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 I in the grounds of appeal and it cannot be allowed to be raised for the first time in this Court. For aught we know, if this point had been raised in any of the courts below, it might have been possible for the plaintiff to prove facts which would make even the present defendant liable.

I will in these circumstances dismiss the appeal with costs.

FAZL ALI, J.

AGARWALA, J.—I agree.

J. K.

Appeal dismissed.

SPECIAL BENCH.

Before Courtney Terrell, C. J., Khaja Mohamad Noor, James.

Dhale and Varma, JJ.

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Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 89—deposit of decretal amount and compensation—part-payment of decretal amount and agreement to pay the balance on a fixed date—time, if can be extended—order refusing to set aside sale, if appealable—reason.

On the 13th of September 1935, certain properties were sold in execution of a decree and on the same date the judgment-debtors paid a portion of the decretal amount to the decree-holder and a joint petition was filed in court by the decree-holder auction-purchaser and the judgment-debtors to the effect that if the balance of the decretal amount was paid by the 10th of November the sale would be set aside and in case of default the sale would be confirmed. The court was closed on the 10th of November and re-opened on the 13th. On the 14th of November the judgment-debtors applied for a chalan to deposit the amount and the deposit was actually

*Appeal from Original Order no. 354 of 1935, from an order of Babu Nidheswar Chandra Chandra, Subordinate Judge of Patna, dated the 25th November 1935.

made on the 20th of November and accepted at the risk of the judgment-debtors. The court after hearing the parties held that it had no power to extend the time of payment as agreed to between the parties and confirmed the sale. The judgment-debtors appealed.

Held, that the time fixed for payment was, under the circumstances, of the essence of a contract and on default the sale became automatically confirmed and time could not be extended.

Held, that the application filed on the date of sale jointly by the parties might be treated as an application under Order XXI, rule 89, of the Code and as such the order was appealable.

Banga Chandra Mozamdar v. Nanda Kumar Mozamdar(1), *Henry Peter Pisani v. Her Majesty's Attorney-General*(2) and *Sadasiva Pillai v. Ramalinga Pillai*(3), relied on.

Held also that if the order refusing to set aside the sale was held to be wrong, it would have been set aside on the ground of refusal to exercise jurisdiction or of material irregularity in the exercise of jurisdiction.

Appeal by the judgment-debtors.

The facts of the case material to this report will appear from the following judgment of Khaja Mohamad Noor and Saunders, JJ. referring the case to a Special Bench :

KHAJA MOHAMAD NOOR AND SAUNDERS, JJ.—The question involved in this appeal, though at first sight simple, appears to us to be beset with difficulties. The appeal purports to be against an order under Order XXI, rule 89, of the Code of Civil Procedure, refusing to set aside a sale held on the 13th September, 1935, in execution of a decree at which the decree-holder himself was the auction-purchaser. An application under Order XXI, rule 89 or rule 90, could have been made by the 13th October, but as there was the civil court vacation it could have been made on the 31st October, 1935, when the courts re-opened. But on the very day of the sale a petition was filed by the parties to the effect that the judgment-debtors had paid Rs. 500 to the decree-holder auction-purchaser towards the satisfaction of the decree and that it was agreed between the parties that if the

(1) (1936) 40 Cal. W. N. 1402.

(2) (1874) L. R. 5 P. C. 516.

(3) (1875) L. R. 2 Ind. App. 219.

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remaining decretal amount with interest, etc., be paid by the 10th of November following, the sale would be set aside and the decree-holder auction-purchaser would forego the five per cent. compensation which he was entitled to under the law. In case of default in the payment by the date fixed the sale would be confirmed. The court was closed on the 10th of November, 1935, and re-opened on the 13th November, 1935, and it is not disputed that the decretal amount could have been deposited on that day. Nothing, however, was done on that date, and the reason for the default was tried to be explained by the judgment-debtors but is not urged in appeal. On the 14th November the judgment-debtors applied for a chalan. There is a note showing that a chalan was issued on the 15th November. The first part of the chalan seems to have been filled up on that date. The second part, which is the authority for the treasury officer to receive the money, does not seem to have been filled up by the court till the 20th of November on which date the decretal amount was actually deposited. The money was accepted at the risk of the judgment-debtors and was later utilized towards the satisfaction of the decree in a subsequent execution case. There is an allegation by the judgment-debtors that they attempted to pay the money to the decree-holder, who is a resident of Benares, before the 10th of November but that he could not be found. This point has, however, not been pressed. On the face of the chalan it may be said that the judgment-debtors were not responsible for the delay in payment between the 15th and the 20th of November and there may be a ground for not making them responsible for the delay between the 14th and the 15th. We have not, however, gone into this matter, as the case was argued on the assumption that the default between the 14th and the 20th November could be ignored since it was conceded that there was default on the 13th, and the question is whether this default can be condoned.

The decree-holder auction-purchaser ignoring the deposit made on the 20th November, applied to the court to confirm the sale as the judgment-debtor defaulted in carrying out the terms of the agreement entered into between the parties on the 13th of September. The learned Subordinate Judge has allowed this petition and has confirmed the sale. It is against this order that the present appeal has been preferred.

The questions for consideration are—

- (1) Whether the order is one under Order XXI, rule 89 and is appealable;
- (2) whether the court has power to set aside the sale on a deposit made after the date fixed by the parties; and, if so,
- (3) should this power be exercised in this case?

It was urged by Mr. Das that no appeal lay, as there was no application under Order XXI, rule 89. At one stage we were inclined to the view that the joint application of the 13th September, 1935, was in spirit, though not in form, an application under Order XXI, rule 89, and that the period for deposit of the decretal amount and compensation, which is thirty days under Order XXI, rule 92, was extended with the consent of the decree-holder auction-purchaser. There are

observations in a decision of this Court in the case of *Chaudhry Rameshwar Misser v. Chaudhry Sureshwar Misser*(1) which may support the proposition that the period of 30 days fixed in Order XXI, rule 92, can be extended with the consent of the parties, but it is argued out that the statutory period of limitation for filing the application under Order XXI, rule 89, and for making the deposit cannot be extended by the consent of any party. If this contention be accepted, it may be said that the proceeding before the learned Subordinate Judge cannot be treated as one under Order XXI, rule 89, and even if the judgment-debtors would have deposited the money in time, the setting aside of the sale would have been not under the provisions of the Code of Civil Procedure but perhaps under the inherent power of the Court to give effect to the agreement of the parties. Mr. Das has contended that under the statutory provision of Order XXI, rule 92, when there was no application either under rule 89, 90 or 91 the Court was bound to confirm the sale. As there was no application under any of the three sections in this case, the confirmation of the sale must be taken to have been under rule 92 and all the intermediate steps should be ignored; and if the judgment-debtors had any right under any contract with the decree-holder, their remedy was a suit. It is also contended by him that in any case the Court has no power to accept the deposit after the agreed date.

It has been contended by Sir Sultan Ahmed, who appears for the appellants, that the decree-holder auction-purchaser by filing the application of the 13th September gave up his right under the sale and substituted for it another right based upon contractual relations between him and the judgment-debtors, one of the considerations of the contract being that the judgment-debtors did not file any application under Order XXI, rule 90. If the decree-holder wanted to enforce that right, which he got by the contract, the Court is entitled to decide that the time fixed was not of the essence of the contract and can refuse to confirm the sale if the decree was satisfied within reasonable time of the date fixed. It is also contended that when the parties come to the domain of contract and give up their statutory rights the Court should give relief against penalty and forfeiture. It is a different matter whether any question of penalty or forfeiture arises in a case of this kind. There is no clear decision on this point. There are some cases in which it has been held that when the parties compromise in a proceeding under Order XXI, rule 90, time is of the essence of the contract [see among others the case referred to in *Kandarpa Nag v. Banuvari Lal Nag*(2)]. These decisions may be taken to have laid down that in a compromise between the judgment-debtor and the auction-purchaser in the course of a proceeding to set aside a sale time is of the essence of the contract. It is contended that those decisions require reconsideration, and further that in the present case there was no proceeding to set aside the sale. In short, in our opinion the question for decision is whether the decree-holder is entitled to insist upon his statutory right under the sale and can say that no deposit made by him after the period fixed by law will affect the sale, or that if that period can be extended by consent, the court has no

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(1) (1917) 2 Pat. L. J. 164.

(2) (1920) 38 Cal. L. J. 244, 248.

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power to accept any deposit beyond the agreed period; or whether the statutory right of confirmation of sale came to an end when the decree-holder auction-purchaser entered into an agreement not consistent with his legal rights and thenceforward the rights of the parties should be determined on the basis of the contract. In the latter case the question of time being of the essence of the contract and the question of forfeiture may arise.

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The next question is whether, if the latter situation be accepted, the judgment-debtors can ask the Court after accepting the deposit though beyond time to set aside the sale, or whether the Court is to confirm the sale and leave the parties to their remedy by a civil suit. In other words, the question will be whether the controversy which has arisen between the decree-holder and the judgment-debtors on the agreement entered into between them after the sale can be investigated and determined in the course of the execution proceedings. This Court has held in the case of *Choudhury Jagdish Missir v. Choudhury Sureshwar Missir*(1) that a proceeding for setting aside a sale under Order XXI, rule 90, is not a proceeding in execution but is in the course of the suit. The correctness of this decision might perhaps be questioned.

Considering the importance of the issues involved in the case and there being no clear decision on them we direct that the record of the case be placed before the Hon'ble the Chief Justice so that he may direct that the case be heard by a specially constituted Bench which will be in a position to deal with the correctness or otherwise of some of the decisions of this Court.

On this reference—

Sir Sultan Ahmed (with him *Mahabir Prasad* and *Choudhury Mathura Prasad*), for the appellant: The Lower court has held that it cannot give any relief against forfeiture for breach of contract. This is not correct. In the case of an order passed by consent of parties, the contractual relations remain in spite of the order of the court superadded to the contract. The Court retains its power to extend the time if it finds that time was not of the essence of the contract. [Reliance was placed on *Sasadhur Ganguly v. Raghob Singh Pradhan*(2).]

The consent order cannot have a greater sanctity than the contract itself. The circumstance that a consent decree has been passed on the basis of a compromise, does not oust the jurisdiction of the court

(1) (1921) 6 Pat. L. J. 253.

(2) (1930) A. I. R. (Pat.) 234.

to grant relief against forfeiture; the court must determine whether, on equitable grounds, relief would have been granted against forfeiture, if it had been called upon to enforce the agreement itself—*Kandarpa Nag v Banwari Lal Nag*(¹). I submit that in the present case time was not of the essence of the contract. The test is whether the terms agreed upon have been substantially complied with. In cases arising out of a proceeding under Order XXI, rule 90, Code of Civil Procedure, no reason has been given by the learned Judges for the refusal to grant relief.

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[CHIEF JUSTICE.—If this contract is substantially complied with, and if the court has power to grant relief against forfeiture, then the question of diligence does not arise.]

Yes.

Baldeva Sahay (with him *C. P. Sinha*), for the respondent: In the present case no appeal lies under Order XLIII, rule 1(j), Code of Civil Procedure. An appeal lies from an order refusing to set aside a sale but the provision has relation to Order XXI, rule 90. The jurisdiction of the Court to set aside or confirm a sale is confined to the events contemplated by rule 92. Therefore, an order which does not come within rule 92 is not covered by Order XLIII, rule 1(j). Courts have to follow statute law and it is only when there is no statute that the court can act on the principles of equity, justice and good conscience. Therefore the court had no jurisdiction to set aside the sale on the basis of the compromise. The parties could not extend the time for confirmation by mutual consent. The contract may bind the parties, but it cannot compel the court to set aside the sale except in accordance with the rules of procedure laid down in the Code.

 (1) (1920) 33 Cal. L. J. 244.

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P. R. Das, followed: In the present case the Court acted on analogy. The parties, rightly or wrongly, substituted a period of their own for the statutory period. This was done by agreement, and unless this agreement was modified by another agreement, there was no power in the court to alter it.

[CHIEF JUSTICE.—You mean to say that as the Court cannot extend the statutory period without the consent of parties, it cannot extend the time fixed by agreement without such consent.]

Yes. My next point is that the question of relief against forfeiture does not arise in the present case. The judgment-debtor lost title at the date of sale. A further period of 30 days is given by way of concession. But the title of the purchaser accrues from the date of sale. In the present case, forfeiture has already been incurred. Relief could only be given if the title had still subsisted in the judgment-debtor. There can be no relief when the property has already vested in me. [Reliance was placed on *Harakh Singh v. Saheb Singh*(1).]

Sir Sultan Ahmed, in reply.—When the Court has a general jurisdiction, parties to a proceeding may by agreement adopt a procedure different from the ordinary procedure and the Court is bound to give effect to such an agreement—*Banga Chandra Mozumdar v. Nanda Kumar Mozumdar*(2). Title did not pass to the purchaser on sale. It passed on confirmation although with retrospective effect. In *Harakh Singh v. Saheb Singh*(1) a vested title had passed. This is not the case here.

S. A. K.

Cur. adv. vult.

(1) (1907) 6 Cal. L. J. 176.

(2) (1936) 40 Cal. W. N. 1402.

KHAJA MOHAMAD NOOR, J.—This appeal is against an order of the Subordinate Judge of Patna confirming a sale held in execution of a decree on the 13th of September, 1935, at which the decree-holder had himself purchased the property sold.

The facts are these. On the very day when the property was sold the decree-holder auction-purchaser and the judgment-debtors jointly filed an application to the effect that the latter had paid Rs. 500 to the former towards satisfaction of the decree and that the parties had agreed that if the remaining decretal amount be paid by the 10th of November next the sale would be set aside and the auction-purchaser would forego the five per cent. compensation which he was entitled to. In case of default in the payment as provided by the date fixed the sale would stand confirmed. The court was closed on the 10th of November and re-opened on the 13th. It may be conceded and in fact has not been disputed that a deposit of the decretal amount in court on the 13th of November would have been within the terms of the agreement. The money was not, however, deposited even on that date. Some explanations were offered on behalf of the judgment-debtors for this default but they were not pressed either before the lower court or before this Court. On the next day, that is, on the 14th of November the judgment-debtors applied to the court for a chalan to deposit the amount. There was for some reason or other, which is not necessary to investigate, some delay in passing the chalan by the court and it was not made over to the judgment-debtors till the 20th of November, 1935, on which date the money was deposited in court. The delay in depositing the money between the 14th of November when the chalan was applied for and the 20th of November when the money was actually deposited is immaterial, as on behalf of the judgment-debtors the case has been argued on the assumption that there was a default on their behalf at least on

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the 13th of November when the court re-opened and on which date the money could have been deposited. The deposit on the 20th of November was accepted at the risk of the judgment-debtors and when the matter was taken up by the court it held that the deposit was not within the terms of the agreement, and that it had no power to extend the time of payment as agreed to between the parties and accept the deposit beyond the time so fixed. It confirmed the sale. It is against this order that the present appeal has been preferred.

It was contended on behalf of the decree-holder auction-purchaser that no appeal lay as the proceedings before the learned Subordinate Judge were outside the scope of the Code of Civil Procedure and there is no appeal unless it has specifically been provided. At most it might be said that the court in allowing the parties to substitute an agreement in place of their legal rights was acting under its inherent powers. If this be the case, orders passed in such a proceeding are not open to appeal.

As to the merits of the appeal, Sir Sultan Ahmed has contended that the agreement between the parties, which was filed in court on the 13th of September 1935, immediately after the sale should be treated as a pure contract between the parties and should be dealt with as such. It was, therefore, for the court to decide whether the time fixed for payment was of the essence of the contract. He contended that under the circumstances of the case the court should have held that the payment though actually made on the 20th November was in effect on the 14th of November (the delay between the 14th and the 20th being due to the acts of the officers of the court) and the court should have also held that the time was not of the essence of the contract and that the payment made on the 14th of November was substantial compliance with the agreement between the parties and the decree-holder auction-purchaser could not avoid it and the

sale ought to have been set aside by virtue of that agreement.

The case was originally heard by a Division Bench of this Court, but considering the important issues raised it asked that the case should be heard by a larger Bench.

The first question to be considered is whether the order of the learned Subordinate Judge, dated the 25th November 1935, confirming the sale is appealable. Now the proceeding before him may be looked upon from two points of view. On the one hand, it may be said that it was outside the scope of the Code. Once a sale has been held it can be set aside only on applications made either under Order XXI, rule 89 or 90 or 91. There is no question of there being any application under rule 90 or 91, and strictly speaking there was no application under rule 89 also. That rule contemplates an application for setting aside a sale within thirty days of it as prescribed in Article 166 of the Limitation Act. If such an application be made within the time and the decretal amount and compensation be deposited in court within thirty days of the sale, the sale has to be set aside. In this case though there was an application within thirty days of the sale, the deposit was not made and was not to be made within the prescribed time but was to be made under the agreement of the parties on a later date fixed by them. Therefore, the proceeding was outside the scope of Order XXI, rule 89, and the court in allowing the parties to substitute a procedure in lieu of one prescribed by law was acting under its inherent power and the order passed in such a proceeding is not appealable. On the other hand, as was pointed out by Mitter, J. in *Banga Chandra Mozumdar v. Nanda Kumar Mozumdar*⁽¹⁾, where a court has general jurisdiction, the parties to a proceeding can by agreement

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adopt a different procedure quite contrary to the ordinary *cursus curiae* and the court is bound to give effect to such an agreement. His Lordship referred to two decisions of the Privy Council in which this principle was laid down. They are *Henry Peter Pisani v. Her Majesty's Attorney-General*⁽¹⁾ and *Sadasiva Pillai v. Ramalinga Pillai*⁽²⁾ In the former case it was held that the departure from an ordinary procedure is permissible unless there is an attempt to give the court jurisdiction which it does not possess or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision. Such a departure has never been held to deprive either of the parties of the right of appeal. In this case though it may be said that the parties agreed to substitute an agreed procedure for the procedure prescribed by law, the procedure nevertheless was in essence though not exactly in form under Order XXI. The setting aside of a sale under Order XXI, rule 89, requires (1) an application and (2) a deposit of the compensation and decretal amount. In this case the application filed on the date of the sale jointly by the parties may be treated as an application for setting aside the sale under Order XXI, rule 89, and the compensation instead of being deposited in court was to be foregone by the auction-purchaser and a portion of the decretal amount, namely, Rs. 500 was paid to the decree-holder out of court and the balance was to be deposited not within the time prescribed by law but some time later. Now in a case in which there is an application for setting aside a sale but its requirements are not complied within time it is clear that the sale cannot be set aside, but nevertheless the proceeding is under the Order and the rule and an order passed even on a barred application or on an application in which

(1) (1874) L. R. 5 P. C. 516.

(2) (1875) L. R. 2 Ind. App. 219.

the deposit is not made according to law is an order under Order XXI, rule 89. Take for instance a case in which there is an application under rule 89, but the judgment-debtor instead of depositing the compensation and the decretal amount in court pays them to the auction-purchaser and the decree-holder out of court and the sale is set aside. It is obvious that the order in essence is one under Order XXI, rule 89. In our opinion the order of the learned Subordinate Judge is appealable. In view, however, of our decision on the main issue it is not necessary to pursue this point further. Even if there be no appeal and if we would have come to the conclusion that the order of the learned Subordinate Judge was wrong, this was clearly a case of not exercising jurisdiction, namely, of setting aside the sale, or, at any rate, a case of exercising jurisdiction with material irregularity, and it would have been open to us to interfere.

The main contention of the appellant in this case is that the agreement between the parties as evidenced by the joint application filed on the date of the sale should be treated purely as a contract and the court should decide whether or not the time for payment fixed was of the essence of the contract. Mr. Das on behalf of the respondent has, however, contended that what the parties did was to substitute for thirty days (the time fixed by the statute) another period and as the time of payment fixed by the statute cannot be extended, so the date fixed by the parties, which takes the place of the period fixed by the statute, cannot be extended. We have come to the conclusion that it is not necessary for us to decide this wider question of the general power of the court under such circumstances, as assuming for the sake of argument that the court had power to examine whether or not the time fixed by the parties was of the essence of the contract the question remains whether in this particular case the time was or was not of the essence of

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the contract. Section 55 of the Indian Contract Act enacts :

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"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

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If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure."

In order to decide whether in this particular case time was of the essence of the contract we must look to the contract itself. The words are that in case the judgment-debtor fails to pay up the decretal amount within the time specified the sale would stand confirmed. No particular order was necessary. The wording of the contract, in our opinion, clearly shows that the parties meant that the benefit which was to accrue to the judgment-debtors would be lost to them if the payment was not made within the specified time; or, in other words, the time was of the essence of the contract. The effect of the contract was that on the expiry of the 10th of November, the last date fixed for the payment of the decretal amount, the sale automatically became confirmed. Even if it be conceded that on account of the court being closed on that and on two subsequent days the payment could have been made by the 13th of November, even then the sale stood confirmed on the expiry of that date, no order of the court being necessary. There was nothing left which could be set aside after that date. It is true that the court when the joint application was filed on the 13th of September, 1936, ordered the case to be put up for confirmation on the 15th of November, but this is immaterial as the court fixed this date for its own convenience in order to finally dispose of the case on a consideration of what happened on the date fixed by the parties.

In this view of the matter the appeal fails and is dismissed with costs.

COURTNEY TERRELL, C. J.—I entirely agree.

JAMES, J.—I agree.

DHAVLE, J.—I agree.

VARMA, J.—I agree.

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Appeal dismissed.

FULL BENCH.

Before Fazl Ali, Khaja Mohamad Noor, James, Dhavle and Varma, JJ.

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Hindu Law of Inheritance (Amendment) Act, 1929 (Act II of 1929)—whether applies to succession opening after the Act came into force—"Hindu male dying intestate", meaning of—presumption of intention in case of person dying intestate.

Where a Hindu male dies intestate leaving his widow or other limited owner, who dies after the enforcement of the Hindu Law of Inheritance (Amendment) Act, the succession to his estate is governed by that Act.

The date of the death of the male owner is not material as the question as to who would be entitled to succeed to his estate as a reversioner cannot be determined until the death of the female owner.

The words "Hindu male dying intestate" do not mean a Hindu male who will hereafter die intestate. The words "dying intestate" which qualify the preceding words "Hindu

*Appeal from Appellate Decree no. 1924 of 1933, from a decision of Babu Kshetra Nath Singh, Special Subordinate Judge of Ranchi, dated the 11th September 1933, confirming a decision of Mr. J. H. Price, Subdivisional Officer-Munsif of Chatra, dated the 26th July, 1932.