APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Moti Sagar.

SADIQ HUSSAIN (DEFENDANT) Appellant,

versus

ANUP SINGH AND ANOTHER (PLAINTIFFS) Respondents.

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April 23.

Civil Appeal No. 2529 of 1919.

Specific Performance—Suit by vendee to enforce a contract of sale — vendor having agreed in case of breach of contract to refund the earnest money and to pay damages to the vendee—Entry in revenue records as to the caste of a particular person—presumption of correctness—Punjab Land Revenue Act, XVII of 1887, section 44—Rule in equity on the question whether time is of the essence of the contract—and whether specific performance can be claimed when the contract provides an alternative remedy by way of damages.

Held, that the mere fact that there is an entry in the revenue records as to the caste of a particular person does not in any way relieve him from the necessity of proving that he really belongs to that caste if the fact is contested by the opposite party; and section 44 of the Punjab Land Revenue Act is not applicable, the statement not falling within the purview of section 31 (2) (*a*) of the Act.

Held also, that equity which governs the rights of the parties in cases of specific performance of contracts to sell real estates looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.

Jamshed Khodaram v. *Burjorji Dkunjibhai* (1), *Tilley* v. *Thomas* (2), and *Stickney* v. *Keeble* (3), followed.

Held further, that the general rule of equity is that if a thing is agreed upon to be done though there is a penalty annexed to secure its performance, yet the very thing itself must be done, and consequently the plaintiff could claim to have the contract of sale specifically enforced, there being no condition that the vendees should abandon their rights and accept a certain sum of money in lieu thereof.

Hukam Chand v. *Nikka Singh* (4), followed.

(1) (1915) I. L. R. 40 Bom. 289 (P. C.)
(2) (1867) 3 Ch. 61.
(3) (1915) App. Cases 386.
(4) 18 P. R. 1906.

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First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Lyallpur, dated the* 12*th August* 1919, *decreeing the plaintiffs' claim.*

SHEO NARAIN, AZIZ AHMAD, AND FEROZ-UD-DIN AHMAD, for Appellant.

ABDUL QADIR AND SLEEM, for Respondents.

The judgment of the Court was delivered by—

MOTI SAGAR J.—This is an appeal from a decree for specific performance passed by the Senior Subordinate Judge of Lyallpur at the instance of a purchaser of immoveable property. The facts are briefly these :—

On the 4th of November 1918 the appellant, who is a resident of Amroha in the Moradabad District, agreed in writing to sell $2\frac{1}{2}$ squares of land in Chak No. 90, Gugera Branch in the Lyallpur Tahsil of the same district, to the respondent Anup Singh for Rs. 18,250 and the latter paid Rs. 1,000 of this sum as a deposit or earnest. The agreement for sale provided that the appellant shall execute a sale deed in favour of respondent No. 1 or in favour of any other person whom the latter wanted to associate with himself in the purchase, and have registration of the same effected by the 15th of December 1918. There were certain other clauses in the agreement for sale which are of special importance with reference to the points arising in this case. It was agreed that if the vendor committed a breach in the performance of this contract he would be liable to refund the earnest-money and to pay damages to the respondent-vendee. It was also agreed that if the vendee made a default in making the purchase he would be liable to have his earnest-money forfeited. It appears that the vendee Anup Singh, who is a member of an agricultural tribe, wanted to associate with himself in the purchase one Inayat Ullah who was not such a member. He accordingly informed the vendor that he should execute two sale deeds, one in respect of half a square in favour of Inayat Ullah and the other in his own (Anup Singh's) favour in respect of the two remaining squares. Now, the 15th of December 1918, the day on which the documents were to be registered, was a holiday. It was accordingly arranged that the documents should be executed and registered on the next day. The plaintiffs'

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case is that on the 16th of December 1918 the defendant-vendor, who had gone to his Chak, came back late in the evening when it was impossible to get the documents registered, though drafts of the sale deeds were prepared and stamps purchased. On the 17th of December 1918, the defendant-vendor informed the plaintiff by a notice that the latter had made a default in carrying out the terms of the contract inasmuch as he had not the full price ready for the purchase of the property and that the contract was, therefore, rescinded. Without waiting for any reply to this notice the defendant-vendor left Lyallpur for Amroha on the same day.

On the 18th of February 1919 the plaintiff instituted this suit for specific performance of the contract, impleading Inayat Ullah as a *pro forma* defendant to the suit. Inayat Ullah demurred to his remaining a defendant, and on his expressing a desire to that effect his name was transferred from the list of the defendants to that of the plaintiffs. Defendant No. 1 resisted the suit on various grounds, but his main contentions were :—

(1) that he was a member of an agricultural tribe, and that as the plaintiff had associated with himself in the purchase a non-agriculturist the contract could not be lawfully performed, having regard to the provisions of section 3 of the Alienation of Land Act ;

(2) that the plaintiffs were themselves guilty of breach, inasmuch as they had not the full price ready for the purchase of the property :

(3) that time was of the essence of the contract, and that as the plaintiffs had failed to have the sale deed executed and registered within the time prescribed in the agreement the contract was cancelled, and

(4) that the contract could not be specifically enforced, inasmuch as an alternative remedy in the shape of damages had been provided for in the agreement which was the only relief the plaintiffs were entitled to.

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The trial Court found in favour of the plaintiffs and decreed specific performance of the contract. The defendant has preferred a first appeal against the decree to this Court through *Pandit* Sheo Narain and Mr. Aziz Ahmad and we have heard Mr. Abdul Qadir for the respondents.

It is argued by *Pandit* Sheo Narain that the appellant is recorded in the revenue papers as a *Kazilbash Pathan*, that *Pathans* in the district of Lyallpur have been notified to be members of an agricultural tribe, that a presumption of correctness attaches to revenue entries, and that the *onus* of proving that he is not a member of an agricultural tribe is shifted on to the plaintiffs. With this contention we are unable to agree. The mere fact that there is an entry as to the caste of a particular person in the revenue records does not in any way relieve him from the necessity of proving that he really belongs to that caste if the fact is contested by the opposite party. Section 44 of the Land Revenue Act, upon which reliance has been placed, merely provides that entries in the annual records shall be presumed to be true until the contrary is proved. An annual record has been described in section 33 of the same Act as an amended edition of the record of rights annually prepared under the authority of the Financial Commissioner, and comprises the statements mentioned in sub-section (2), clause (*a*) of section 31. The question for determination is whether a statement as to the caste of a land-owner is a statement falling within the purview of section 31, sub-section (2), clause (*a*). That section provides that the record-of-rights for an estate shall include the following documents, namely :—

(*a*) statements showing, so far as may be practicable—

(*i*) the persons who are land-owners, tenants, or assignees of land revenue in the estate, or who are entitled to receive any of the rents, profits, or produce of the estate, or to occupy land therein ;

(*ii*) the nature and extent of the interests of those persons, and the conditions and liabilities attaching thereto ; and

(*iii*) the rent, land revenue, rates, cesses, or other payments due from and to each of those persons and to the Government.

We do not think that a statement as to the caste of a land-owner is a statement covered by this section, and we are consequently of opinion that no presumption of correctness attaches to such an entry and that section 44 of the Land Revenue Act does not in any way assist the appellant. The only evidence on the record on this point is that of Mr. G. F. deMontmorency, the Deputy Commissioner of Lyallpur. He has stated that in his opinion *Kazilbashes* are *Afghans*, but not necessarily *Pathans*, and that the vendor was not a member of an agricultural tribe. The defendant did not produce any evidence in support of his contention that he was a *Pathan*, and as the *onus* of proving that he belonged to an agricultural tribe was clearly upon him we are of opinion that the finding arrived at by the learned Senior Subordinate Judge is correct.

The second contention raised by *Pandit* Sheo Narain is that the plaintiffs were guilty of a breach and that they failed to get the documents registered on the 16th of December 1918 as they were not in possession of the full price they had contracted to pay for the property in suit. It appears, however, from the evidence that *Sardar* Anup Singh, plaintiff No. 1, sold three squares of his for Rs. 16,750 to Sundar Singh and Bishen Singh on the 6th of September 1918 in order to provide himself with the money required for the purchase of this property. There is also evidence to show that Inayat Ullah, plaintiff No. 2, mortgaged his house to one *Lala* Wazir Chand, Pleader, for Rs. 2,500 which he received in cash on the 13th of December 1918. The finding of the learned Senior Subordinate Judge is that on the 16th of December 1918 the two plaintiffs had Rs. 17,700 in their possession between themselves and that they were quite ready and prepared to perform their part of the contract. We are in full agreement with this finding and hold that the defendant has entirely failed to show that the breach was in any way due to the default of the plaintiffs. The facts that the plaintiffs went to the length of selling and mortgaging their other properties, that they purchased

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stamps on the 16th of December 1918, and that they got drafts prepared on that very day are also strong pieces of evidence in favour of the view that the plaintiffs had the full price ready and that they were not guilty of any breach.

Next, it is argued that time was of the essence of the contract, and that the contract was cancelled, inasmuch as the plaintiffs failed to get the documents executed and registered within the time prescribed in the agreement. We have no hesitation in holding that this contention is not well founded. It is now well-settled by the Judicial Committee in the case reported as *Jamshed Khodaram* v. *Burjorji Dhunjibhai* (1) that equity which governs the rights of the parties in cases of specific performance of contracts to sell real estates looks, not at the letter but at the substance of the agreement, in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. This doctrine is in full accord with what has been formulated by Lord Cairns in *Tilley* v. *Thomas* (2) and by the House of Lords in the case of *Stickney* v. *Keeble* (3). The evidence in the present case shows that the documents could not be executed and registered on the 16th owing to the default of the defendant and that on the 17th when the plaintiffs were quite ready to have the contract completed, the defendant left the station without assigning any valid reason for the non-performance of his part of the contract. We do not, therefore, think that there is any substance in this contention, and we overrule it.

The main point in the case is whether the contract could or could not be specifically enforced. *Pandit* Sheo Narain's contention is that an alternative remedy in the shape of damages was provided for in the agreement itself, and that it was at the election of the defendant either to perform the contract or to pay damages to the plaintiffs. He further argues that as a specific sum is not named in the agreement as the amount payable to the plaintiffs in case of a breach of the contract the case does not fall within the purview of section 20 of the Specific Relief Act, and that therefore specific performance

(1) (1915) I. L. R. 40 Bom. 289 (P. C.) (2) (1867) 3 Ch. 61.
(3) (1915) App. Cases 386

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of the contract cannot be claimed. There is no doubt that section 20 has nothing to do with alternative contracts, which stand on an entirely different footing from contracts in which a sum is named as the amount to be paid in case of a breach. Alternative contracts are as fully performed by the payment of the money as by the doing of the act and therefore there is no ground for proceeding against a party having the election to compel the performance of the other alternative. But the question whether a contract is alternative or not is a question of construction, and consequently each case depends upon its own circumstances, though the guide is always the primary intention of the parties. The general rule of equity is that if a thing is agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. On the other hand, it is certainly open to parties entering into contracts to agree that in case of a breach of the contracts only a fixed sum of money shall be paid by way of compensation. In the present case it is clear from the evidence that the intention of the parties was that the contract should be specifically enforced. In the case of *Hukam Chand* v. *Nikka Singh* (1) an agreement to sell executed by the vendor contained covenants to execute a deed of sale in favour of the vendees, to get it registered on receiving the balance of the purchase money at the time of registration, to put the vendees into possession, and, on failure to do so, to pay them a certain sum of money as damages and to refund the earnest-money. It was held that as there was no condition that the vendees should abandon their right to specific performance, and there was no understanding by them to accept a certain sum of money in lieu of their rights as purchasers, the contract could be specifically enforced. In our opinion, the principle laid down in that case fully applies to the present case, and there is no force in the contention that the vendor could pay the penalty and decline to convey the subject matter of the contract.

The appeal fails and is dismissed with costs.

C. H. O.

Appeal dismissed.

(1) 15 P. R. 1908.