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triction, because there is nothing to prevent this Court from setting aside the convictions of the accused and the sentences imposed on them by the Additional Sessions Judge who accepted the verdict of the jury. If the case is sent back to the sessions court, the learned Additional Sessions Judge would re-examine the matter carefully and then come to the conclusion whether he should or should not disagree with the verdict of the jury. If he thinks that he should not disagree with the verdict or that it is not a case in which it is necessary to express disagreement, he would forthwith convict the accused accordingly. If, however, he is of the opinion that the case should be referred to the High Court under section 307 because he disagrees with the verdict and the case is so referred, we would have power to re-consider the case on its merits and pass suitable orders. The new section 561A amply justifies the order which we propose to make.

We, therefore, set aside the convictions of the accused and the sentences passed on them and send the case back to the court of the Additional Sessions Judge to readmit the case to its original number on the file and after hearing the arguments consider whether he would express disagreement with the verdict or not, and, accordingly, either make a reference under section 307 to the High Court or uphold the verdict and convict the accused and pass suitable sentences.

APPELLATE CIVIL

*Before Mr. Justice Niamat-ullah and Mr. Justice
 Ganga Nath*

RASHIK LAL AND OTHERS (PLAINTIFFS) v. RADHA DULAIYA
 (DEFENDANT)*

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*Limitation Act (IX of 1908), articles 141, 143—Hindu widow
 allotted some property for her life for maintenance—Condi-*

*Second Appeal No. 788 of 1934, from a decree of A. H. Gurney, District Judge of Jhansi, dated the 28th of July, 1934, reversing a decree of K. N. Joshi, Subordinate Judge of Jhansi, dated the 8th of April, 1933.

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tion of forfeiture on unchastity—Non-enforcement of forfeiture—Waiver—Whether widow's possession becomes adverse possession thereafter—Prescription—Suit by reversioner for possession after widow's death—Limitation.

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By an arbitration award dividing joint Hindu family property among the members, part of the property was given to a widow for her life for her maintenance, with reversion to certain persons, and with a condition of forfeiture upon becoming unchaste, in which event the reversioners would be entitled to take possession from her at once. She made a gift of the property to the defendant's predecessor, and thereafter she became unchaste in 1910. The reversioners did not sue for possession then. She died in 1929, and the reversioners brought a suit for possession in 1932 on the ground that they were entitled to the property on the termination of the widow's life estate. The defendant pleaded that the widow had become unchaste in 1910 and the reversioners not having sued for possession within 12 years thereof, their claim was barred by limitation under article 143 of the Limitation Act:

Held, that article 143 could not be applied to the suit as brought by the plaintiffs, who had based their claim on a cause of action available to them which had no reference to any forfeiture at all, and the article applicable was 141.

It is a well known rule of law that a person entitled to the benefit of a forfeiture can waive it, and if he has a right to the property wholly apart from forfeiture, that title can not be affected by the fact that he could have, at his option, enforced the forfeiture clause but waived it. The two causes of action are quite distinct and separate, and the non-enforcement of the one can not affect the availability of the other.

The non-enforcement of the forfeiture at the time when it was incurred would not have the effect of turning the possession of the widow or her donee into adverse possession from that time with the result that after the lapse of 12 years her limited right would be enlarged to absolute proprietary right. The widow having been given only a life interest by the award, she could not, by acting contrary to the terms of the award which conferred the life interest subject to the condition of continued chastity, obtain by prescription for herself or grant or convey to her transferee a larger interest than that given by the award.

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Dr. S. N. Sen and Mr. A. M. Gupta, for the appellants.
 MESSRS. P. L. Banerji and K. Verma, for the respondent.

NIAMAT-ULLAH and GANGA NATH, JJ.:—This is a second appeal by the plaintiffs and arises from a suit for possession which was decreed by the court of first instance. On appeal by the defendant, the plaintiffs' suit was dismissed.

The facts, so far as it is necessary to mention them for the purpose of this appeal, are as follows. [Portions of the judgment which are not material for the purpose of this report have been omitted.] The property in dispute belonged to one Janki Prasad and his sons by his two wives. There were disputes in the family some time before the 12th of July, 1891, when certain arbitrators appointed by the members of the family gave an award dividing the family property between two sets of the members of Janki Prasad's family. The validity of the award and its binding character are no longer in dispute between the parties. The award provided, *inter alia*, that certain properties be given to Mst. Sarwan Dulaiya, the widow of Ram Sewak, and Mst. Ujiari, the widow of Bhagat Raj, for their maintenance. Their interest was expressly limited to their life time. The award went on to provide that the widows would be entitled to adopt and that, in case they did not make any adoption and became unchaste, Ram Prasad and Har Das, the surviving brothers of their deceased husbands, would be entitled to take possession of the property allotted to them for maintenance. The widows were not empowered to alienate the property given to them except to a member of the family.

Mst. Ujiari, the widow of Bhagat Raj, made a gift of the property given to her for maintenance to Damodar, son of Janki Prasad by his second wife (the husband of the present defendant, Mst. Radha Dulaiya). The donee obtained possession under the deed of gift and has been in possession ever since. Mst. Ujiari became

unchaste in 1910 or 1912. This fact was in controversy in both the lower courts but their findings on an essential question of fact like this is conclusive in second appeal. We must therefore take it that Mst. Ujiari became unchaste in 1910 or 1912. She died in 1929. The present suit was brought on the 26th of November, 1932, by the son of Har Das and grandsons of Ram Prasad on the simple allegation that the property given to Mst. Ujiari under the award was for her life and that the plaintiffs, who are the son and grandsons respectively of Har Das and Ram Prasad, are entitled to possession thereof under the award.

The only defence which it is necessary to mention at this stage is that Mst. Ujiari became unchaste in 1910 or 1912 and that the right to sue accrued to Ram Prasad and Har Das or their descendants at that time and the suit not having been brought for more than 12 years from the time of Mst. Ujiari's unchastity is barred under article 143 of the Indian Limitation Act. This contention did not find favour with the trial Judge but was accepted by the learned District Judge in appeal by the defendant.

The only question which has been argued in second appeal is one of limitation. It is argued by the plaintiffs' learned counsel that the proper article to apply on the facts of this case is article 141, while it is contended by learned counsel for the defendant that the learned District Judge applied the right article, namely article 143. We are clearly of opinion that article 143 has no application to the facts on which the plaintiffs' claim is based. The allegations contained in the plaint make no reference to the fact that Mst. Ujiari became unchaste in or about 1910. The plaintiffs' cause of action is stated to be the death of Mst. Ujiari in 1929, when, on the termination of her life estate, the plaintiffs' right to sue accrued. If there had been nothing else in the case, there could be no doubt that the suit was governed by article 141. The fact that Mst. Ujiari became un-

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chaste was alleged by the defendant and was proved by her. The line of argument adopted by learned advocate for the defendant is that article 141 applies to cases in which the plaintiffs' right to sue accrues only on the death of a Hindu or Muhammadan female entitled to a life interest and that where the right to sue accrues in consequence of unchastity of the widow also, article 141 ceases to be applicable. We are unable to accept this contention. As we read the award, it is perfectly clear that Mst. Ujiari had only a life interest, on the termination of which Ram Prasad and Har Das or their descendants would be entitled to possession of the property given to the widows for maintenance. They could also take possession earlier of the property given to any of the two if she became unchaste. The fact that they did not exercise, what to our mind was only an option, when Mst. Ujiari became unchaste in or about 1912, cannot deprive them of their right to recover possession when the life interest of Mst. Ujiari determined in consequence of her death. We think that it was open to Ram Prasad and Har Das or their representatives to waive the forfeiture incurred by Mst. Ujiari by becoming unchaste and if they waived such forfeiture their ultimate right to take possession on the death of Mst. Ujiari was in no way affected. The logical result of the defendant's contention is that if no suit for possession was brought by Ram Prasad and Har Das or their representatives immediately on Mst. Ujiari becoming unchaste, the nature of her estate which was originally one for maintenance was altered and that thenceforth she or her donee began to hold adversely and after the lapse of 12 years the limited right was enlarged to absolute proprietary interest. We do not think that such a result can be arrived at by any process of reasoning. As their Lordships of the Privy Council observed in *Bhagwani Kunwar v. Mohan Singh* (1): "Where a widow of a deceased member of a joint Hindu family, under an

(1) (1925) 23 A.L.J., 589.

agreement, obtains possession of certain properties for her life for her maintenance, she cannot obtain against the co-sharers of the joint Hindu family any title by prescription. Whether she acts in accordance with the agreement or contrary to it, is immaterial. She has no other title to the property in question and cannot grant or convey any title to the properties which would be effective for any purpose beyond the term of her own life." The *ratio decidendi* underlying their Lordships' judgment appears to us to be applicable to the circumstances of the case before us. In the present case Mst. Ujiari, or her donee the defendant, cannot obtain by prescription a larger interest than that given to her by the award only because she acted contrary to the terms of the award which conferred the right of maintenance upon her on certain conditions. As stated by their Lordships, she has never had any title to the property in dispute other than the one recognized in the award.

It seems to us that article 143 cannot be applied to the frame of the suit adopted by the plaintiffs. If they had sued on the ground that Mst. Ujiari forfeited her maintenance by becoming unchaste, their suit would have been barred under article 143. But as already indicated they based their claim on a totally different cause of action which has no reference to any forfeiture whatever. It is a well-known rule of law that a person entitled to the benefit of a forfeiture can waive it and if he has a right to the property wholly apart from forfeiture, that title cannot be affected by the fact that he could have enforced the forfeiture clause but waived it. It is clear to us that on Mst. Ujiari becoming unchaste, Ram Prasad and Har Das or their representatives might have sued for the enforcement of the forfeiture clause in the award. It was open to them to forego the benefit which such clause conferred upon them and to wait till Mst. Ujiari died, when they acquired a fresh right to sue for possession of the estate in terms of the last clause of the award to which reference has already been made.

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We are clearly of opinion that article 141 is applicable and that article 143 has been wrongly applied by the lower appellate court. The result is that this appeal is allowed, the decree of the lower appellate court is set aside and that of the court of first instance is restored.

REVISIONAL CRIMINAL

Before Mr. Justice Allsop

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 November, 6

RAM SARAN DAS v. MST. RAM PIARI*

Criminal Procedure Code, section 488(4)—Wife's petition for maintenance—Compromise that husband would pay a certain sum monthly on condition that the wife did not go into service—Order accordingly—Validity—"Living separately by mutual consent".

Upon a wife's petition under section 488 of the Criminal Procedure Code for maintenance there was a compromise between the parties that the husband would pay Rs.4 monthly for her maintenance, on condition that she did not go into the service of any other person, and the Magistrate passed an order accordingly:

Held, that the order was a valid order under section 488 and could be enforced. The case was not one which came within the words, "living separately by mutual consent", in section 488(4). The "mutual consent" in sub-section (4) means a consent on the part of the husband and wife to live apart no matter what the circumstances may be; where a wife refuses to live with her husband on some specific ground like cruelty or the husband's keeping a mistress in the house, it can not be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him. Such an interpretation would defeat the very purpose of the section.

Further, the order was not invalid by reason of its being a conditional order. There is no reason why the parties to a case under section 488 should not come to terms on conditions arranged by themselves and why the Magistrate should not then pass an order for maintenance accordingly. If in future the conditions are broken, it will be for the Magistrate to inquire into the circumstances of the case and then to enforce or refuse to enforce the order previously passed.

*Criminal Reference No. 705 of 1936.