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Justice Turner in *Soorjeemoney* v. *Denobundoo Mullick* (1). A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

There is also another passage in the same judgment which applies in principle to the question raise in this case :—"If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate, which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize."

These principles appear to me to be equally applicable to the circumstances of England and of India, and in the absence of any provision of Hindu Law by which their application is negatived, I think that the present case falls within their scope. The deed of compromise first gave an absolute estate to Bishan Lal, and then proceeded to impose restrictions upon his powers of alienation. These restrictions are opposed to the policy of the law, they cannot be recognised, and therefore Bishan Lal must be held to have had an absolute estate which would devolve upon his heirs and which could be sold in execution of decrees for his debts. I concur therefore in the order which my brother Oldfield has proposed.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885 *January* 14.

NAND RAM AND ANOTHER (PLANTIFFS) *v.* FAKIR CHAND (DEFENDANT).*

Arbitration—Remand under Civil Procedure Code, s. 566 for trial of issues—Reference by first Court of whole case to arbitration—Refusal of arbitrator to act—Award by remaining arbitrators—Illegality of award—Civil Procedure Code, s. 510.

A Court of first instance to which issues have been remitted under s. 566 of the Civil Procedure Code by the appellate Court, has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference

* Second Appeal No. 54 of 1884, from a decree of H A. Harrison, Esq., District Judge of Meerut, dated the 12th March, 1883, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 27th January, 1882.

(1) 6 Moo. I. A. 555.

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of the case to arbitration, which is only within the jurisdiction of the appellate Court. *Gossain Dowlut Geer* v. *Bisseseur Geer* (1) referred to.

When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award.

Where a case was referred by a Court to the arbitration of three persons, and the parties to the reference agreed to be bound as to the matters in dispute by the decision of a majority of the arbitrators, and one of the arbitrators subsequently refused to act, and withdrew from the arbitration,—*held* that the Court could not pass a decree on the award of the remaining arbitrators, and could only, under s. 510 of the Civil Procedure Code, appoint a new arbitrator or supersede the arbitration and proceed with the suit. *Kazee Syud Naser Ali* v. *Musammat Tinoo Dossia* (2) and *Rohilkhand and Kumaon Bank* v. *Row* (3) referred to.

THE plaintiffs in this case claimed the money due on a promissory note. The Court of first instance (Subordinate Judge of Meerut) dismissed the claim. The lower appellate Court remanded the case to the Subordinate Judge for the trial of certain issues under s. 566 of the Civil Procedure Code. At the end of the order of remand, the Court made the following observations:—"I should hope that this case may be settled out of Court. Otherwise this Court will proceed to judgment on the expiry of seven days after the return of the lower Court's finding on the above issues. After the case had gone back to the lower Court for the trial of the issues remitted, the parties on the 20th April, 1882, applied to the Subordinate Judge that the matters in dispute might be referred to arbitration, and accordingly an order of reference was passed on the same day. Each of the parties appointed an arbitrator, and an umpire was also appointed, and it was agreed that the parties should be bound as to the defendant's liability upon the promissory note by the decision of a majority of the arbitrators. On the 22nd May, 1882, the three arbitrators held their first meeting. On the 23rd, the arbitrator appointed by the plaintiffs, one Nainsukh, filed an application in Court stating that he withdrew from the arbitration, and refused to take any further part in it. The next meeting took place on the 27th May, 1882, Nainsukh being absent, and at that meeting the award was prepared and signed by the arbitrator appointed by the defendant and the umpire. Objections were made by the plaintiffs to the validity of the award, thus made,

(1) 22 W. R. 207. (2) 6 W. R. 95.
(3) I. L. R. 6 All., 468.

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but the Subordinate Judge overruled these objections, and sent up the award to the lower appellate Court, which passed a decree in accordance with its terms.

From this decision the plaintiffs now appealed to the High Court.

Mr. *C. H. Hill*, for the appellant.—The Court of first instance had no authority to refer the case to arbitration after issues had been remitted under s. 566. *Gossain Dowlut Geer* v. *Bissessur Geer* (1) is in point, and shows that the effect of remitting issues is not to remand the case for retrial, and that the first Court could not refer to arbitration so much of the matter as it had already dealt with. After the first Court had passed its decree it became *functus officio*, and when the appeal was preferred, the lower appellate Court was seized of the case, and continued to be so after it had remitted issues. The functions of the lower Court when issues were remitted to it were purely ministerial. They extended merely to the return of findings upon these issues. But a reference to arbitration is a delegation of power to decide the whole case, and such a delegation cannot be made were the Court itself has no such power. S. 508 of the Civil Procedure Code enacts that when once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as thereinafter provided. S. 522 provides that "if the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, and if no application has been made to set aside the award, or if the Court has proved such application, the Court shall.....proceed to give judgment according to the award." This clearly shows that what the Legislature contemplated was that no Court should have power to refer a case for arbitration, which could not make a decree according to the award. That could not have been done by a Court which was only authorized to return findings upon certain issues remitted to it by an appellate Court. My second point is that when one of the arbitrators refused to act, the other arbitrators had no authority to proceed to make an award in his absence and to which he was not a party, even though the parties had agreed to be bound by the decision of a majority. [He was stopped.]

(1) 22 W. R. 207.

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Babu *Baroda Prasad Ghose*, for the respondents.—The appellants themselves moved the Court of first instance to refer the case to arbitration. It does not lie in their mouths, therefore, to say now that the Court was not competent to make the reference. [MAHMOOD, J.—In India there can be no waiver of pleas to jurisdiction. The fact that the appellants applied for the reference to arbitration does not stop them from disputing the legality of the Court's action.] In reference to the second point raised by the other side, the Subordinate Judge found that the arbitrator, in refusing to proceed with the arbitration, acted in collusion with the plaintiffs, and in order to prevent an unfavourable award. [MAHMOOD, J. —That is a two-edged argument, for it practically amounts to saying that one of the arbitrators acted corruptly, and that would be a good objection to the award.]

Mr. *Hill*, for the appellant, was not called upon to reply.

OLDFIELD, J.—Both pleas are good. The Court of first instance had only jurisdiction to try the issues remitted to it by the appellate Court, and was *functus officio* in other respects, and could not make a reference to arbitration, which was only within the jurisdiction of the appellate Court—see *Gossain Dowlut Geer* v. *Bissessur Geer* (1). Further, it is clear that one of the arbitrators refused to act, and the only course open to the Court was, under s. 510, to appoint a new arbitrator, or supersede the arbitration, and proceed with the suit. The Court could not pass a decree on the award of the remaining arbitrators.

The decree of the lower Court is reversed, and the case remanded for trial. Costs to follow the result.

MAHMOOD, J.—I am of the same opinion. Two pleas in appeal have been raised in this case. The first is, that the order of reference, dated the 20th April, 1882, was illegal, and the second that the absence of one of the arbitrators vitiated the award, and that the decree carrying out the terms of the award was therefore wrong. I am of opinion that when a Court has disposed of a case and passed a decree upon it, the jurisdiction assigned to the Court ceases, so far as that case is concerned, and can be revived only in the manner and to the extent which the law prescribes. In the

(1) 22 W. R. 207.

present case, when the Subordinate Judge had passed his decree, he had no power to interfere with it except by review or in consequence of the direction of a superior Court. And as soon as the appeal was filed in the Court of the District Judge, that Judge only was competent to deal finally with the case. What I mean by "dealing finally" with it is the power to say yes or no to the plaintiff's claim. Now, an order passed by the District Judge under s. 566 of the Civil Procedure Code has not for its object the transfer of the appellate Court's jurisdiction—its power to say yes or no to the claim—to the Court of first instance. It amounts to nothing more than a delegation to that Court of authority to take evidence upon certain issues which it is necessary to determine, and which may be dealt with either by the appellate Court under s. 568, or by the Court of first instance on remand under s. 566, at the discretion of the appellate Court.

The only tribunals which really have power to dispose of disputes are those which the State has established. Those tribunals can only delegate the powers conferred on them by the Legislature if, and in so far as, the Legislature expressly authorizes them to do so. It is obvious that if a Court has jurisdiction to deal with a particular suit, it may delegate that power, but it cannot delegate a case which it cannot itself try. I think that the principle of the maxim *delegatus delegari non potest* applies here, and that the Subordinate Judge being, in this sense, himself a delegate in the case from the District Judge, could not himself delegate it to another tribunal, that his order of reference was therefore *ultra vires*, and that everything done in consequence of it was invalid.

In regard to the second point I agree with my brother Oldfield that the presence of all the arbitrators at all meetings, and above all at the last meeting, when the final act of arbitration is done, is essential to the validity of the award. The learned pleader for the respondent has cited two decisions of the Calcutta High Court to the contrary effect. One of these is *Kazee Syud Naser Ali* v. *Musammat Tinoo Dossia* (1) in which it was held that the absence of one arbitrator out of three who have been appointed does not vitiate the award, if the parties agreed to be bound by the decision of a majo-

(1) 6 W. R., 95.

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rity. I confess that I am unable to agree in this view of the law. What the parties to a reference to arbitration intended is that the persons to whom the reference is made should meet and discuss together all the matters referred, and that the award should be the result of their united deliberations. This conference and deliberation in the presence of all the arbitrators is the very essence of the arbitration, and the sole reason why the award is made binding. In a case recently decided by this Court—*Rohilkhand and Kumaon Bank* v. *Row* (1), I took occasion to express my views upon a cognate subject, holding that no judgment can be given in a Court consisting of several Judges, unless those Judges have conferred together, heard evidence and arguments together, and formed their opinions upon the entire arguments and evidence so heard. I held that the only proper decree was that of the majority after such conference. Here the same principle should be applied. Whatever may have been the arbitrator's motive for withdrawing, his non-participation in the deliberations of the others makes their award *ultra vires* and of no effect.

I therefore concur with my brother Oldfield that the appeal should be decreed and the case remanded to the lower appellate Court under s. 562 of the Civil Procedure Code. Costs to follow the result.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885 *January* 15.

MAHADEI (PLAINTIFF) *v.* RAM KISHEN DAS AND OTHERS (DEFENDANTS) *

Court-fees—Act VII of 1870 *(Court-Fees Act), ss.* 6, 12, 28—*Order requiring additional court-fee on claim, passed subsequent to decree—Decree prepared so as to give effect to subsequent order—Civil Procedure Code, ss.* 54, 55, 584.

A Judge, after disposing of an appeal on the 1st March, 1883, again took it up, and on the 21st March, 1883, directed the appellant to pay additional court-fees on her memorandum of appeal. On the 2nd May, 1883, the appellant paid the additional court-fees under protest, and a decree was then prepared, bearing date the 1st March, 1883, but it referred to and carried into effect the subsequent order of the 21st March and the 2nd May.

Per MAHMOOD, J., that as soon as the Judge had passed the decree of the 1st March, 1883, he ceased to have any power over it, and was not competent to

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* Second Appeal No. 71 of 1884, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 1st March, 1883, affirming a decree of Hakim Shah Rahat Ali, Subordinate Judge of Gorakhpur, dated the 21st March, 1872.

(1) I. L. R., 6 All. 468.