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April 22.

*Special Appeals Nos. 509 and 59 of 1863.*

BA'LA' valad SANKIA' ..... *Appellant.*  
GABA'JI' BALVANT KULKARNI' ..... *Respondent.*

*Sale of Land in the Mofussil—Specific Performance.*

In suits arising out of default on both sides to complete a contract for the purchase and sale of land in the Mofussil, the Court should proceed as a Court of Equity, and should look to the acts and conduct of the parties subsequent to the making of the contract, as well as to the language of the contract itself; and where the contract has been partially performed, and the purchaser put into possession of a portion of the land, and allowed by the vendor so to continue long after the period fixed for completion of the contract has elapsed, further time should be given by the Court for the performance of the contract *in specie* (*Tucker, J., dissentiente*).

The court should not, by its decree, make for the parties a different contract from that which they themselves had entered into.

THESE were special appeals from decisions of the Assistant Judge of the Ahmednagar District, in Appeal Suits Nos. 134 of 1862 and 169 of 1863, against decrees passed by the Munsif of Pimpalgáv Basvant, in Original Suits Nos. 7072 and 6693 of 1861.

*McCombie and Ganesh II. Patvardhan* for the appellants.

*Dhirajlál Mathurádás* for the respondents.

The facts sufficiently appear in the judgments.

ERSKINE, J. :—On the 5th of May 1858, the special appellant, Bálá, contracted (see exhibit No. 3, Special Appeal No. 59) to purchase from the special respondent, Gabáji, certain lands &c. for Rs. 200. He paid a moiety of the purchase-money in cash at once; gave a bond (exhibit No. 3, Special Appeal No. 509) for the other moiety; and at once obtained possession of one half of the estate; the other half being then, it is said by the special appellant himself (see plaint in Special Appeal No. 59), under crop.

By the bond just referred to, passed on the same 5th of May 1858, the purchaser (special appellant) bound himself to pay the remaining moiety of the purchase-money by the end

of the year, on the 5th of November following. He was then to take the whole estate, which was to be entered in his own name in the Collector's books. Should he, however, fail to make payment, as above specified, the deed of sale (exhibit No. 3, Special Appeal No. 59) was to become null and void; the money already paid was to be forfeited; the land already obtained was to be restored; and rent for the whole, up to the date of restoration, was to be paid, exclusive of assessment, at the rate of Rs. 51 per annum.

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On the same 5th of May 1858, also, the vendor, special respondent, agreed (exhibit No. 15, Special Appeal No. 509) to present in "eight or fifteen days" to the Mámílatdár a rúzínámá (or release) for the lands, and to cause their transfer to the special appellant's name in the Collector's books. Should he fail to perform this agreement, he was to repay the moiety of purchase-money, together with a like sum as a penalty.

The purchaser has since repudiated the bond (exhibit No. 3, Special Appeal No. 509), and pleaded a tender of payment of the remaining moiety of the purchase-money; but the Assistant Judge has found the bond proved, and the tender of payment not proved.

In three or four weeks after the contract of sale, the vendor seems (exhibit No. 32, Special Appeal No. 59) to have presented a rúzínámá to the Mámílatdár, the special appellant presenting a kabuláyat, or undertaking for the assessment of the land. But the transfer of the land to the name of the special appellant did not take place; owing, it is now said, to the non-payment by him of the remainder of the purchase-money. At all events, one half of the estate remained in possession of the special respondent, and one half in possession of the special appellant, for two or three years.

At last, on the 30th of December 1861, the special respondent sued to recover the moiety of the lands, which had remained in the possession of the special appellant, together with rent for four years, at Rs. 51 per annum (Rs. 204), on the ground, that, by failing to pay the remaining moiety of

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the purchase-money, the special appellant had become liable to this extent, under the bond (exhibit No. 3, Special Appeal No. 509). The Munsif awarded for the special respondent to the full extent. The Assistant Judge, in appeal, amended the Munsif's decree; awarding rent for somewhat less than four years, at the rate of Rs. 25-8 only, *i.e.*, for the moiety of the estate which had been in the special appellant's possession. Against this decree is Special Appeal No. 509.

Again, on the 31st of January 1862, just a month after the laying of the special respondent's suit, the special appellant, on his part, sued to obtain the moiety of the land, which had remained in the special respondent's possession. It is not stated in the plaint that the special appellant sued because the special respondent had failed to perform his agreement (exhibit No. 15, Special Appeal No. 509), by which he had engaged that the field should be entered in the special appellant's name; nor did the special appellant claim to recover the penalty, stipulated in the event of a breach of that agreement. The special appellant's claim was thrown out by the Munsif, whose decision was confirmed by the Assistant Judge, with reservation of the special appellant's right to sue on the agreement for any penalty claimable under it.

Against this decree is Special Appeal No. 59.

These two special appeals are now before the Court.

I would support generally the conclusion at which the courts below have arrived; and would merely amend the decree of the Assistant Judge in Special Appeal No. 509, to the extent of allowing the special appellant a further period of (say) three months, within which to pay to the special respondent the remaining moiety of the purchase-money, with interest at nine per cent. : the decree of the Assistant Judge to be enforced if the special appellant fail to make such further payment within the period now allowed; but the payment, if duly made, to establish his right to be put in possession of the other moiety of the estate.

To this extent, perhaps, the special appellant may be equitably entitled to consideration, on the ground of a mutual understanding between the parties as to a postponement of the completion of payment and delivery, respectively.

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But it does not appear to me that the special appellant is in a position to show, that, before the date on which, under the bond, he was to lose his interest in the estate on failure to complete his payment, the special respondent had already made a breach of contract : either in respect to making over the other half of the estate, which, on the special appellant's admission in his plaint (Special Appeal No. 59), was to remain in the special respondent's possession until the crops then standing should be reaped ; or in respect to the transfer of names in the Collector's books, towards which the special respondent had promptly done all that, up to that date, could be done under the Survey rules. Indeed, the plea that, on the date on which the special respondent made default under the bond, the special respondent had already made such a breach of contract as barred his right of action on the bond, does not seem consistent with the defence put forward by the special appellant in one suit (Special Appeal No. 509), or with his plaint in the other (Special Appeal No. 59). In his defence, after repudiating the bond altogether (it is found to be proved), the special appellant alleges a tender of payment (found not to be proved) only three days after the date of the agreement ; thus demonstrating that, in his judgment, the actual making over of the rest of the land, and the actual transfer of names in the register, were not to be conditions precedent to the payment of the rest of the purchase-money. In his plaint, again, he does not seek to impose on the special respondent any liability for the penalty stipulated in the agreement for a breach of the engagement relative to a transfer of names.

The contract in this case does not seem to have been unfavourable to the special appellant. If he had completed his payment in due time, he might not only have claimed full possession of the estate ; but might also, had the special respond-

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ent then failed to act up to his agreement, have recovered the full amount of the purchase-money, as penalty. Even as it is, the special appellant has remained in the position of a purchaser who has paid half of the purchase-money and enjoyed half the estate, without being charged, hitherto, either with rent or taxes for any part of it.

TUCKER, J. :—These are appeals from decisions by the Assistant Judge of Ahmednagar, in cross suits arising out of mutual breaches of covenant in the execution of a contract of sale.

By deeds executed on the 5th of May 1858, a vendor, Gabáji, contracted to sell to a vendee, Bálá, a field, No. 31, for Rs. 200; and he agreed, on the receipt of half the purchase-money, and the execution of a bond for the remainder, payable at the expiration of five months, to deliver possession of the entire field, and to cause it to be transferred to the vendee's name in the Collector's books, within a week or a fortnight; and bound himself, if he failed to do this, to return the sum of one hundred rupees already paid, and pay an equal sum as a penalty.

The vendee, Bálá, on the other hand, in the bond which he passed for the balance of the purchase-money engaged to pay this sum at the stipulated date, or, in default, to forfeit what he had already paid, and to return the field,—paying rent for it at the rate of Rs. 51 yearly, for the period during which it might have been in his occupation. It is admitted that the vendor delivered only a moiety of the field, and that, though he made an application to the revenue authorities for a mutation of names, his request was not complied with. It is not shown why this application was ineffectual; but, as it was made after the date fixed by the Survey rules for the receipt of such applications, this fact will account for its not being acted upon. It does not appear to have been renewed during the following season, when alone it could have been attended to. It is also admitted that the balance of purchase-money has not been paid by the vendee. He (the vendee) denied before the lower court the execution of the bond, which purports to bear his signature, and pleaded

that he had tendered payment of the sum due by him ; but both these issues have been found against him.

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Such being the position of affairs between the parties, the vendor's demand for the restoration of the moiety of the field, which had been made over to the vendee, and for the recovery of rent for the said moiety during the time it has been in the vendee's occupation, has been decreed by the Assistant Judge ; and the vendee's claim for the delivery of the other half of the field has been rejected ; the vendee being left to enforce, by a separate action, the payment of any penalty to which he may be entitled, in consequence of the vendor's failure to transfer the field to the vendee's name.

I do not consider the settlement of the matter equitable. Neither party has strictly adhered to his engagement ; but the first and principal default was undoubtedly made by the vendor ; and he is not entitled to demand specific performance by the vendee of the portion of this contract, which was binding upon the purchaser, unless he can show that there has been no *lâches* on his own part. As the vendor was bound to deliver the whole field, and to cause it to be entered in the purchaser's name, before the second instalment of the purchase-money became due ; and as he has not performed either of these acts, I am of opinion that he is not in a position to claim either the restoration of the portion of the field which has been delivered, or the payment of the balance of the purchase-money. A court of equity will not assist a party to a contract to obtain an enforcement of the provisions which may be in his favour, if he cannot show that the precedent conditions, binding on himself, have been duly fulfilled ; and in the present case I hold that the vendor is not entitled to any relief. On the other hand, the vendee, as he neglected to tender the remainder of the purchase-money, or to take any steps to effect the completion of the contract, at the time the first breach of engagement was made, may be held to have tacitly acquiesced in this departure from the strict letter of the agreement ; and it is, therefore, not competent to him now to insist upon the fulfilment of the contract in its integrity.

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I would, therefore, affirm the Assistant Judge's decree in No. 59; and reverse it in No. 509: the plaintiff in either case to bear all costs in all courts. This will leave each party in the position which each held when the cross actions commenced; the vendee retaining half the field, in consideration for the payment of half the purchase-money agreed upon.

The two Judges having differed, the case was referred by them to FORBES and COUCH, JJ., as follows:—

The point of law on which, in this case, there is a difference of opinion (see Act XXIII. of 1861, Sec. 23) is the following:—Do the facts, established as having occurred before the 5th of November 1858 (on which date the purchaser, if the remaining moiety of the purchase-money then remained unpaid, was to lose his right to the property), constitute on the part of the vendor (special respondent) such breach of contract (either by failure to deliver the remaining moiety of the land, or to take steps for the transfer of names in the Collector's books) as deprived the said vendor of his right to proceed against the purchaser (special appellant) on the bond, exhibit No. 3.

FORBES and COUCH, JJ.:—The exhibit No. 3, Special Appeal No. 59, the bond passed on the same day (5th of May 1858), exhibit No. 3, Special Appeal No. 509, and the exhibit No. 23, Special Appeal No. 59, formed, we think, one contract, between Gabaji and Balá, for the sale and purchase of the land. The meaning of the latter instrument with regard to the time fixed for the transfer is not clear, whether it was to be within eight or fifteen days from the date, or within eight or fifteen days from the time fixed for the payment of the remainder of the purchase-money; but the words in the bond “These rupees (being the Rs. 100 balance) I shall pay you at the end of Ashvin of the current year, and get the number of the field, which stands in your name, entered in mine,” seem to show that the latter was the intention of the parties.

Both parties made default: the purchaser did not pay the remainder of the purchase-money, at the time appointed; and

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the seller did not transfer the land. The seller (special respondent) has sued to recover back the moiety of the lands, of which the purchaser took possession, with rent for the whole of the four years that have elapsed at Rs. 51 per annum; and the purchaser (special appellant) has sued to obtain the other moiety of the lands, which had remained in the seller's possession.

We concur with Mr. Justice Erskine as to the decree which should be made. In applying the rules as to the performance of conditions precedent, upon which the judgment of Mr. Justice Tucker appears to be founded, the Court must act as a court of equity. At law the time fixed is deemed of the essence of the contract, although a party may, even at law, waive the forfeiture and enlarge the time; but equity will in certain cases carry the agreement into effect, notwithstanding that the time appointed has elapsed; and although there has been no waiver, and although the treaty may have lain dormant for some time, yet, if the contract is not abandoned, performance will be decreed *in specie*; Sugden's Vendors and Purchasers, Chap. 5, Sec. 3, Cl. 8.

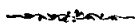
In this case the purchaser (special appellant), on the failure of the seller to transfer the land, instead of treating the contract as broken, and claiming the repayment of the half of the purchase-money, which he had paid, and the penalty, and relinquishing the moiety of the land, of which he had received possession, remained in possession of it. His conduct in this respect, we think, amounted to a waiver of the time: and if the seller is now willing to transfer the land, the purchaser is bound to take it and pay the remainder of the purchase-money. And the case is stronger against him, as by his plaint in the suit Special Appeal No. 59, he treats the contract as subsisting, and claims to have it performed, by having possession given to him of the remaining half of the land. He is entitled to this, on paying the balance of the purchase-money; and if the seller is unable or unwilling to transfer the land, he ought only to be allowed to recover back the moiety with rent, as awarded by the Assistant Judge, who appears to us to be mistaken only in thinking that the pur-

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A decree in accordance with the opinion of Mr. Justice Tucker would be, in our opinion, to make for the parties, and to force upon them, a different contract from that which they entered into. Neither party appears to have desired or intended that there should be a sale of half only of the field; and neither now by his plaint makes any such claim.

PER CURIAM (*Tucker, J., dissentiente*):—The Court order that the special appellant be allowed a further period of three months from this day, within which to pay to the respondent the remaining moiety of the purchase-money, with interest at nine per cent. per annum, on payment of which within the said period, the special appellant is to be put into possession of the remaining moiety of the estate, and the decrees of both the lower courts in Special Appeals 59 and 509 are to be reversed; but in the event of his failing to make such payment within the said period, the decrees of the Assistant Judge in Special Appeals 59 and 509 are to be confirmed: costs to be in proportion in either case.



Jan. 6.

*Special Appeal No. 511 of 1863.*

LA'LI' RATANJI ..... *Appellant.*  
GANGA'RA'M TULJA'RA'M..... *Respondent.*

*Ownership—Easement—Relief sought.*

In a suit brought to establish a right of ownership over certain land:—  
*Held* that it was not competent to the Court to enter into and decide upon the plaintiff's right to an easement over the same.

A question not raised by the plaint ought not to be decided by the Court.

THIS was a special appeal from the decision of C. Gonne, Acting Judge of the Konkan District.

Gangarám brought the original suit on the 4th of July 1862, in the Court of the Principal Şadr Amín of Tháná, to establish his ownership over a strip of ground adjoining his house on the north side.