in the possession of a widow and the property acquired by her cannot be claimed by the reversioner during the life-time of the widow; so that the condition of things contemplated by section 90 could have no application to the case of an acquisition of property by the widow and to a Hindu reversioner. In our opinion the mere fact of the widow being in possession of her husband's estate could not in any sense justify the inference that the property purchased by her without any detriment to the estate or without the help of the estate itself could be treated as a part of the estate, and in this sense we think the view of the lower appellate court was incorrect. We, therefore, answer the question referred to us in favour of the appellant. Both parties are agreed that there are other questions which arise in the case and which have to be determined by the lower appellate court, and both of them are also agreed that we should deal with the case and pass final orders in it so far as this appeal is concerned. We accordingly allow the appeal, set aside the decree of the court below and remand the case to that court under order XLI, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of the other points according to law. Costs here and hitherto will be costs in the cause.

Appeal allowed and cause remanded.

APPELLATE CIVIL.

1920

December 21.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MASIH-UN-NISSA BIBI AND OTHERS (DEFENDANTS) *v.* KANIZ SUGHRA BIBI (PLAINTIFF).*

Civil Procedure Code, 1908, *section* 105 (2); *order XLI, rules* 23 *and* 25—*Procedure—Appeal—Distinction between an order under rule* 23 *and an order under rule* 25.

Where in the course of an appeal a Judge or a Bench has made an order under order XLI, rule 25, of the Code of Civil Procedure, 1908, referring issues for trial by the lower court, it is open to the Judge or Bench before whom the appeal ultimately comes for disposal to consider whether such an order was necessary, and, if it is found that it was not necessary, the order and the subsequent findings may be ignored.

*First Appeal No. 91 of 1920 from an order of Muhammad Shafi, Subordinate Judge of Saharampur, dated the 8th of March, 1920.

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MASIH-UN-NISSA BIBI v. KANIZ SUGHRA BIBI.

But it is otherwise with an order of remand made under order XLI, rule 23. Such an order is appealable under section 10 of the Letters Patent and, if no appeal is filed against it, it cannot subsequently be challenged.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Ibn Ahmad*, for the appellants.

Mr. *S. A. Haidar*, for the respondent.

PIGGOTT and WALSH, JJ. :—The plaintiff in this case sued for possession over a half share in a certain house. The defendants pleaded that, whether or not the plaintiff had a good title, neither she nor the transferors from whom she claimed had been in possession within 12 years of the institution of the suit. They further pleaded that they themselves had been in adverse possession for more than 12 years prior to the institution of the suit. The first court dismissed the suit as barred by limitation and that finding was upheld by the court of first appeal. On second appeal a learned Judge of this Court held that the decision of the two courts below had proceeded upon an erroneous view of the law. He treated the finding of the lower appellate court as amounting to nothing more than a finding that the plaintiff and her transferors had not been in actual possession within 12 years of the institution of the suit. He held that it had not yet been determined whether the plaintiff's transferors had been ousted by the defendants so as to set limitation running in favour of the latter and against the plaintiff and her transferors. On this view he set aside the decision of the lower appellate court and remanded the case to that court under order XLI, rule 23, of the Code of Civil Procedure for a decision on the merits. The lower appellate court has now recorded a finding that the defendants have failed to prove ouster ; i.e., the defendants have not satisfied the lower appellate court that their possession had become adverse to that of the plaintiff's vendors more than 12 years prior to the institution of this suit. Upon this finding the lower appellate court has set aside the decree of the trial court and has once more passed an order of remand under order XLI, rule 23, of the Code of Civil Procedure, directing the trial court to dispose of the suit on the merits, the issue of limitation being finally determined in favour of the plaintiff. The appeal before us is against this order of remand. The first point taken is that

the court of first instance had found that the defendants had been in adverse possession and that this finding had been upheld by the lower appellate court before the second appeal to this Court was filed. In effect we are asked to reconsider the correctness of the order of remand passed by the single Judge of this Court when disposing of the second appeal. There is authority for the proposition that, where a Judge of this Court has remitted issues under order XLI, rule 25, of the Code of Civil Procedure, and the appeal subsequently comes up for disposal before another Judge, or a Bench of this Court differently constituted, the Bench which is seised of the appeal and on which the law casts the burden of finally disposing of the same is not bound by the order remitting the issues. It can consider the question whether that order was a proper one and, if it comes to the conclusion that that order should never have been passed, it can ignore the findings on the remanded issues and any evidence which may have been taken after the order remitting the said issues. The reason for this is obvious. No appeal lies against the order remitting issues, nor does that order dispose of the pending appeal. Consequently the tribunal which undertakes the responsibility of finally disposing of the appeal is seised of the entire case and has jurisdiction to reconsider the propriety of an interim order, such as that remitting issues, passed by another Judge or by a Bench differently constituted. In the present case the single Judge of this Court disposed of the appeal then pending before him finally by means of his order of remand, which was not under order XLI, rule 25, but under order XLI, rule 23, of the Code of Civil Procedure. We have no responsibility for the result of that appeal. The decision of the single Judge of this Court could have been challenged by appeal under the Letters Patent and was not so challenged. The principle laid down in section 105, clause (2), of the Code of Civil Procedure, which prohibits a party, after submitting to an order of remand from which an appeal lay, from disputing its correctness at a later stage, applies also to the case now before us. We are satisfied that the appellant is not entitled to challenge the correctness of the order of remand passed by this Court on the second appeal. As the case stands, this finding disposes of the

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appeal before us. Whatever may have happened previously, the lower appellate court has now recorded a finding that adverse possession for 12 years prior to the institution of the suit is not proved on behalf of the defendants. That is a finding of fact which cannot be successfully impugned on any of the grounds taken in the memorandum of appeal before us. This appeal, therefore, fails and we dismiss it accordingly with costs.

Appeal dismissed.

1920
December, 22.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Ryves.

GAJADHAR SINGH (PLAINTIFF) *v.* BASANT LAL AND OTHERS (DEFENDANTS.)*

Act No. IX of 1908 (*Indian Limitation Act*), *section* 5—*Amendment of decree—Appeal—Limitation.*

Where a decree has been amended and an appeal is filed against the amended decree which is *prima facie* barred by limitation, it is not in every case that the appellant can pray in aid the provisions of section 5 of the Indian Limitation Act, 1908. He cannot do so, for instance, if his appeal does not attack the *amended* decree, or raise some question connected with the amended decree. *Amar Chandra Kundu* v. *Asad Ali Khan* (1), *Brojo Lal Rai Chowdhury* v. *Tara Prasanna Bhattacharji* (2) and *Kalu* v. *Latu* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Munshi *Narain Prasad Ashthana*, for the appellants.

Pandit *Shiam Krishna Dar*, for the respondent.

MUHAMMAD RAFIQ and RYVES, JJ.:—This appeal arises out of a suit brought by the plaintiff appellant as lambardar for the recovery of arrears of rent or revenue against the defendant respondent, a co-sharer. The claim was laid at Rs. 456, for three years immediately preceding the institution of the suit. The claim was resisted on various pleas. The Assistant Collector decreed the claim for Rs. 125-12-2 on the 30th of May, 1917. On the 8th of August, 1917, the plaintiff made an application to the Court of the Assistant Collector for amendment of the decree

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*Second Appeal No. 13 of 1918 from a decree of H. J. Collister, District Judge of Agra, dated the 19th of September, 1917, confirming a decree of Salig Ram Pathak, Assistant Collector, first class, of Muttra, dated the 30th of May, 1917.

(1) (1905) I. L. R., 32 Calc., 908. (2) (1905) 3 C. L. J., 188.
(3) (1893) I. L. R., 21 Calc., 259.