rights and remedies.

III. UNDERSTANDING RIGHTS AND REMEDIES

The distinction between rights and remedies has attracted considerable scholarly attention and assumes great significance in the context of this article.⁴⁰ A key question that arises in the literature is whether it is instructive or useful to understand the law of rights

³³ *Id.*, ¶¶44–59.

³⁴ See *infra* Part III on "Understanding Rights and Remedies".

³⁵ Sujatha Reddy, *supra* note 8, ¶¶47, 48.

³⁶ *Id.*, ¶¶57–59.

³⁷ See *infra* Part IV on "Judicial Treatment of the Amending Act".

³⁸ Sujatha Reddy, *supra* note 8, ¶¶41, 62–65, 82.

³⁹ *Id.*, ¶¶66, 67, 72, 73.

⁴⁰ See *infra* notes 42, 44, 50. See also Hanoch Dagan, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY, 144–160 (Oxford University Press, 2013).

separately from the law of remedies. This question is particularly relevant to the interpretation of the Act in view of the following observation made by the Supreme Court in *Sujatha Reddy*:

“We do not subscribe to the aforesaid reasoning provided by the High Court for the simple reason that after the 2018 Amendment, specific performance, which stood as a discretionary remedy, is now codified as an enforceable right which is not dependent anymore on equitable principles expounded by Judges, rather it is founded on satisfaction of the requisite ingredients as provided under the Specific Relief Act”.⁴¹(emphasis added)

The “aforesaid reasoning” here refers to the High Court’s finding that since the law of specific relief is procedural, an amendment of that law ought to apply retrospectively. While the Supreme Court appears to focus its attention on the issue of whether the law of specific relief is, in fact, procedural, its use of terminology warrants closer attention. The observation quoted above makes two distinct assertions regarding the effect of the Amending Act: first, that specific performance is no longer discretionary or dependent on equitable principles but, instead, is a statutory relief; second, that specific performance is no longer a remedy but a right.

The first proposition, while not without its difficulties,⁴² is relatively uncontroversial and largely corresponds to the purported legislative intent behind the Amendment, namely, to convert specific performance from a secondary remedy (to be awarded only if damages are inadequate) to a primary remedy.⁴³ The second proposition, however, is entirely unfounded. While it is possible that ‘right’ and ‘remedy’ were used interchangeably, it is more likely that the Court had some distinction in mind and, hence, used both terms. Moreover, even if the two terms were used interchangeably, it is worthwhile to examine whether such usage obscures a conceptual distinction that impacted the Court’s analysis.

Stephen Smith argues that for a proper understanding of remedial law, the most important question is the relationship that remedies bear to the claimant’s substantive rights.⁴⁴ In particular, he points out that while the rules governing damages and rules governing specific relief are both conventionally treated as part of the law of remedies, they are “remedial in entirely different senses”.⁴⁵ This is because, in his view, the law of damages focuses on what wrongdoers should do for their victims, whereas the law of specific relief focuses on when a court can compel the defendant to perform their duty towards the claimant. It is pertinent to note that Smith consistently classifies specific performance as belonging to remedial law, or as

⁴¹ *Sujatha Reddy*, *supra* note 8, ¶48.

⁴² There is broad consensus among courts and scholars that the ‘discretion’ available to courts in granting specific performance is discretion in a weak sense, and the exercise of this discretion is limited to deciding whether certain well-defined bars to specific performance apply in a particular case. For instance, *see* Rafal Zakrzewski, *REMEDIES RECLASSIFIED*, 91–96 (Oxford University Press, 2009). For the view that the bars to specific performance have been liberally interpreted by English courts in favour of granting specific performance, *see* Andrew Burrows, *REMEDIES FOR TORTS AND BREACH OF CONTRACT*, 457, 458, 504, 505 (Oxford University Press, 3rd edn., 2004). For the same argument made in the context of Indian law, *see* V. Niranjan, *Specific and Agreed Remedies for Breach of Contract in Indian Law: A Code of English Law?* in *STUDIES IN THE CONTRACT LAWS OF ASIA: REMEDIES FOR BREACH OF CONTRACT*, 81–83 (Chen-Wishart et al. eds., Oxford University Press, 2016). For the argument, albeit in the context of the Transfer of Property Act, 1882, that the codification of equity “standardises” and “crystallises” equitable rules, rendering them more rigid in their application by courts, *see* Shyam Balganes, *Codifying the Common Law of Property in India: Crystallisation and Standardisation as Strategies of Constraint*, Vol. 63, *AM. J. COMP. L.*, 33 (2015).

⁴³ Gowda Committee, *supra* note 13.

⁴⁴ Stephen A. Smith, *RIGHTS, WRONGS AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW*, 7 (Oxford University Press, 2019).

⁴⁵ *Id.*, ix.

he also terms it, “rules about rulings”.⁴⁶ Smith’s argument that remedial law should be understood on a more principled basis and his suggestion that the distinctiveness of this body of law lies in its focus on what courts should do, highlight why the Supreme Court’s conclusion that specific performance is ‘a right’ is far from self-evident. In particular, such a conclusion indicates nothing about when the ‘right’ to specific performance arises and does not provide sufficient justification for the ultimate conclusion that the Amending Act should only apply to transactions concluded after its coming into force.⁴⁷

Smith classifies private law causes of action recognised by the common law into three categories, which he explains as follows: “(1) proof that the defendant is unwilling to comply with the claimant’s substantive rights (a ‘rights-threat’); (2) proof that the defendant wronged the claimant (a ‘wrong’); and (3) proof of an unfair loss or gain (an ‘injustice’)”.⁴⁸

In this schema, he identifies specific performance as a response to a ‘rights threat’. This is consistent with specific performance often being sought to prevent a threatened breach of contract rather than remedy an actual breach. When classifying types of remedies, Smith further identifies specific performance as a ‘replicative order’, i.e., orders that “replicate substantive duties”.⁴⁹ This view is shared by Peter Birks in his well-known classification of ‘wrongs’ and ‘not-wrongs’ as causative events that trigger legal remedies.⁵⁰ Birks argues that specific performance is a remedy that responds to the ‘not-wrong’ of making a contract and not the ‘wrong’ of breach of contract. In his words:

“Contract, a manifestation of consent, as opposed to breach of contract, a wrong, generates rights which English law will under certain conditions order to be specifically performed. Specific performance functions on the primary plane. It could, with little enough trouble, be represented as a response to the wrong of breach. But at the moment that is not the law, and only dogmatic insistence on a monopoly of wrongs could necessitate a change. It is the not-wrong of making a contract which generates the primary right realized when a court orders, and then if necessary enforces, specific performance”.⁵¹

Birks, therefore, argues that specific performance is a remedy that replicates the underlying primary right to the performance of a contract. In other words, if one were to compare the ‘content’ of the primary duty to perform a contract with the duty created by an order of specific performance, they would appear identical. From this premise, it is tempting to conclude that the duty of specific performance, like all other primary contractual duties, arises when the contract is formed. This is probably what the Supreme Court was referring to when it observed that specific performance is “an enforceable right”. However, as both Smith and Birks show, an order of specific performance transforms the underlying substantive obligation to perform into a different kind of obligation, one that is ordered by the court. As Smith puts it, the failure to distinguish remedial and substantive law has led to the assumption that remedies mirror substantive rights.⁵² Crucially, he points out that even in the case of replicative orders, i.e., “where the only thing claimants ask the court to do is to direct defendants to perform their pre-existing substantive duties”, the question of how courts should

⁴⁶ *Id.*, 7.

⁴⁷ Sujatha Reddy, *supra* note 8, ¶59.

⁴⁸ Smith, *supra* note 44, 10.

⁴⁹ *Id.*, 11.

⁵⁰ Peter Birks, *Rights, Wrongs, and Remedies*, Vol. 20(1), OXFORD J. LEGAL STUD., 25 (2000).

⁵¹ *Id.*, 27.

⁵² Smith, *supra* note 44, 13.

treat citizens is distinct from the question of how citizens should treat each other.⁵³ In other words, when exercising the jurisdiction to grant or refuse specific performance, the court creates a new duty of a different kind than the duty contracting parties have towards each other when the contract is formed, and such a new duty necessarily cannot exist at the time of contract formation.

A detailed account of the idea that remedies ought to be understood distinctly from rights is also presented by Rafal Zakrzewski, who suggests that in order for the term remedy to have a “stable core meaning”,⁵⁴ remedies should “be broadly approximated to court orders”.⁵⁵ Noting the relationship between substantive rights and remedies, he observes: “It will be seen that the vast majority of remedies function by replicating such rights; however, it will be observed that a number function in a transformative manner”.⁵⁶ Zakrzewski outlines his own classificatory scheme for remedies and argues that the most sound basis for classifying remedies is the manner in which remedies give effect to substantive rights.⁵⁷ As he puts it, “Focusing on this relationship...the main question is whether remedies are simply restatements of substantive rights existing independently before them or whether the court’s order generates something which is quite different from the rights and duties which already pertained between the parties”.⁵⁸ In answering this question, he classifies remedies into “those which restate or replicate substantive rights (replicative remedies) and those which do not replicate any substantive rights (transformative remedies)”.⁵⁹ (emphasis added) The distinction between replicative and transformative remedies is further qualified: First, by whether the remedy replicates (in the case of replicative remedies) a primary right or a secondary right, and secondly, based on the jurisdictional origins of the remedy, i.e., whether the remedy historically arose from common law, equity or statute.⁶⁰ The purpose of distinguishing remedies originating in equity is that traditionally, courts have had wider discretion to refuse such remedies than for remedies originating in common law.⁶¹

Based on the above classificatory scheme, Zakrzewski classifies specific performance as a replicative remedy originating in equity.⁶² However, while it may replicate a primary right, Zakrzewski makes it clear that “the making of the order gives rise to new rights. These new rights take precedence”.⁶³ Therefore, an order of specific performance is a creature distinct from the primary obligation of performance created by the contract, even though the content of the right and the order may be the same, or as Zakrzewski puts it, “The remedy arising from a decree of specific performance is simply an authoritative official restatement of

⁵³ *Id.*, 14.

⁵⁴ Zakrzewski, *supra* note 42, 43. For a more detailed account of what this ‘stable core meaning’ entails, see 43–61.

⁵⁵ *Id.*, 2.

⁵⁶ *Id.*, 3.

⁵⁷ For a complete account of the classificatory scheme and the argument for rejecting received systems of classification in its favour, see Zakrzewski, *supra* note 42, 63–84. Broadly speaking, two other methods of classifying remedies are considered and rejected by Zakrzewski: according to the goal of the remedy (compensation, restitution, punishment, etc.) and according to the means of enforcing the remedy (punishment for contempt, direct recourse to the defendant’s assets etc.).

⁵⁸ Zakrzewski, *supra* note 42, 78.

⁵⁹ *Id.*, 78, 79.

⁶⁰ *Id.*, 81.

⁶¹ *Id.*, 81. For a detailed discussion on why even common law remedies involve an element of discretion and how the extent of discretion for several equitable remedies, including specific performance, is far narrower than is sometimes assumed, see Zakrzewski, *supra* note 42, 91–96.

⁶² *Id.*, 121, 134–142.

⁶³ *Id.*, 138.

a duty owed by the defendant under a contract”.⁶⁴ Zakrzewski’s distinction between replicative and transformative remedies sheds further light on why the Supreme Court likely allowed the similarity between an order of specific performance and the underlying primary right of performance to obscure the distinct times at which obligations flowing from each of them arise.

This view is similar to the views of Birks and Smith outlined above and emphasises the distinction between an order of specific performance made by a court and the right to performance each contracting party has against the other. Moreover, Zakrzewski’s qualifier ‘equitable’ is important because the hallmark of the Amending Act is the reduced (but not entirely eliminated) scope of discretion granted to courts in deciding whether to award specific performance. In other words, if there has indeed been any significant change in the nature of specific performance as a remedy in Indian law after the Amending Act, it is that the range of ‘bars’ that may be invoked to refuse the remedy has now become narrower.⁶⁵

The Supreme Court’s decision, however, seems to interpret the effect of the Amending Act differently.⁶⁶ Recast in the language of rights and remedies, it is unclear how a statutory change in the extent of discretion available to courts in awarding a ‘replicative remedy’ can be interpreted to have transformed the said remedy into a right. It is even less clear how an entitlement to a remedy can be conferred on a contracting party at the time of contract formation. Further, in addition to being theoretically unconvincing, as a matter of doctrine, the Supreme Court’s reasoning fails to engage with a number of High Court decisions prior to Sujatha Reddy dealing with the applicability of the Amending Act, all of which were united in their treatment of specific performance as a remedy.

IV. JUDICIAL TREATMENT OF THE AMENDING ACT

As noted previously,⁶⁷ the Supreme Court in Sujatha Reddy examined the applicability of the Amending Act in terms of whether it was procedural or substantive in nature and, consequently, whether it ought to apply prospectively or retrospectively. However, as discussed in this section, a better approach would have been to examine what ‘event’ the Amending Act applies to. There were a number of High Court decisions prior to Sujatha Reddy which adopted this approach, implicitly recognising specific performance as a remedy. Interestingly, the Telangana High Court examined these cases,⁶⁸ while the Supreme Court did not. The core of this paper is rooted in this lacuna where the Supreme Court’s failure to consider these cases has led to an obfuscation of the crucial distinction between rights and remedies. This Part considers the manner in which these cases approach the applicability of the Amending Act and how this recognises the distinction between rights and remedies. Accordingly, it tests the cases on two bases:

1. Whether the court found the Amending Act to be applicable or inapplicable?
2. What the court considered the relevant ‘event’ to which the Amending Act applies.

A. CASES WHERE THE AMENDING ACT WAS APPLICABLE

⁶⁴ *Id.*, 138.

⁶⁵ Zakrzewski, *supra* note 42, 92–94.

⁶⁶ See *supra* Part II on “The Decision in Sujatha Reddy”.

⁶⁷ See *supra* Part II on “The Decision in Sujatha Reddy”.

⁶⁸ Hyderabad Potteries, *supra* note 20, ¶¶76, 77, 88, 89, 91, 93, 94.

1. *CHURCH OF NORTH INDIA V. RT. REVEREND ASHOKE BISWAS*

In *Church of North India v. Rt. Reverend Ashoke Biswas* ('Ashoke Biswas'),⁶⁹ a suit was filed by Reverend Ashoke Biswas, the Bishop of the Church of North India (the defendant), seeking a declaration that the decision taken by the Church to superannuate him was wrongful.⁷⁰ The Church filed an application for rejection of the plaint, inter alia, on the ground that the suit was barred by §14(1)(b) of the Act, as the plaintiff was seeking specific performance of a contract of employment of a personal nature disguised as a suit for declaration.⁷¹ It is pertinent to note that the arguments of the Church were based on the unamended Act,⁷² reflecting an implicit assumption that the Amending Act applies prospectively and would therefore be inapplicable to the present case, as the suit was filed before the Amending Act came into force.⁷³ In his reply to the Church's application, the plaintiff contended that the Bishop was not an employee of the Church, as there was no master-servant relationship between them.⁷⁴ Further, and more importantly, they argued that the Amending Act would apply retrospectively. The plaintiff's argument was that the Amending Act had removed the words "or volition" present in the erstwhile §14(1)(b), and therefore, there was no longer a bar to the enforcement of contracts of personal service.⁷⁵

The Calcutta High Court held that the Amending Act was applicable.⁷⁶ Interestingly, this conclusion was not based on whether the Amending Act should apply prospectively or retrospectively. Rather, the issue, as framed by the court, was "the relevant date for ascertaining the applicability of the amendment — the date of filing of the suit or the date of passing of the decree".⁷⁷ This framing is significant for the options it considers as the 'relevant date' and, more importantly, the option it does not consider: the date of contract formation.

As discussed above,⁷⁸ the latter option was chosen by the Supreme Court without elaborating on the reasons for its choice. The High Court's reasoning was that §14 opens with the words, "The following contracts cannot be specifically enforced", which indicates that the applicability of §14 is a matter that only arises at the time of passing of the decree (judgment), as it is only then that a court is required to decide whether to enforce specific performance. If it were otherwise, the section might have opened with words such as: "No suit can be filed for specific performance of the following contracts [...]".⁷⁹

While the High Court's reasoning appears to be based on a literal approach to statutory interpretation, the implications of such reasoning are more significant. In stating that the Amending Act would apply either from the date of filing the suit or the date of passing the decree, it is submitted that the High Court implicitly recognised that specific performance is a

⁶⁹ *Church of North India v. Rt. Reverend Ashoke Biswas*, 2019 SCC OnLine Cal 3842 ('Ashoke Biswas').

⁷⁰ §34 of the Act allows a party to apply to the court to seek a declaration that they are "entitled to any legal character, or to any right as to property".

⁷¹ *Ashoke Biswas*, *supra* note 69, ¶3.

⁷² *Id.*, ¶18. The court records that the petitioner (Church) was "referring to the language of Section 14(1)(b)". After the Amending Act, the bar contained in the erstwhile §14(1)(b) is now contained in §14(d).

⁷³ The court found that the suit was filed prior to the Amending Act coming into force and that the Amending Act came into force during the pendency of the suit. *See Ashoke Biswas*, *supra* note 69, ¶¶98, 101.

⁷⁴ *Ashoke Biswas*, *supra* note 69, ¶27.

⁷⁵ This argument is somewhat unconvincing, as the words "so dependent on the personal qualifications of the parties" continue to be present in the amended §14(d) of the Act.

⁷⁶ *Ashoke Biswas*, *supra* note 69, ¶102.

⁷⁷ *Id.*, ¶98.

⁷⁸ *See infra* Part II on "The Decision in Sujatha Reddy".

⁷⁹ *Ashoke Biswas*, *supra* note 69, ¶¶99, 100.

remedy and, therefore, the earliest stage at which any question as to the availability of specific performance may arise in a case is when the suit is filed.

Whether the question arises at that stage or when the decree is passed depends on whether one takes the view that specific performance must be claimed by a party or can be awarded by a court *suo motu*. If Smith and Zakrzewski's understanding of remedies is accepted,⁸⁰ then the latter interpretation would be preferable, as a remedy is best approximated to a court order. However, on either interpretation, the crucial point that the decision of the Calcutta High Court highlights is that specific performance is not a right arising from the contract itself. The Supreme Court's decision in Sujatha Reddy, on the contrary, assumes that at the moment of contract formation, a right to specific performance is conferred on contracting parties, and therefore, any change in the law affecting the availability of specific performance must apply as on the date of contract formation. This is the only plausible explanation for why the Amending Act was held to apply only to transactions concluded after its coming into force.

2. *MUKESH SINGH V. SAURABH CHAUDHARY*

In *Mukesh Singh v. Saurabh Chaudhary* ('Mukesh Singh'),⁸¹ a suit was filed by the purchasers under an agreement to sell, seeking specific performance of the agreement by directing the sellers to register a sale deed in their favour after receiving the balance consideration due to them.⁸² As is required by §16 of the Act, the plaintiffs pleaded that they were ready and willing to perform their obligations under the agreement, having paid the required earnest money to the sellers and requested them several times to register the sale deed and receive the balance consideration.⁸³ The defendants denied the plaintiff's case almost in its entirety, alleging that their signatures had been obtained on blank paper and later converted into an agreement to sell by the plaintiffs.⁸⁴ However, the issue of whether the Amending Act applies arose out of the defendant's argument that the trial court ought to have considered §20 of the Act as it stood prior to the amendment.⁸⁵ §20(2)(b) of the unamended Act allowed the court to refuse specific performance on the ground that it would cause undue hardship to the defendant.⁸⁶ The amended Act does not provide for such an exception. It is this discretion that the defendant was invoking, and the success of this argument, therefore, turned on whether the Amending Act was applicable.

The Allahabad High Court held that the Amending Act was applicable,⁸⁷ although it came into force after the judgment had been passed by the trial court during the pendency of the appeal before the High Court.⁸⁸ The analysis used to reach this conclusion was grounded in the effect of repeal of an existing statutory provision by substitution of an entirely new provision, as had been done with §20.⁸⁹ Thus, unlike the Supreme Court in *Sujatha Reddy*, the High Court did not examine the applicability of the Amending Act by asking whether the law of specific relief was procedural or substantive. Rather, the focus was on whether the

⁸⁰ See *infra* Part III on "Understanding Rights and Remedies".

⁸¹ *Mukesh Singh v. Saurabh Chaudhary*, 2019 SCC OnLine All 5523 ('Mukesh Singh').

⁸² *Id.*, ¶3.

⁸³ *Mukesh Singh*, *supra* note 81, ¶¶5, 6.

⁸⁴ *Id.*, ¶8.

⁸⁵ *Id.*, ¶16.

⁸⁶ For an understanding of the unamended provision, see *supra* note 6.

⁸⁷ *Mukesh Singh*, *supra* note 81, ¶37. On the facts, this meant that the defendant's argument based on the erstwhile §20 was rejected.

⁸⁸ *Id.*, ¶30.

⁸⁹ For an understanding of the effect the Amending Act has on §20, see *supra* note 7.

Amending Act had withdrawn the old provisions of the Act and replaced them entirely, which the High Court answered in the affirmative.⁹⁰

While the High Court did not expressly say so, it assumes that the rules governing specific performance belong to the law of remedies. This is apparent from the observation that the crux of the Amending Act is:

“...that the wider discretion of courts to grant specific performance and to make specific performance of contract a General Rule than exception subject to certain limited ground has been done away... After amendment, the jurisdiction of the Court is not discretionary to decree specific performance. Consequently, the repealed provisions of Section 20 of the Act would not be available for decision in the present appeal”.⁹¹

What is notable here is the High Court’s emphasis on the court’s jurisdiction to grant specific performance, which conforms to Smith and Zakrzewski’s understanding of remedial law as ‘rules about rulings’⁹² or the law of court orders.⁹³ In other words, the High Court reasoned that an amendment fundamentally altering the court’s approach to the grant of a remedy must be taken into consideration when the court is examining whether and to what extent the remedy ought to be granted. Coupled with the principle that an appellate court is required to consider all issues of both fact and law applicable to the case,⁹⁴ the Amending Act was held applicable even to an appeal that was filed prior to its coming into force. Significantly, the High Court’s reasoning in this case focuses on the court’s jurisdiction and, therefore, the stage when proceedings have been instituted, in contrast to the reasoning in *Sujatha Reddy*, which considers contract formation the relevant stage.

3. *JINDAL SAW LTD. V. APERAM STAINLESS SERVICES AND SOLUTIONS PRECISION SAS*

In *Jindal Saw Ltd. v. Aperam Stainless Services and Solutions Precision Sas* (‘*Jindal Saw*’),⁹⁵ the plaintiff here filed a suit for specific performance of a settlement agreement, which had been concluded between the plaintiff and the defendant in order to settle disputes between them in relation to a joint venture agreement. In essence, the settlement agreement required the defendant to sell its shares in the joint venture entity to the plaintiff for a fixed price.⁹⁶ The defendant had refused to perform its obligations under the settlement agreement and sought to terminate the agreement on the ground that the shares had been undervalued by the plaintiff and thus, the agreement was voidable at the defendant’s option for misrepresentation.⁹⁷ One of the defences to the suit was that the plaintiff itself was in violation of the settlement agreement and was therefore “not entitled to the discretionary relief of specific performance”.⁹⁸ Addressing this argument required the court to examine the applicability and effect of the Amending Act.

The Delhi High Court held that the Amending Act was applicable. The court’s analysis, like that of the Supreme Court in *Sujatha Reddy*, was partially based on classifying

⁹⁰ Mukesh Singh, *supra* note 81, ¶¶34–37.

⁹¹ Mukesh Singh, *supra* note 81, ¶37.

⁹² Smith, *supra* note 44, 7.

⁹³ Zakrzewski, *supra* note 42, 2.

⁹⁴ Mukesh Singh, *supra* note 81, ¶38.

⁹⁵ *Jindal Saw Ltd. v. Aperam Stainless Services and Solutions Precision Sas*, 2019 SCC OnLine Del 9163 (‘*Jindal Saw*’).

⁹⁶ *Id.*, ¶3.

⁹⁷ *Id.*, ¶3.

⁹⁸ *Id.*, ¶7.

the law of specific relief as procedural law, with any amendments to that law therefore being retrospective in operation.⁹⁹ However, despite being susceptible to the same criticism as this article makes against Sujatha Reddy, namely that the distinction between substance and procedure obscures the more important distinction between rights and remedies, two facets of the High Court's reasoning render the decision more illuminating on principle than Sujatha Reddy. The first is the observation, made together with the 'procedural' classification, that "specific relief is a form of judicial redress".¹⁰⁰ This aligns closely with the definitions of remedial law proposed by Smith and Zakrzewski, outlined above and their view that specific relief is best viewed as a part of remedial law.¹⁰¹ Secondly, and crucially for the purposes of this article, even while framing the question of applicability of the Amending Act as a choice between prospective and retrospective application, the High Court observed that the question arose because the Amending Act came into force "after the institution of the suit".¹⁰² This once again reflects the unstated assumption that there is no substantive right to specific performance created at the time of contract formation. In other words, the parties' agreement is that each will perform the contract (the right), but not that the court will order specific performance (the remedy).

B. CASES WHERE THE AMENDING ACT WAS HELD INAPPLICABLE

1. *M. SURESH V. MAHADEVAMMA*

In *M. Suresh v. Mahadevamma* ('Suresh'),¹⁰³ the plaintiff was the purchaser under an agreement to sell land owned by the defendant vendors. Pursuant to the agreement to sell, the plaintiff paid an advance to the defendant, and the parties agreed that the balance sale consideration would be payable at the time of registration of the sale deed. The contract specified that the payment of consideration and registration of the sale deed was to be completed within five months. The plaintiff contended that he had been ready and willing to perform his obligation to pay the balance and had called upon the defendants to perform, but they had refused.¹⁰⁴ On the other hand, the defendants contended that the plaintiff was required to pay the balance within five months but failed to do so. Therefore, the plaintiff had failed to perform his obligation and was not entitled to specific performance, in addition to having forfeited the advance paid.¹⁰⁵ The trial court rejected the plaintiff's prayer for specific performance but directed the defendants to refund the advance payment with interest.¹⁰⁶ Specific performance was refused on the ground that the plaintiff had failed to prove that he had sufficient funds to pay the balance consideration, thereby negating the requirement that he was ready and willing to perform his obligations.¹⁰⁷ It was common ground that the trial court had invoked the discretion conferred by the erstwhile §20 of the Act.¹⁰⁸

On appeal by the plaintiff from this judgment, the Karnataka High Court observed that the trial court's exercise of discretion under §20 was justified unless, as a matter

⁹⁹ *Id.*, ¶60.

¹⁰⁰ *Id.*, ¶60.

¹⁰¹ See Smith, *supra* note 44, 7, 10, 11; Zakrzewski, *supra* note 42, 2, 121, 134–142. For a more comprehensive account of Smith and Zakrzewski's understanding of remedial law and their treatment of specific performance, see generally Part III.

¹⁰² Jindal Saw, *supra* note 95, ¶60.

¹⁰³ *M. Suresh v. Mahadevamma*, 2020 SCC OnLine Kar 3425 ('Suresh').

¹⁰⁴ *Id.*, ¶3.

¹⁰⁵ *Id.*, ¶4.

¹⁰⁶ *Id.*, ¶6.

¹⁰⁷ *Id.*, ¶7.

¹⁰⁸ *Id.*, ¶¶7, 8.

of law, the Amending Act was applicable to the case.¹⁰⁹ Interestingly, before considering the applicability of the Amending Act, the High Court held that on facts, the plaintiff had failed to prove that he had sufficient funds to pay the balance consideration, and as “the readiness and willingness of the plaintiff play a pivotal role”, the plaintiff was not entitled to the “equitable discretionary relief of specific performance”.¹¹⁰ The court went on to consider the effect of the Amending Act, and after referring to its Statement of Objects and Reasons,¹¹¹ began its analysis with the observation that §§16 & 20 of the Act, which applied to the case at hand, had been substituted by the Amending Act with different provisions.¹¹² Consequently, the High Court’s analysis was based on the legal effect of repeal by substitution, similar to the analysis of the Allahabad High Court in Mukesh Singh.¹¹³ In fact, the court distinguished the decision in Mukesh Singh and held that repeal by substitution does not necessarily mean that the substituted provision is applicable retrospectively.¹¹⁴ This is especially so when the legislature specifies that the amendment will come into force on a particular date, as was the case with the Amending Act.¹¹⁵

Like the Supreme Court in Sujatha Reddy, the High Court here held that the provisions governing specific relief in the unamended Act conferred a “substantive right” on the defendants. Accordingly, in the absence of a clear indication, the Amending Act could not be interpreted to have destroyed this accrued right.¹¹⁶ However, the crucial difference in the High Court’s reasoning lies in the observation that “such rights/privileges vested with the defendants at the time of breach of contract alleged, while filing the suit”.¹¹⁷ (emphasis added) What is unclear from the High Court’s judgment is whether both §§16 & 20 of the Act were necessary for the defence of the suit. The emphasis on the conduct of the parties indicating that the plaintiff was not ready and willing to perform suggests that §16 would be a sufficient answer to the plaintiff’s case.¹¹⁸

If so, the outcome would be the same whether or not the Amending Act applies, as the plaintiff is required to prove that he was ready and willing to perform even under the Amending Act. As noted above, a similar point can be made about the decision in Sujatha Reddy.¹¹⁹ However, the fact remains that the High Court did consider the hardship that would be caused to the defendant as a justification for refusing specific performance,¹²⁰ which would not have been an available ground under the Amending Act, as §20 has been repealed.

In any event, despite following substantially the same reasoning as the Supreme Court in Sujatha Reddy, it is significant that the High Court did not express the view that the applicability of the Amending Act ought to be considered based on contract formation. The authority of this decision, therefore, is solely for the proposition that for the amended provisions of the Act to apply, the suit ought to have been filed after the Amending Act came into force.

¹⁰⁹ *Id.*, ¶13.

¹¹⁰ *Id.*, ¶19.

¹¹¹ *Id.*, ¶21.

¹¹² *Id.*, ¶22.

¹¹³ *Id.*, ¶¶23–27.

¹¹⁴ *Id.*, ¶28.

¹¹⁵ *Id.*, ¶33.

¹¹⁶ *Id.*, ¶35.

¹¹⁷ *Id.*, ¶35.

¹¹⁸ *Id.*, ¶36.

¹¹⁹ See *infra* Part II on “The Decision in Sujatha Reddy”.

¹²⁰ Suresh, *supra* note 103, ¶37.

The High Court's decision is an illuminating instance of the terminological confusion that results when using 'right' and 'remedy' interchangeably. Despite holding that specific performance is a substantive right, the High Court held that the Amending Act applies to suits filed after its effective date. This view implies that the "substantive right" to specific performance arises when a suit seeking specific performance is filed. However, in this interpretation, 'remedy' is a more natural term to describe an entitlement that arises upon legal proceedings being initiated in a court of law.¹²¹ Furthermore, if "substantive" is understood as 'primary' as opposed to 'secondary', a distinction familiar to the common law of contract,¹²² then it is conceptually contradictory to argue that a 'primary' right to contractual performance is created when a suit is filed, i.e., only after an actual or threatened breach of contract has taken place. However, this is precisely what the High Court's reasoning implies. This confusion, however, is easily resolved when it is accepted, as shown in Part III above,¹²³ that specific performance is a remedy that replicates the primary right to contractual performance.¹²⁴

2. *SHON RANDHAWA V. RAMESH VANGAL*

In *Shon Randhawa v. Ramesh Vangal* ('Shon Randhawa'),¹²⁵ the case arose out of a challenge to an arbitral award under which the arbitrator had refused to award specific performance of a share purchase agreement ('SPA'). The purchaser, in her claim before the arbitrator, had alleged a breach of the SPA by the sellers and claimed that she was entitled to an order of specific performance directing the transfer of shares as agreed by the parties, in addition to damages.¹²⁶ The arbitrator refused to award specific performance but directed the sellers to refund the loan paid by the purchaser in a contemporaneous transaction, with enhanced interest as compensation. The refusal was grounded in §20 of the unamended Act (the award was passed in 2014), observing that an order of specific performance would be inequitable, as it would force the parties into a "glorified partnership" given their hostile relationship and multiple allegations against each other, which would, in turn, render the management of the company difficult.¹²⁷ The arbitrator's decision was challenged by the purchaser before a Single Judge of the Delhi High Court, who refused to set aside the award and interfere with the arbitrator's exercise of discretion under §20.¹²⁸ It was in the purchaser's appeal against this order that the issue of whether the Amending Act applies was first considered.¹²⁹

The Division Bench of the Delhi High Court considered its previous decision in *Jindal Saw*, which interestingly was decided by one of the members of the Bench sitting as a Single Judge.¹³⁰ As noted above, the Court in *Jindal Saw* held that the Amending Act would be applicable to pending suits on the ground that specific performance was a form of judicial redress.¹³¹ However, the Division Bench was now required to consider whether an appellate court, in considering a challenge to an arbitral award passed prior to the Amending Act, could

¹²¹ See Smith, *supra* note 44, 7; Zakrzewski, *supra* note 42, 2.

¹²² For the distinction between primary and secondary obligations in the law of contract, see *Photo Production v. Securicor*, [1980] AC 827, 848, 849 (United Kingdom House of Lords).

¹²³ See *supra* Part III.

¹²⁴ Birks, *supra* note 50, 27, 28.

¹²⁵ *Shon Randhawa v. Ramesh Vangal*, 2020 SCC OnLine Del 2548 ('Shon Randhawa').

¹²⁶ *Id.*, ¶4.

¹²⁷ *Id.*, ¶6.

¹²⁸ *Id.*, ¶8.

¹²⁹ *Id.*, ¶10.

¹³⁰ *Id.*, ¶11.

¹³¹ *Jindal Saw*, *supra* note 95, ¶60.

consider the provisions of the Amending Act. It answered this question in the negative, on the ground that while an appeal from a suit requires the appellate court to reconsider all issues of fact and law afresh, an arbitral award challenged under §34 of the Arbitration and Conciliation Act, 1996 can only be set aside on the statutory grounds specified in the provision,¹³² considered as on the date of the award.¹³³

The common principle in both this case and *Jindal Saw*, considered above, is that specific performance, being a remedy, is governed by the law that applies at the time of judgment (or award). This principle aligns with the theoretical understanding of remedies as court orders, as Part III has attempted to show. Thus, while the Delhi High Court's decision in *Shon Randhawa* appears to support the conclusion in *Sujatha Reddy* that the Amending Act cannot apply retrospectively, the court's reasoning is consistent with the treatment of specific performance as a remedy and not a substantive right. This is why the High Court did not reconsider its earlier view in *Jindal Saw* and distinguished the two decisions on the basis that *Jindal Saw* concerned a suit filed before the Amending Act but decided after its coming into force, while *Shon Randhawa* concerned a challenge to an arbitral award passed before the Amending Act.

Regardless of the outcomes in the above cases, this Part has tried to show that all of them share a common theme: the implicit recognition that specific performance is a remedy and the entitlement to specific performance is governed by the law as it stands when (at the earliest) a suit (or arbitral proceedings) seeking specific performance is filed. In fact, as noted above, the decisions in *Ashoke Biswas*, *Mukesh Singh*, *Jindal Saw* and *Shon Randhawa* held that the applicability of the Amending Act ought to be considered with reference to when the suit or appeal is being decided. In *Hyderabad Potteries*, the Telangana High Court engaged with all these decisions and correctly identified the remedial nature of specific performance, observing:

“Admittedly, the Amendment Act of 2018 does not confer any right on litigants neither it abrogates any right or privilege so vested in parties before the amendment. What the amendment did is it took away the discretion of the Court, making an equitable relief a statutory one”.¹³⁴ (emphasis added)

Given this background, it is perplexing that the Supreme Court in *Sujatha Reddy* did not engage with this existing line of authority and instead held that the applicability of the Amending Act is to be decided with reference to when the contract between the parties is concluded, without giving any reasons for this conclusion.

V. POST SUJATHA REDDY: THE AMBIGUITY OF TRANSACTION

This article has attempted to show that the Supreme Court's focus on distinguishing substantive and procedural laws in the context of specific performance prevented it from examining the more fundamental question of whether specific performance is a right or a remedy. It is argued that framing the question in this manner would have been the proper interpretive approach to the Amending Act, particularly given the strong basis for such an approach in prior High Court authorities. Notably, the failure to follow this interpretive

¹³² *Shon Randhawa*, *supra* note 125, ¶30.

¹³³ *Id.*, ¶31.

¹³⁴ *Hyderabad Potteries*, *supra* note 20, ¶90. *See also* *Balganesh*, *supra* note 42.

approach is not merely academic but, as subsequent cases relying on Sujatha Reddy indicate, has resulted in a confused and mechanical approach to the applicability of the Amending Act.¹³⁵

A telling illustration is provided by the decision of the Bombay High Court in *Vijay Madhavrao Budhale v. Bhagoji Ganu Kamble* ('Madhavrao').¹³⁶ The dispute, in this case, concerned the sale of immovable property, with the purchaser filing a suit for specific performance against the seller, alleging that the seller had failed to receive the balance sale consideration and execute a sale deed in the purchaser's favour.¹³⁷ Pertinently, while the contract was concluded in 2011, the suit for specific performance was filed in 2019 and decreed in 2022.¹³⁸ The applicability of the Amending Act would, therefore, clearly depend on which event was considered relevant. Without considering this question in detail, the High Court simply relied on Sujatha Reddy and held that as the transaction was of the year 2011, the Amending Act would not be applicable.¹³⁹ This is in stark contrast to the High Court decisions prior to Sujatha Reddy, considered above,¹⁴⁰ which contained detailed discussion on the stage at which the availability of specific performance as a remedy becomes relevant. The Calcutta High Court in *Ashoke Biswas*,¹⁴¹ went so far as to examine whether the applicability of the Amending Act would depend on when the suit was filed or when the decree was being passed,¹⁴² reflecting a nuanced approach to the nature of specific performance as a remedy.

The Bombay High Court's decision in *Madhavrao*¹⁴³ is contrary to the earlier decision of the Court's Nagpur Bench in *Sumanbhai Pandurang Petkar v. Suresh Lataruji Ramteke*,¹⁴⁴ where the High Court relied on Sujatha Reddy and held that the Amending Act would not apply to suits filed before the Amending Act came into force.¹⁴⁵ The case concerned a suit for specific performance filed by the purchaser seeking to enforce a sale of agricultural land agreed upon in 2004, the key issue being whether the purchaser had proved readiness and willingness to perform its obligations and was entitled to the discretionary relief of specific performance.¹⁴⁶ The suit was filed in 2010,¹⁴⁷ which is why the High Court held that the unamended provisions of the Act would apply. The High Court clearly interpreted transaction to mean the filing of the suit, although this is not even expressly stated, let alone substantiated with reasons.¹⁴⁸

A third and more ambiguous approach was followed by the Delhi High Court in *Sanghi Bros (Indore) Pvt. Ltd. v. Kamendra Singh*,¹⁴⁹ where the High Court, applying Sujatha Reddy, was content to observe that the transactions in the case took place from 1998, the date

¹³⁵ For instances, see *Basavaraj v. Narayanappa*, MANU/TN/1277/2023, ¶17; *Gaddipati Divija v. Pathuri Samrajyam*, 2023 SCC OnLine SC 442, ¶23; *Mohammad Abubacker Siddiq v. A.P.M.S Habbeebal*, MANU/TN/5647/2023, ¶55; *Pan Resorts Ltd. v. H.H. Karthika Thirunal Lakshmi Bayi*, MANU/TN/5523/2023, ¶37 ('Pan Resorts'); *Sanghi Bros (Indore) Pvt. Ltd. v. Kamendra Singh*, SCC OnLine Del 5528, ¶120; *Vijay Madhavrao Budhale v. Bhagoji Ganu Kamble*, 2024 SCC OnLine Bom 142, ¶¶36–38.

¹³⁶ *Madhavrao Budhale v. Bhagoji Ganu Kamble*, 2024 SCC OnLine Bom 142 ('Madhavrao').

¹³⁷ *Id.*, ¶¶4, 5.

¹³⁸ *Id.*, ¶¶4–7.

¹³⁹ *Id.*, ¶35, 36.

¹⁴⁰ See *supra* Part IV.

¹⁴¹ *Ashoke Biswas*, *supra* note 69.

¹⁴² *Id.*, ¶98.

¹⁴³ *Madhavrao*, *supra* note 136.

¹⁴⁴ *Sumanbhai Pandurang Petkar v. Suresh Lataruji Ramteke*, 2022 SCC OnLine Bom 11903 ('Sumanbhai').

¹⁴⁵ *Id.*, ¶¶10, 11.

¹⁴⁶ *Id.*, ¶¶1, 3.

¹⁴⁷ *Id.*, ¶3.

¹⁴⁸ *Id.*, ¶¶9–11.

¹⁴⁹ *Sanghi Bros (Indore) Pvt. Ltd. v. Kamendra Singh*, SCC OnLine Del 5528 ('Sanghi Bros').

of the contract, to 2004, the date of filing the suit.¹⁵⁰ The suit in question was filed seeking specific performance of a Memorandum of Understanding (‘MoU’) executed in 1998, by which the defendant agreed to transfer his interest in some immovable property he had inherited by a will to the plaintiffs.¹⁵¹ The MoU also required the plaintiff to pursue proceedings for probate of the will before the Madhya Pradesh High Court,¹⁵² which were pending and continued well after the filing of the suit.¹⁵³ Given the multiplicity of proceedings, it was all the more important for the Delhi High Court to have clearly and unambiguously interpreted what the Supreme Court meant by transaction in *Sujatha Reddy*. Unfortunately, the court provided no such clarification, which leaves little guidance for future decisions.

As the above decisions indicate, the meaning of transaction has not been consistently interpreted by High Courts in decisions subsequent to *Sujatha Reddy*. This is conspicuously different from the approach followed by the High Court decisions examined in Part IV, prior to *Sujatha Reddy*, which raised and answered crucial questions about when a law amending the availability of specific performance is applicable to a particular case.

VI. CONCLUSION

The aim of this article has been to demonstrate that judicial recognition of specific performance as a remedy (and not a right) leads to a sounder interpretation of the Specific Relief (Amendment) Act, 2018. In particular, this entails the recognition by courts that the law of specific performance essentially addresses the extent of discretion available to a court in granting the remedy,¹⁵⁴ and not the rights that parties have at the time of entering into a contract. This would further the legislative intent behind the Amending Act to make specific performance a more widely available remedy. Moreover, this would mitigate the effect of the decision in *Sujatha Reddy*, which effectively excluded all contracts entered into before the Amending Act (i.e., October 1, 2018) from the new statutory framework. Given that a suit may be filed several years after a contract is formed,¹⁵⁵ and a final decision may be rendered several years thereafter,¹⁵⁶ it is extremely significant to consider the ‘event’ relevant for determining the applicability of the Amending Act.

Further, this article has attempted to show that as a result of the Supreme Court’s decision in *Sujatha Reddy*, the question of whether the Amending Act applies prospectively or retrospectively has been examined from the rather imperfect lens of whether the law of specific relief is substantive or procedural in nature. It is submitted that this distinction raises more questions than it answers, and a more illuminating answer is provided by the distinction

¹⁵⁰ *Id.*, ¶¶6, 120.

¹⁵¹ *Id.*, ¶6.

¹⁵² *Id.*, ¶7.

¹⁵³ *Id.*, ¶9–12.

¹⁵⁴ *Global Music*, *supra* note 1, ¶42. The Delhi High Court recently observed that “the Amendment Act, 2018 has changed the nature of specific relief from an equitable, discretionary remedy to a statutory remedy”. The recognition of specific performance as a remedy, therefore, continues to persist despite the decision in *Sujatha Reddy*.

¹⁵⁵ The Limitation Act, 1963, Sch. I, Item 55. It provides that a suit for breach of contract must be filed within three years of the date of the breach, which may take place years after a contract is formed.

¹⁵⁶ For instance, *see Pan Resorts*, *supra* note 135, ¶¶1–3. The agreement of sale was entered into in 1993, and the suit was filed in 1997 and decided in 2012. For a more general understanding of case pendency and timelines of civil disputes in High Courts, *see NATIONAL JUDICIAL DATA GRID, High Courts of India*, available at https://njdg.ecourts.gov.in/hcnjdgnew/?p=main/pend_dashboard (Last visited on January 13, 2025).

between rights and remedies. The point is not merely academic, but as demonstrated above,¹⁵⁷ can make a real practical difference in how a suit for specific performance is decided.

As noted above, the Supreme Court had a recent opportunity to revisit its reasoning while considering a review petition against Sujatha Reddy but chose to confine itself to the reasoning on merits and not on the issue of applicability.¹⁵⁸ While that may have been a justifiable choice given the limited scope of a review petition,¹⁵⁹ one can only hope that if the opportunity arises, a larger Bench of the Supreme Court will engage in greater depth with this problem and reconsider its rather scant reasoning in *Sujatha Reddy*.

¹⁵⁷ See *supra* Part V.

¹⁵⁸ See *Sujatha Review*, *supra* note 11.

¹⁵⁹ *Id.*, ¶32.