**ALLAHABAD HIGH COURT**

Akbari Begam

Vs

Rahmat Husain

(Niamatullah, J.)

14.08.1933

**JUDGMENT**

**Niamatullah, J.**

1. This is a plaintiffs' appeal and arises in the following circumstances:

2. The property in dispute in the case belonged to one Ahmad Husain, who died on 10th December 1925, leaving two daughters, Mt. Akbari Begam and Mt. Soghra Begam, the two plaintiffs, and three sons, Rahmat Husain, Shafqat Husain and Azmat Husain, the three defendants. The plaintiffs instituted the suit, which has given rise to this appeal, on 10th December 1928 claiming their legal share in the immovable property entered in list A and in the moveables detailed in list B annexed to the plaint. Subsequently the plaint was amended and several deeds of gifts, which the defendants had relied on in the written statement filed in the meantime, were impugned on the ground that the same had been obtained by the exercise of undue influence. Similarly certain other gifts relied on by the defendants were impeached on the ground that the same, if made at all, were vitiated by marzul maut from which Ahmad Husain was suffering at the time when these latter gifts were made. If all the gifts on which the defence was rested be accepted as valid, it is not disputed that the plaintiffs' suit must be dismissed. The defendants maintained in their written statement the validity of all the gifts therein referred to and claimed that such gifts had been perfected by delivery of possession as required by Mohamedan Law. Other pleas were also taken by the defendants. It was urged that the plaintiffs were not in possession of any part of the property in suit, and therefore not competent to maintain a suit for partition. Another question which arose on the pleadings had reference to the share obtained by Farhat Husain the fourth son of Ahmad Husain under some of the gifts. Farhat Husain predeceased Ahmad Husain, and the plaintiff claimed that even if the gifts relied on by the defendants be valid, Farhat Husain's one-fourth share devolved upon Ahmad Husain, on whose death the plaintiffs became entitled to their legal share in such one-fourth share. The learned Subordinate Judge framed a number of issues embodying the various disputes which arose on the pleadings. The case was fixed for hearing on 16th and 17th May 1929. When the case was called

on for hearing on 16th May 1929, Mr. Abdul Rauf vakil put in appearance on behalf of the plaintiffs. He was accompanied by a pairokar named Hikayat Yar Khan, the husband of the plaintiff Mt. Soghra Begam. Defendant Shafqat Husain was represented by Mr. Poshakilal vakil, the defendant Azmat Husain by Mr. Man Mohan Lal, and the defendant Rahmat Husain was present in person. An application signed by the Yakils of both the parties and Hikayat Yar Khan was filed and verified by the pleaders. It ran as follows:The parties rely on the statement of defendant 1 as regards all the disputed questions in the case including costs. Whatever statement the aforesaid defendant makes will be accepted by the applicants and the case be decided in accordance therewith. The parties do not desire to lead any other evidence in the case.

3. I have given my own translation of the original application, as I think the translation to be found in the paper book is not very happily worded. I have ignored the words "faisle ki babat" occurring at one place in the original application, as they do not quite fit in with the context in which they occur. No difference is however made as regards the substance.

4. It is easy enough to understand why Rahmat Husain was chosen as a referee. The property claimed by him had been gifted to him under a deed executed as far back as 1912. He did not claim under any of the oral gifts which had been pleaded by his two brothers, Shafqat Husain and Azmat Husain, defendants 2 and 3. It was probably realised by the plaintiffs that the deed relied on by Rahmat Husain could not be shown to have been fictitiously executed which was the only ground on which it had been impeached by the plaintiffs. There was probably no real contest between the plaintiffs and Rahmat Husain. They had however a chance of success as regards a portion of the property claimed by the other defendants under the oral gifts set up by them. The plaintiffs' plea of "marzul maut" had reference only to such gifts. Rahmat Husain was not regarded as interested in falsely upholding the oral gifts. Defendants 2 and 3 and the plaintiffs were equally related to Rahmat Husain, who was, for these reasons, considered to be neutral.

5. Rahmat Husain made a detailed statement covering all points in dispute in the case. He stated that Ahmad Husain had executed a deed of gift in his own favour and perfected it by delivery of possession. Similarly he affirmed the validity of the deeds relied on by the other defendants. He also deposed to oral gifts in favour of his brothers. He negatived the plea of "marzul maut" raised by the plaintiffs. According to him Ahmad Husain left no property which could devolve upon his heirs. He added that, in his opinion, the parties should bear their own costs. The plaintiffs might have had reason to repent the course which was adopted on their behalf, but there can be no doubt that Rahmat Husain's statement was decisive of all points, if it could be accepted as true. It was not challenged on any ground when it was recorded. No right of cross-examination was claimed. The plaintiffs did not ask for any opportunity to lead evidence, such as they now claim. It is perfectly true that those who could do all this stood committed to the course which had been adopted. The whole controversy, in my opinion, resolves itself to the question whether the plaintiff's pleader had authority to agree to abide by the statement of Rahmat Husain.

6. The learned Subordinate Judge forthwith delivered his judgment, which narrates the pleadings and mentions the issues arising there from. He refers to the circumstances in which Rahmat Husain made his statement, which is briefly reproduced. The judgment concludes by dismissing the plaintiffs' suit with costs. A decree was drawn up in due course according to the judgment.

7. After a week, on 23rd May 1929, an application was presented by the plaintiff Mt. Akbari Begam, questioning the authority of her "pairokar" and the vakil to agree to abide by the statement of Rahmat Husain. The other plaintiff, Mr. Sughra Begam, did not join in this application, probably because her husband, Hikayetyar Khan, was a party to the agreement to abide by the statement of Rahmat Husain. She did not originally figure as one of the appellants, but was impleaded as a respondent. But as her own case was identical with her sister in impeaching the proceedings of 16th May 1929, she-was, on her own application, transposed to the array of the appellants. Mt. Akbari Begam's application, above referred to, imputes collusion to Hikayetyar Khan. No such allegation is made against Mr. Abdur Rauf. It was prayed that:The order, dated 16th May 1929, be set aside and the above named case be heard and decided.

8. On a question put by the learned Subordinate Judge to the pleader who then appeared for the plaintiffs, it was said that the application was one under Section 511, Civil P.C., and that the Court should set aside the decree in the exercise of its inherent power. The Judge apparently doubted that he could, take action under that section. He however preferred to.dispose of the application on the merits. He held that Mr. Abdul Rauf had ample authority to bind his client in agreeing to abide by the statement of Rahmat Husain. He referred to the terms of the "vakalatnama" executed by the plaintiffs. Accordingly the application was dismissed on 28th May 1929. The order last mentioned has not been challenged by an appeal or revision, assuming one cart lie. The present appeal is from the decree dated 16th May 1929. I think. the plaintiffs have adopted the right course in merely filing an appeal from the decree which is final, except so far that it may be interfered with: (1) in review on grounds mentioned in Order 47, Civil P.C., which are not alleged, or (2) in a regular suit based on allegations of fraud or the like, or (3) in appeal from the decree itself. In the last case its validity can be examined solely with reference to the materials on the record of this case.

9. The grounds on which the decree appealed from is impeached in the memorandum of appeal are that neither the "pairokar" nor Mr. Abdur Rauf had authority to agree on behalf of the plaintiffs to abide by the statement of defendant 1, and that the application not having been made with the express consent and verification of the plaintiffs, who are "pardanashin" ladies, should not have been granted by the lower Court." In my opinion, the second ground can have no force if the vakil had been authorised by his vakalatnama to take the action which he did, because, if such authority had been conferred, the pleader's act would be binding and no consent or verification by them was needed; otherwise the general authority previously conferred by the vakalatnama would be meaningless. That acts done by an agent within the scope of his authority are as good as those of the principal is too well established a proposition to need any further

discussion, and to my mind the sole important question is whether Mr. Abdur Rauf's vakalatnama conferred an authority on him to agree to abide by the statement of any person be deemed fit.

10. It has not been argued before us that the vakalatnama executed by the plaintiffs in favour of Mr. Abdur Rauf was not intelligently executed and that they did not understand its provisions. The only question which was raised in the grounds of appeal and argued before us related to the construction to be placed on the vakalatnama to determine the extent of the vakil's authority. The material part of the vakalatnama runs as follows:
We have appointed Maulvi Abdur Rauf, Vakil, High Court, for the prosecution of the above noted suit (pairvi moqaddama) on our behalf. We agree that everything done by the pleader (sakhta wa pardakhta) will be considered as our own action and we shall accept the same, The aforesaid vakil shall have power to take refund of the court-fee, refer to arbitration (taqarrur salasi) and enter into compromise (sulahnama) and recover moneys (due to the executants), execute receipts, file and withdraw documents, verify plaint, draw lots, attest agreements to refer to arbitration and compromise, obtain copies and execute decrees. We shall not question his actions.

11. The transaction in the paper book is inaccurate where it mentions the power to "file a compromise." It is much wider and extends to entering into a compromise. There can be no doubt that the vakalatnama confers very wide powers upon the vakil. Power to compromise on any terms and to refer to the arbitration of anyone are only illustrative of what the pleader is authorised to do by the preceding part of the document in which every act of the vakil is declared to have the same force as if it were of the plaintiffs themselves. The power to compromise, which is much wider than the power to agree to abide by the decision of a referee and the power to refer to arbitration, taken in conjunction with the general and residuary power conferred by the vakalatnama, are comprehensive enough to include a power of the kind exercised by Mr. *Abdur Rauf on 16th May 1929. Wasiuzzaman Khan v. Faiza Bibi*[1] is on all fours on the question of construction. Mt. *Masita Bibi v. Khuda Bakhsh*[2], also takes the same view. In both these cases a general provision that the client would be bound by all acts of the pleader coupled with the power to compromise and to refer to arbitration was held to include the power to agree to abide by the statement of a particular individual. Apart from the special powers referred to, I am of opinion that it is inherent in the position of every advocate, vakil or pleader to make statements, in course of the trial, refusing to examine witnesses and to say that he will rely solely upon the evidence of a particular witness. It makes no difference if pleaders on both sides make identical statements, refusing to examine any witness other than a certain person, even though such person happens to be one of the parties to the case. Statements of this kind may be regarded as pleadings which ordinarily operate as estoppel. To this extent Mr. Abdur Rauf had power to act apart from the special authority contained in his vakalatnama. Agreement to abide by the statement of a party or third person which partakes of the nature of a compromise and an agreement to refer to arbitration requires special authority. The vakalatnama executed by the plaintiffs in favour of Mr. Abdul Rauf has to be examined and if it does confer such authority the agreement made by the

vakil must be held to be binding like any other authorised act done by him in the discharges of his duty.

12. It has been argued by Mr. Khwaja on behalf of the appellant that the application of 16th May 1929 goes further than merely containing a statement to the effect that the pleaders would not examine any witnesses other than Rahmat usain, defendant 1. It is pointed out that the decision of the case was to follow not only the statement to be made by Rahmat Husain on disputed questions of fact but also the opinion of the witness an the question of "marzul maut," which is a mixed question of law and fact, and even as regards costs. In my opinion, this does not make any difference. "Marzul maut" is a well understood expression among the Mahomedans. What the pleaders of the parties stated in the application was that if Rahmat Husain's statement shows that the deceased Ahmad Husain, was not suffering from "marzul maut," the gifts in relation to which the plea of "marzul maut" had been raised should be upheld. As regards costs, which are always in the discretion of the Court, the parties agreed that the Court should decide in accordance with the opinion of the witness. It seems to me that, in so far as the application contained an agreement of the, parties that Rahmat Husain's statement be accepted as conclusive his statement, operated as an admission of both parties. Section 20, Evidence Act, is, in my opinion, clearly applicable. It lays down that:statements made by persons to whom a patty to the suit has expressly referred for information in reference to a matter in dispute are admissions.

13. Messrs. Amir Ali and Woodroffe quote, in their notes to Section 20, Evidence Act, from Taylor, para. 761, as follows: These principles apply whether the question referred be one of law or of fact; whether the persons to whom reference is made have or have not any peculiar knowledge on the subject.

14. These remarks are based on English decided cases. The learned Counsel for the appellants commented on the word "information" occurring in this section and contended that the parties did not stand in need of obtaining any information from Rahmat Husain but agreed to abide by his decision. The word "information," occurring in Section 20, is not to be understood in the sense that the parties desired to know something which none of them had any knowledge of Where there is a dispute as regards a certain question and the Court is in need of information regarding the truth on that point, any statement which the referee may make, though known to one or both of the parties, is nevertheless "information" within the meaning of Section 20, Evidence Act. Admissions may operate as estoppel and they do so where parties had agreed to abide by them.

15. The matter may be considered from another stand-point. In so far as the application of 16th May 1929 contained an agreement that the parties would abide by the opinion of Rahmat Husain on the question of "marzul maut" and costs, he may be considered to have been made an arbitrator. We have to look to the substance rather than the form in which the agreement, arrived at on 16th May 1929, is couched. If one part of the application has all the attributes of an

agreement to refer and another part has all the attributes of statements in pleadings, I see no reason why the application should not be given effect to in both of its aspects. If, as is contended by the learned Counsel for the appellants, the decision of these questions was referred to Rahmat Husain, the Court made a reference as soon as it examined him, and the witness gave his award when he stated in course of his deposition that Ahmad Husain was not suffering from "marzul maut" when certain gifts were made, and that in his opinion parties should bear their own costs. As already mentioned, the "vakalatnama" executed by the plaintiffs in favour of Mr. Abdur Rauf clearly confers upon him a power to refer to arbitration. In this view the pleader should be considered to have acted in the exercise of his power to prosecute the plaintiffs' case when he stated in the application that he would, not examine any witnesses on behalf of the plaintiffs and would rely solely on the statement of Rahmat Husain, and to have referred to the arbitration of Rahmat Husain the questions of "marzul maut" and costs. The pleaders of the opposite party did the same. The statement of Rahmat Husain,. in so far as it fell within the first category, should be considered to be an admission of the parties and his award, so far as it fell within the purview of the second. Such admissions operate as estoppel (See Taylor, Section 760). The award is an adjustment of the suit in the manner agreed.

16. It does not appear from the record, nor is it contended, that any of the parties attempted to resile from the agreement before the judgment was delivered. The only evidence which the Court had before it for the disposal of all the issues arising in the case was the statement of Rahmat Husain. The lower Court gave its finding on all the issues quoted in the judgment relying upon such statement which if accepted, as true, was decisive on every one of them. The learned Subordinate Judge was not moved by anyone on behalf of the plaintiffs, before he delivered his judgment, that they desired to lead other evidence. Indeed such an application, if made, would not have been entertained in view of what had happened. It is not possible to suggest that the learned Subordinate Judge should have adopted any course other than that which he did adopt on the date when he pronounced his judgment. We must consider in this appeal, which is from the decree dated 16th May 1929, what the situation then was. The case had been fixed for final disposal. The only evidence which the parties desired to lead was before the Court. None of the parties intimated that they had anything further to do in substantiating their respective cases. The case was ripe for judgment, and the Court had no alternative but to decide the case on the evidence before it. It has not been argued before us that the evidence of Rahmat Husain, if accepted, did not enable the learned Subordinate Judge to decide the case on any question which he was called upon to decide. It would have been open to the defendants to argue before the learned Subordinate Judge delivered his judgment that the evidence of Rahmat Husain, if accepted as true, did not justify a total dismissal of the plaintiffs' case, and that on his evidence, or in the absence of his evidence on a particular point, the plaintiffs were entitled to succeed as regards part of their claim. The learned Counsel for the appellants has not argued before us that Rahmat Husain's evidence did not go far enough to justify the total dismissal of the plaintiffs' case. The grounds of appeal likewise did not impugn the decree of the learned Subordinate Judge on any such ground. The argument before us, was practically confined to the question that the

plaintiffs' vakil had no authority to bind the plaintiffs by the agreement appearing in the application of 16th May 1929.

17. It was suggested in the course of arguments that the parties could not agree that the case be decided on the statement of Rahmat Husain, defendant 1. The suggestion was based on certain observations occurring in Bishambhar v. Radha Kishunji AIR 1931 All 557 which was a case in which the parties agreed to abide by the statement of a pleader without an oath being administered to him, but before the pleader made a statement and before any decree was passed in accordance with his statement, the plaintiff resiled from his agreement. It was held that it was open to the plaintiff to resile from the agreement. It was observed at p. 396 (of 1931. A.L.J.) that:although the breach of such an agreement might entitle a party to sue for damages, we do not consider that such an agreement binds the parties to it and prevents them from resiling from such an agreement and we do not consider that such an agreement must necessarily be enforced.

18. That question does not arise in this case and I do not intend to hold anything which is in conflict with the view expressed in the above passage. Reliance is placed on a passing" remark occurring at p. 396 (of 1931 A.L.J.) which runs as follows:Now it is clear that there are two kinds of proceedings which are allowed to parties who do not wish their suit to be tried by a Court in the usual manner. Firstly, the parties may agree to-abide by the statement on oath of some person under the Oaths Act, or secondly, the parties may make a reference to arbitration under the Schedule 2, Civil P.C.
19. Later on it was observed that:if parties desire that the case should abide by the knowledge of facts possessed by some person, then it is open to the parties to make an agreement under the Oaths Act, that the case should abide by the statement on oath of that person. If on the other hand the parties desire that the case should be decided by some person instead of being decided by the Court, then it is open to the parties to have that person appointed as arbitrator under Schedule 2. But the particular kind of reference in the present case which is by no means uncommon seems to us to serve no useful purpose.

20. No argument can be built on this passage and it cannot be contended that the parties can only agree to abide by the statement of a person made on special oath, but that it is not open to the parties to agree to abide by the statement of a third person made in the usual manner as a. witness or made without an oath. I do not think that the learned Judges who decided that case intended to lay down any such proposition. It is, in my opinion, open to the parties to agree to abide by the statement of a. third person to be made on an oath administered in the manner in which witnesses are sworn in Courts. This view has been consistently taken by this Court in: Jai Gobind v. Jasram[3] *Kesho Ram v. Peare Lal*[4], and *Mithu Lal v. Sri Lal*[5] The only difference is that in case of special oath contemplated by Sections 8 and 9. Oaths Act, Section 11 of that Act applies and the statement is conclusive; while in cases in which the Oaths Act does not apply, the statement of the referee amounts to an admission of both the parties and, as such, entitled to the same consideration as are applicable to any other admission which may or may not operate as estoppel.

Where parties agree to abide by such statement it will so operate, unless fraud is established or the bar of estoppel is otherwise removed (Taylor, para. 760).

21. For the reasons stated above, I am of opinion that the learned Subordinate Judge was justified in passing a decree on the statement of Rahmat Husain. On the facts stated by him being accepted, no other decree could be passed. The result, in my opinion, is that the decree appealed from cannot be challenged. I would affirm it and dismiss the appeal with costs.

**Bennet, J.**

22. In this first appeal the facts have been set forth in the judgment of my learned brother, and there are only a few facts on which I would like to lay stress. The father of the parties, M. Ahmad Husain, died on 10th December 1925, leaving two daughters, the two plaintiffs, who are pardanashin ladies, and three sons, who arc the three defendants. Prima facie the plaintiffs are entitled to 1/4 share in the property of their deceased father and they have sued for that share. Defendant 1 is a Sub-Inspector of police; defendant 2, is a pleader of Bareilly, and defendant 3, is a mukhtar and revenue agent of Bareilly. The written statement of the defendants which was first filed on 19th January 1929, was to the effect that M. Ahmad Husain, the father of the parties, did not leave any property on his death. It was not contested that the list of immovable property in the plaint was incorrect or that that property did not belong at one time to M. Ahmad Husain. That property embraces five items of immovable property consisting of shares in two villages, two houses and a building with a sugar manufactory, the total of the immovable, property being valued at Rs. 25,000 and there was also a list of movable property valued at Rs. 4,328-8-0, the total property being valued at Rs. 29,328-8-0. The pleading of the defence in regard to this property was that under a deed of gift dated the 23rd May 1912, M. Ahmad Husain had made a gift of items 1 and 3 to the three defendants and a fourth son, Farhat Husain who was then alive, and had delivered possession to them, and under a second deed of gift dated the 24th May 1912, Ahmad Husain had made a gift of item 1 to defendants 1 and 2, and had delivered possession. After that it was said that M. Ahmad Husain got the house, item 4 constructed. Item 5, the sugar factory, was stated to have been constructed by defendant 2. In para. 9 of the written-statement it was pleaded that in December 1925, M. Ahmad Husain made an oral gift of the property in Mauza Chanwar, which is item 2, to defendant 3, and give him possession. Farhat Husain had predeceased his father, and it was also pleaded in para. 9 that his father made a gift of the right to the residential house which had devolved on him from Farhat Husain to defendant 3. It was further pleaded that Ahmad Husain that declared Mt. Nasiban who is not a party to the case to be owner of the ornaments and household goods under an agreement dated the' 2nd October 1923. It was disputed that the list of movable property was not correct as regards furniture. There were three written statements on the 19th January 1929, by each defendant and three further written-statements were filed by each defendant on 19th March 1929. These were in reply to amendments of the plaint on that date.

23. The amendment of the plaint was to the effect that the two deeds of gift dated the 23rd and 24th May 1912 were executed fictitiously to guard the property, and that on the death of Farhat Husain his 1/4 share in the property, items 3 and 5 in list A under those deeds of gift would have devolved on his father, and that after his death each of the plaintiffs became entitled to a two-anna share in his four anna share. It: was further pleaded that M. Ahmad Husain was seriously ill when the deed of gift in respect of the pro-perty 2 was alleged to have been executed by him; in other words, that it was invalid on account of marzul maut" and undue influence on the part of the defendants. The further written-statement of the defendants pleaded that the oral deed of gift of Ahmad Husain was not made during "marzul maut". It was, however, not clearly stated in the pleadings of the defendants at what period the oral gift in question was made. On p. 14 para. 5 it is merely stated that there was an oral gift made, and on p. 15, in para 9, there is a reference to the year 1925 when the gift of a zamindari property in mauza Chanwar was made. The further written-statements of the defendants do not clear up the date of the alleged oral gift, and the pleading, on p. 18, para. 5, suggests that the deceased had only one day's illness, the day before his death. The next proceeding in the case was that on 19th January 1929, Hikayat Yar Khan was examined as pairokar of the plaintiffs and one of the defendants was examined for the defendants under Order 10, Rule 1, and eight issues were framed on that date The plaintiffs applied thereafter for the issue of a commission ox commissions for evidence, and there was some delay in the execution of the commission. There is a reference to a commission being sent to Ghazipur district. It was while this matter was pending that the case came before the Court on 16th May 1929. The dates 16th and 17th May 1929, had been fixed for the final hearing of the case by an order of 19th March 1929, passed on the date of framing issues. The English note? show that there were in the meantime a number of orders in regard to the issue of commissions on behalf of the plaintiffs, and of these the last order in English, to which reference is made on the vernacular order-sheet, is dated 15th May 1929, and is to the following effect:

I find that the plaintiffs are trying to obstruct the proceedings of the suit. Pour witnesses cannot be examined on commission on a Court day. If the commission is not executed on 12th May 1929, I am afraid the application shall have to he refused(?).

24. The next order of 16th May is:

The parties agree to bind themselves by the statements of M. Rahmat Husain. The case was dismissed according to his oath.

25. There is no order further in regard to the commission. These were the circumstances of the case when the date of 16th May 1929, arrived, that is the commission for four witnesses for the plaintiff had apparently not returned from Ghazipur. The question before us is whether the plaintiffs are to be held as bound by the action taken by M. Abdur Rauf, pleader for the plaintiffs, on that date, an action which according to the petition on p. 27 of the plaintiff Akbari Begam was taken without her knowledge and information and without instructions authorising the pleader to act in such a manner. One of the questions relevant in this connection is whether the action taken by the vakil would be the natural action for a vakil to take under the circunir stances of the case and whether it would be an action which could be regarded as bona fide. It has been suggested

that it is always open to a vakil conducting a case to refuse to produce evidence if in his judgment that is the wisest course. That may be so, but it is necessary to consider the circumstances of the case as they stood on 16th May. Prima facie the plaintiffs had a right to a 1/4 share of the property which had belonged to their father. The case for defence was that that property had been disposed of by the deceased before his death partly by oral gifts and partly by written deeds of gift. The onus of proving the oral gifts of immovable property worth about Rs. 6,000 lay on the defence. It would have been possible for the vakil for plaintiffs to contest the case for his clients by cross-examination of the witnesses who would be produced by the defence to prove the alleged oral gifts. It was further necessary for the defence to prove that the alleged oral gifts were made at a period that was not during the "marzul maut" of the deceased. It will be remembered that the pleadings for defence were vague on this point and did not allege any date for the alleged oral gifts. Prima facie therefore, there was a good fighting case for the plaintiffs as matters stood. It was not a case where a vakil found that the onus of proof lay on his client and that on the date fixed by the Court for final disposal his clients left him in the awkward position of having no evidence to produce. The present case was far otherwise, because the onus of proof of the alleged deeds of gift lay on the defence, and it is obvious from the nature of. the case that it would require very good evidence indeed on behalf of the defence to convince a trial Court and a Court of appeal that the deceased had really made oral gifts disposing of the whole of his property. Under these circumstances the action taken by M. Abdur Rauf pleader for the plaintiffs, was to file a document, which is printed at p. 21 and which is as follows: We, the petitioners, leave the decision of all the points at issue in this case with costs on the statement of Munshi Rahmat Husain, defendant 1. We shall abide by the statement of the aforesaid gentleman concerning the decision of the said case and it may be decided in accordance therewith. The parties do not want to produce any other evidence.

26. On this document the first signature is not of M. Abdur Rauf but the first signature is of Hikayat Yar Khan described as the pairokar for the plaintiffs. As Hikayat Yar Khan did not possess any power of attorney from either of the plaintiffs his signature on this document does not bind either of the plaintiffs. He is the husband of the second plaintiff and he is a clerk in the execution department of the Judge's Court in Lucknow. The document was signed further by defendant 2, defendant 3 and by one B. Poshakilal pleader and by one B. Monmohan Lal pleader for defendant 3. It was not signed by defendant 1. Now it is obvious that the document in question goes far beyond the conduct of a case by counsel. It is not merely the question that the counsel for the plaintiffs did not want to produce evidence.

27. There are three other points in this document: firstly the document leaves the decision of all the points at issue to defendant 1; secondly, the decision of costs is also left to defendant 1; and thirdly there is an undertaking that the plaintiffs will abide by the statement of defendant 1 concerning the decision of the case. After this document was executed, defendant 1 made a statement on oath which supported his case. He did not merely state that at the time of the oral gift the deceased was not suffering from "marzul maut". He went much further and stated that the

oral gifts were made, that the plaintiffs were not entitled to anything except Rs. 3 monthly which was fixed for them, that the deeds of gift were genuine, and that no undue influence was exercised on the deceased. These are all matters which would have formed the subject of cross-examination if the case had been conducted in the usual manner, and it is obvious that the mere statement of a defendant that certain oral gifts were made is not a statement which would have been sufficient to convince a Court of the facts alleged. The Court accepting the application of the parties decided the case in favour of the defence and ordered that the parties should bear their own costs. This was also in accordance with the opinion of defendant 1. It is only this small point which was conceded by defendant 1 to the, plaintiffs, and the only result for his clients from the vakil of the plaintiffs entering into this arrangement was this one point. As regards the Rs. 3 due per mensem to the plaintiffs that was already mentioned in the written-statement, p. 15 para. 8. After the case was decided an application was made a week later, on 23rd May, by Mt. Akbari Begam to the effect that the proceedings of reference by Hikayat Yar Khan and the pleaders had been taken against her wish and without her knowledge and information and that she had given no instructions to Hikayat Yar Khan or her pleaders to that effect. Now this application might have been treated by the lower Court as an application for review of judgment. The lower Court stated that the vakil for the applicant did not point out under what provision of law the application could have been entertained, and only referred to the inherent powers of the Court laid down in Section 151, Civil P.C. He proceeds to say:I have however heard the application on merits and I am of opinion that it cannot be granted. There is no proof whatever that the vakil for the applicant had not consulted her before agreeing to abide by the oath of the defendant. In the vakalatnama of Maulvi Abdur Rauf, the vakil for the plaintiff, ample powers have been given to him to bind the plaintiffs in the way he did. No doubt the word "hasar" is not vised in the vakalatnama, but powers are given to appoint an arbitrator to file a compromise and also to verify an agreement.

28. The application was rejected. Now the lower Court did not make any enquiry in this matter and apparently by hearing the application on the merits the Court meant that the Court listened to some argument on the subject. I consider that the lower Court should have given the plaintiff an opportunity to produce evidence on the point and that it should itself have taken evidence on the point. I note that the plaint shows that Mt. Akbari Begam resides close to the Dewankhana of Bareilly and the case was one tried in the Civil Courts of Bareilly. It would therefore have been perfectly easy for the lower Court at the time of the presentation of this application on 16th May 1929, to have sent for Mt. Akbari Begam and ascertained whether she did or did not agree to abide the statement of defendant 1. In the case of pardanashin ladies a Court ought to take certain precautions. Under the Registration Act when there is a question of registration of a document by pardanashin ladies the registering officer ascertains either by the issue of a commission or personally from the pardanashin lady as to whether she understands the contents of the document and has executed the document. Why should similar precautions not be taken in the case of an application to obviously against the interest of the plaintiffs as the application of 16th May 1929? In the ruling of Basangowda Hanmantgowda v. Churchigirigowda Yogangowda (1910) 34

Bom403, there was a similar case where after the passing of a decree the defendant made an application to set aside the decree on the ground that he did not engage the pleader and had not authorised the pleader to compromise the suit. It was held that the Court had inherent power to set aside the decree and correct its own procedure when it had been misled. A reference is also made to an English authority to the same effect, Neale v. Gordon Lennox (1902) AC 465. In Jaduraj Kunwari v. Raj Kishore Deo Singh First Appeal No. 132 of 1928, decided on 24th February 1932, by a Bench of this Court, there was an offer by a pairokar of the plaintiff, who was a pardanashin lady, that she would be bound by the oath of the defendant on Ganges water. The plaintiff then filed an objection to the effect that she had not-authorised her pairokar to make any such offer. It was held by this Court that the lower Court should have enquired into the question of whether the' lady had or had not authorised her pairokar to take such action. The only difference between that case and the present case is that in that case the lady made her objection before the case was decided, and in that case there was an interval which occurred between the making of the offer by the pairokar and the statement of the defendant on oath. But in the present case there was no opportunity to the plaintiff because the application was made on 16th May 1929, the statement of defendant was taken on that date, and the case was decided on that date. There was no interval of time within which the matter could come to the knowledge of the plaintiff and she could make an objection before the statement was taken.

29. I do not consider that the plaintiff should be debarred from any remedy by the hasty procedure adopted in the present case. The question on appeal is whether the plaintiff should have an opportunity of showing that she did not authorise the procedure of her vakil, or whether she should be debarred from any such opportunity in the present case and left to her remedy, if any, by a suit to set aside the decree on the ground of fraud or other similar grounds. I think that in the present case the facts should be taken into account that the plaintiffs are pardanashin ladies, that the defendants consisted of one Sub-Inspector of police and two legal gentlemen practicing in Bareilly, and that the case heard in Bareilly may have been influenced by these considerations. The record does not show whether M. Abdur Rauf is like defendant 2 a pleader of Bareilly or whether he comes from some other place. However this is a matter which affects the merits and which should not affect the law on the point except in so far as various rulings of their Lordships of the Privy Council lay down that special precautions should be taken in regard to pardanashin ladies. Now the question is whether the procedure adopted by the lower Court was a procedure which can be justified by law. The questions which arise in regard to this are two: firstly, the general question as to whether the procedure was legal at all, and secondly, the particular question as to whether in this case if the procedure was legal, the vakil for the plaintiff was authorised by his vakalatnama or generally by the fact that he was a vakil to take such action. I shall deal firstly with the narrow question of the vakalatnama. The translation is printed on p. 11 and my learned brother has pointed out that it is not quite accurate, and I accept the corrections which he has made. There is in the vakalatnama no specific power to make an application similar to that on p. 21. The application cannot be regarded as a compromise because the application is not an adjustment of the rights of the parties in the case. Consequently the fact that there is a

reference to compromise in the vakalatnama is not of very great importance. That reference however is not very clear. The actual words used are "ikhtiyar taqarrur salsi wo sulahnama wo wasul zar." It has been pointed out by learned Counsel for appellants that the word "sulahnama" means a deed of compromise and not compromise. "Authority of a deed of compromise" is a defective expression in grammar, and what was intended may have been meant either "authority to compromise" ("ikhtiyar sulah ka hai") or "authority to file a deed of compromise previously arrived at," which would be "ikhtiyar sulahnama dakhil karne ka hai." The expression in the vakalatnama that:We do covenant that whatever is done by the above named person shall be accepted as done by us.is a very general expression usually occurring in such documents, and I do not consider that it can be taken to empower the person appointed by the vakalatnama as vakil to execute a document such as the document in question. In Jagapati Mudaliar v. Ekambara Mudaliar (1898) 21 Mad 274, there was a vakalatnama on p. 275 in which there was a similar expression:Therefore I shall accept, as having been conducted by me in parson, all the acts done by you in the Court, concerning the suit.

30. But the Court held that this general expression would, not confer a right on the vakil to make a compromise without the authority of the party. I do not consider therefore that the vakalatnama will cover the action taken by the vakil in the present case. Reference was made to *Sourendranath Mitra v. Tarubala Dasi*[6] where there was a question of the powers of an advocate to compromise a suit, and it was held that a power to compromise was inherent in the position of an advocate of a High Court in India, but that no advocate has actual authority to settle a case against the express instructions of his client. But on p, 494 (of 1930 A.L.J.) it is stated:Their Lordships desire to confine their decision on this point to the case of advocates, whatever their qualifications, admitted as such by the respective appropriate Courts in India, who derive their general authority from being briefed in a suit on behalf of a client. Where the legal representative in Court of a client derives his authority from an express written authority, such as a vakalatnama, different considerations may well arise, and in such cases their Lordships express no opinion as to the existence of any implied authority of the kind under discussion,

31. If therefore their Lordships considered that a vakil appointed by a vakalatnama did not have any inherent power to compromise apart from powers conferred by his vakalatnama, it would apparently follow that a vakil does not have, apart from his vakalatnama, any authority to bind his client by a document which goes much further than a compromise, that is, a document binding his client to have the case decided by the statement of one of the opposite party.

32. In regard to the power to refer to arbitration it has been held in a number of rulings that a pleader without special authority cannot make a reference Jaipal Tewari v. Tapeswar Tewari AIR 1917 Pat 136, Sheo Das v. Brij Nandan (1903) 7 C W N 343, Ramjiwan v. Kalicharan (1907) 29 All 429, Dwarkanath Roy v. Fanindra Nath Roy AIR 1919 Cal 232, Fanindra v. Dwarka Nath (1919) 25 C W N 832, A. I.R. 1929 Lah. 171, and A.I.R. 1924 Nag. 338. In Ramjiwan Ram v. Kali Charan Singh (1907) 29 All 429, it was held:

It is the duty of the Court itself to see that the parties have signed the application for an order of reference themselves in person, or that when the application is signed on their behalf by a pleader that that pleader is expressly authorized in writing. A vakalatnama in general terms is wholly insufficient.

33. If therefore general terms are not sufficient for power to make a reference to arbitration, why should general terms be sufficient for power to bind a client by the statement of the opposite party? There are some cases on the power of a pleader to bind his client by making a reference under the Oaths Act. In *Sadashiv Rayaji v. Maruti Vithal*[7] it was held that neither an agent nor a pleader has this power. This ruling has been quoted with approval recently in 1929 by a Bench of the Calcutta High Court in *Mohammad Mahmud Choudhury v. Behary Lal*[8]

One of the cases referred to in that connexion is *Sadashiv Rayaji v. Maruti Vithal*[9] In that case it was held that an agent, holding a power-of-attorney authorizing him to act and appear for a party to a suit, cannot bring the suit to a close by offering to be bound by the oath of the opposite party in a particular form. Nor can a pleader so bind his client. The proposition laid down in that case cannot be disputed.

34. In *Wasiuzzaman Khan v. Faiza Bibi*[10] Tudball and Walsh, JJ., had a case in which the husband of the plaintiff holding a power of attorney from her had made an offer under the Oaths Act. Tudball, J., referred to the ruling in *Sadashiva Rayaji v. Maruti Vithal*[11] and said:It is urged that the decision mentioned above is not correct and should not be followed....In so far as the special power-of-attorney in the present case is concerned, I have examined the terms of it carefully and find that the plaintiff gave very extensive powers to her husband, for instance, to abandon the suit as well as to compromise it. I have not the slightest doubt whatsoever that the husband as agent of the lady had full power to take the step which he did take....In the Act itself there is no language which goes to show that the word "party" can be used only in its restricted sense and not in the wider sense....I can see no reason why a "duly" authorized agent of a party should not make the offer contemplated in Section 9. In the present case I am satisfied that the plaintiff's husband had full power to take this step in view of the language of the power-of-attorney on the record.

35. Three points may be noticed, about this ruling. Firstly, it was not about a pleader or vakil. Secondly, it was about the Oaths Act and was based on the language of that Act. Thirdly, it laid down that the language of that particular power of attorney, which is not quoted, did give the husband full power to apply under the Oaths Act. Another point is whether the application in the present case comes under the Oaths Act. learned Counsel for the respondent when asked a direct question stated that he considered that the application did not come under the Oaths Act. But the application does not purport to be under the Oaths Act, It does not refer to a statement to be made by defendant on any special oath, or indeed on any oath at all. I agree with my learned

brother in his finding that the application does not come under the Oaths Act.

36. The suggestion has been made that defendant 1 can be treated as a person coming under Section 20 of the Indian Evidence Act. But that section deals with persons to whom a party refers for information and not to a person to whom the parties refer to decide the case. The reference made to defendant 1 was that he should decide all the issues of the case and also the question of costs, and that the parties will be bound by his statement. Section 20 deals with a person to whom a reference is made, and the statement of that person is treated as an admission against the party making the reference. Section 31 states that admissions are not conclusive proof of the matters admitted, and therefore in the case of any admission under Section 20 it would be open to the party making the reference to call evidence to contradict the statement. Section 20 therefore cannot be legal authority for the application in the present case in which the condition is laid down that the statement is to be binding. There are therefore the following reasons why the application does not come under Section 20: (1) the section is for one party not for both parties; (2) the reference is for information not for decision; (3) the statement under the section is not binding. In *Bishatmbhar v. Radha Kishunji*[12] there was a somewhat similar reference to a third party to make a statement by which the parties would be bound, which did not come under the Oaths Act, and it was held on p. 395 (of 1931 A. L.
J.) that Section 20, Evidence Act, would not apply.

37. In this ruling the question was raised whether such a reference, not under the Oaths Act, is a legal method of disposing of a suit and it was held" that it was not. On p. 396 (of 1931. A.L.J.) it is stated:Now it is clear that there are two kinds of proceedings which are allowed to parties who do. not wish their suit to be tried by a Court in the usual manner. Firstly, the parties may agree to abide by the statement on oath of some person under the Oaths Act, or secondly, the parties may make a reference to arbitration under Sch 2, Civil P.C. For the defendant-respondents it is contended that under Section 151, Civil P.C., this Court by its inherent jurisdiction should sanction a third method of procedure, that is, the method adopted by the parties in this case, and should further hold that once a reference has been made to the statement of a person to whom the parties referred, then each party to the case cannot resile from such an agreement. It is contended that the agreement to make a reference would be a legal agreement under the Contract Act, the consideration being in the case of each party that the opposite party had also made a promise to abide by the result....But...we do not consider that such an agreement binds the parties to it and prevents them from resiling from such an agreement and we do not consider that such an agreement must necessarily be specifically enforced. We do not see that any advantage would accrue from the setting up of a third method of procedure in addition to the method of Schedule 2 and the method of the Oaths Act. If the parties desire that the case should abide by the knowledge of facts possessed by some person, then it is open to the parties to make an agreement under the Oaths Act, that the case should abide by the statement on oath of that person. If on the other hand the parties desire that the case should be decided by some person instead of being decided by the Court, then it is open to the parties to have that person appointed as arbitrator

under the Schedule 2....We consider that the objection of the plaintiff to the procedure in the present case is therefore well founded.

38. The question to be considered is:Can a civil Court conduct a trial by a procedure not prescribed by the Civil Procedure Code or by any special or local law or by any other law?

39. The assumption in a number of rulings is that the parties can agree to adopt any procedure they desire, and that the agreement of the parties gives the Court jurisdiction to adopt that form of procedure. This is shown in Kesho Ram v. Pearilal AIR 1923 All 443, a single Judge ruling by Walsh, J., where there was this agreement?The vakil for the plaintiff states that the evidence of the defendant may be taken with the ordinary oath and that the suit may be decided according to that.

40. On p. 210 (of 21 A. L. J.) Walsh, J., stated:I agree with the respondents' counsel that this is not an agreement for a special oath within the meaning of Sections 8 and 9, Oaths Act I think these sections of the Oaths Act only snow that such an agreement may be binding on the parties, even though it relates to an oath not ordinarily recognized by the procedure of the Court, provided it is an oath which the Court is permitted to administer under Section 8. It is only an argument by analogy. The argument for the appellant is that as such agreements are sanctioned by this Act, there can be nothing illegal in an agreement relating to an ordinary oath. I agree.

41. In *Mithi Lal v. Sri Lal*[13] there is another single Judge ruling by Daniels, J., in which the defendant agreed to be bound by the oath of the plaintiff. Before the statement of plaintiff was taken, the defendant wanted to resile from the application, but this was not allowed by the Court. It was held that the agreement was valid though not under the Oaths Act. Both these rulings refer to Muhammad Asghar Ali Khan v. Imtiaz Ali (1898) AWN 200. In this case the defendant made an application to the Munsif stating In the suit the defendant will abide by the statement, whatever it may be, which the plaintiff may make on oath as prescribed by law touching his claim. The defendant has no evidence to produce. The suit may be disposed of on the defendant's statement.

42. The plaintiff stated "That claim is true". It was argued that the case did not come under the Oaths Act. Blair, J., said:It seems to me unnecessary to decide the point, for the appellate Court trying the case had before it no other evidence than that which is contained in the plaintiff's statement, and must therefore have regarded the undertaking of the defendant to be bound by the plaintiff's statement as an admission from which he could not escape. It might, and probably would, have had the effect of preventing the plaintiff from calling other evidence to establish his case.

43. Aikman, J., stated:I think a Court of justice should hold the defendant bound by his offer which was accepted by the plaintiff who complied strictly with his conditions.

44. In none of these ruling was the point raised that a civil Court must follow the procedure of the Civil P.C., in conducting a trial, and that the agreement of parties does not give the Court jurisdiction to adopt a, different procedure. Act 5 of 1908 is entitled An Act to consolidate and amend the laws relating to the procedure of the Courts of civil judicature.

45. This indicates that the Code deals exhaustively with the subject, as the laws dealing with civil procedure are to be consolidated into one Code. Is there any section of the Code which allows civil Courts to adopt a procedure other than the procedure laid down in the Code? There is such a section. It is Section 4(1). -Revenue Courts are provided for in Section 5, and in Section 4(2) there is exemption from the Code for proceedings of a landholder in recovery of rent (by distraint). For civil Courts the section which allows the adoption of other procedure is Section 4(1), which states:
In the absence of any specific provision to the contrary, nothing in this Coda shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.

46. It is clear that Section 4(1) is intended to be exhaustive, and to enumerate all the sources from which a civil Court may derive authority to adopt another form of procedure. Agreement of parties is not mentioned in Section 4(1) as a source from which the civil Court may derive, authority to adopt another form of procedure. Therefore agreement of parties is not a source from which a civil Court may derive authority to adopt another form of procedure. In my opinion Section 4(1) is a complete answer to the argument of Walsh, J., in *Kesho Ram v. Piari Lal*[14] already quoted, that there is nothing illegal in such agreements. In my view the agreement would defeat the provisions of Section 4(1), of the Code of Civil Procedure, as Section 4(1) does not except agreement as authority for adoption of a different form of civil procedure. The agreement would also defeat those part of the Code which provide for the ordinary procedure of a civil Court conducting a trial. Those parts are, Section 33:The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

47. That is, the case must be heard, not merely a statement taken by which the other party is bound, and where he has apparently agreed not to cross-examine.

48. Order 18, Rule 2(1), states:On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which be is bound to prove.

49. In the present case the onus of proof was on the defendants, as they had to prove various alleged transfers and oral gifts of the deceased to them. The correct procedure would have been for defendants to produce evidence in support of these issues. Instead of producing evidence,, the

defence merely produced a defendant to make a statement on oath which, the plaintiff's vakil had agreed to treat as binding, and in regard to which the right of cross-examination to show that the statement was untrue had been given up. Cross-examination is provided for in Section 138, Evidence Act. In Order 20, Rule 5, it is provided that the Court shall state its finding or decision, with the reasons therefore upon each separate issue.

50. That is, the Court is to state its finding or decision, and not the finding or decision of someone else. Here by the agreement We...leave the decision of all the points at issue in this case with costs on the statement of Munshi Rahmat Husain, defendant 1. We shall abide by the statement of the aforesaid gentleman concerning the decision of the said case.

51. This shows that the case was to be decided by defendant 1 and not by the the Court. The Court therefore abdicated its position and put defendant 1 in its place as the person to give a decision, even on the question of costs. Such a decision by another person can only be made by an arbitrator. But the provisions of the Code in regard to arbitrators is strict. In Section 89(1) it is provided:
Save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in suit or otherwise, and all proceedings thereunder, shall be governed by the provision contained in Schedule 2.

52. I consider that the agreement would defeat the provisions of the Code of Civil Procedure which I have set forth. It would defeat those provisions because it sets up another form of procedure and because it relieves the defendants of their onus of producing evidence which would be subjected to cross-examination to test its truth, and because it places defendant 1 in the position of the Court to give a decision on all the issues, and also on the question of costs. The agreement therefore would deleat these provisions of the Code of Civil Procedure.

53. Section 23, Contract Act, provides:The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law....In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

54. I consider that the agreement comes under the parts quoted of Section 23 as an agreement which would defeat the provisions quoted of the Code of Civil Procedure, and that the agreement is therefore void under Section 23. I also consider that the object of the agreement is forbidden by law, because Section 4(1), Civil P.C., shows that the procedure of the Code is not to be altered by agreement. For this reason also the agreement would be void under Section 23, Contract Act. For the reasons which I have given I consider that the appeal should be allowed and the decree should be set aside, and the case should be remanded to the lower Court for disposal according to law.

55. As the Judges composing this Bench differ on questions of law arising in the case, it should be laid before the Hon'ble Chief Justice for reference to a Single Judge or larger Bench for the determination of the following questions and disposal of the case:

(1) Can the parties to a suit agree, apart from the Indian Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit and can they "leave the decision of all points" including costs arising in the case to be according to his statement? (2) Did the "vakalatnama" in favour of Mr. Abdur Rauf authorise him to make the application dated 16th May 1929?
(3) Is it open to the appellant in the present appeal, which is from the original decree, to call in question the propriety of action taken by the lower Court on the subsequent application, dated 22nd May 1929; and if so, whether an opportunity should have been given to the plaintiffs to produce evidence to prove that the vakil had not been authorised to make the application dated 16th May 1929?

**JUDGMENT**

**Sulaiman, C.J.**

56. The learned Judges before whom this appeal came for hearing differed on some points. They considered that they differed on certain questions of law arising in the case and, accordingly directed that the case should be referred to a single Judge, or a larger Bench, for the determination of those questions and disposal of the case.

57. In my opinion the order directing certain points to be referred is perfectly justified, but the reference of the whole case, so that the new Bench should dispose of it, is neither warranted by Section 98, Civil P.C., not by the Letters Patent. Under the former section when a Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by another Bench. It is obvious that the hearing by the other Judges is confined to the specific points stated and cannot cover the whole case over again. The object obviously is that there should not be a further hearing of questions on which there has been no difference of opinion at all. Section 98 is confined to points of law only, but the newly added Sub-section (3) makes it subject to the provisions of our Letters Patent. Section 98 would apply only when there is no similar provision in the Letters Patent; but if there is a specific provision, Section 98 would not apply to a chartered High Court.

58. Under Clause 27 of our Letters Patent, the Judges who differ on any points on which the decision of the case rests are bound to state those points and refer them, to the other Bench. It will be seen that Clause 27 is wider in the sense that points both of law and fact should be referred, and that such reference is not only discretionary but obligatory. But this clause also makes it necessary that the points on which they have differed should be stated and it is those

points only which should be referred, and not the whole case.

59. I am therefore of opinion that the reference of the whole case for disposal by us is not competent, but that we should confine our attention to the three specific points referred to us, provided the Judges have differed on them.

60. The first point referred to us is:

Can the parties to a suit agree, apart from the Indian Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit and can they leave the decision of all points including costs arising in the ease to be according to his statement?

61. The facts of this case are given at length in the judgment of the learned Judges who have made the reference. This was a suit for recovery of their shares brought by two daughters of the deceased against three brothers. The defendants set up two registered deeds of gift of 1912 and also two oral gifts made by the deceased in 1925, in which year he died. The eldest brother Rahmat Husain did not claim any benefit under the oral gifts. On the 16th of May 1929 which was the date fixed for the production of evidence, a joint application was filed signed by the husband of one of the plaintiffs, describing himself as their pairokar, and by defendants 2 and 3. It was also signed by Mr. Abdul Rauf, and advocate for the plaintiffs, and by the pleaders for the defendants 2 and 3. The application was not signed by Rahmat Husain, defendant 1, nor by any one of his pleaders; nor did it parport to be an application made on his behalf. The application states as follows:-
We, the petitioners, leave the decision of all the points in dispute in the case, including costs, on the statement of Munshi Rahmat Husain, defendant 1. Whatever statement the aforesaid gentleman makes with regard to the decision of the case, shall be accepted by the applicants, and the case be decided in accordance therewith The parties do not want to produce any other evidence.

62. Rahmat Husain was present in the Court room, was put into the witness box and oath also was administered to him. He made a statement against the plaintiffs and in favour of the defendant on all the important points, and expressed his opinion that the parties should bear their own costs. No one appears to have objected to his statement. The Court pronounced judgment on the same day in accordance with the statement of Rahmat Husain and dismissed the suit.

63. The application did not in express terms say that the statement of Rahmat Husain should be made on oath, though, in fact, he did take oath. Accordingly, the learned Judges have assumed that it was not intended that he should make his statement on oath and that accordingly the case did not fall under the Indian Oaths Act. Under Section 8 of that Act the Court can tender oath or affirmation to a party or a witness who offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race and persuasion to which he

belongs and not repugnant to justice or decency and not purporting to affect any third person.

64. Section 9 provides for an offer by one party to be bound by any such oath or solemn affirmation made by another party or witness and the acceptance by such other party or witness. Then Section 11 lays down that the evidence so given shall as against the person who offered to be bound by any such oath be conclusive proof of the matter stated. It does not seem necessary for the application of the Oaths Act that the oath should be in any particular form, or that even it need be an oath at all. and not a mere solemn affirmation. The learned Judges have interpreted the application as implying that the statement was not to be made on an oath or solemn affirmation as contemplated in Section 8 of the Act, and they accordingly agreed in holding that the Oaths Act does not apply. This point has therefore not been referred to us.

65. On the question, whether parties can agree to abide by the statement of g. witness or a party to the suit, Niamatullah, J., has held that it is open to the parties to agree to abide by the statement of a third person to be. made on oath administered in the manner in which witnesses are sworn in Court; while Bennet, J., is of opinion that this would set up another form of procedure contrary to the provisions of the Code of Civil Procedure and, inasmuch as such an agreement would defeat the provisions of that law and it must therefore be deemed to be forbidden by Jaw, it is void under Section 23 of the Indian Contract Act.

66. Now there is an overwhelming authority in favour of the view that a decree passed on the basis of such an agreement when carried out by the statement of the referee is binding upon the parties. The only difference of opinion that seems to have arisen is as to whether the binding character of the decree should be based on the supposition that such a reference amounts to a reference to arbitration or an adjustment of the claim, or is an admission of the parties of an offer amounting to an estoppel...

67. The trend of the authorities in this Court appears to be more in favour of the view that such an agreement is in substance a compromise or adjustment of the suit, and neither a mere admission capable of being rebutted nor strictly speaking a reference to arbitration.

68. Although in some cases the right to resile from such an agreement has been doubted, in some others it has been held that such an agreement can be resiled from in special circumstances. But it has never been held so far that if the agreement has been acted upon and the referee has made the statement in pursuance of the agreement, the party against whom the statement goes is entitled to go back upon it after having come to know what it amounts to.

69. In Ram Narain Singh v Babu Singh (1895) 18All 46, the plaintiff had applied to be bound by the statement which the defendant might make on oath holding the arm of his son: the defendant accepted the proposal, took the required oath and made a statement against the plaintiff. The

plaintiff had attempted to revoke his proposal when the defendant came into Court ready to take the oath. Konx, Offg.

**C.J. and Aikman, J.**

held that such a form of oath ought not to have been administered; but when one party offered to be bound by the oath of the other party and such other party accepted the proposal the party was offering to be bound and not to be allowed to revoke his proposal except upon the strongest possible grounds proved to the satisfaction of the Court to be genuine grounds for revoking the proposal.

70. In Muhammad Asghar *Ali Khan v. Muhammad Imtiaz Ali*[15] a defendant to a suit agreed to be bound by whatever statement might be made by the plaintiff upon oath as prescribed by law; the plaintiff accordingly was examined on oath administered in the usual manner. It was held by Blair and Aikman JJ., that though the statement thus made by the plaintiff might not be-binding under the special provisions of Section 11 of the Oaths Act, nevertheless the defendant must be held bound by his agreement to rest the decision of the case upon the plaintiff's statement on-oath.

71. In *Kesho Ram v. Peare Lal*[16] it was held by Walsh J., following the ruling in Muhammad Asghar Ali v. Muhammad Imtiaz Ali (1898) A W N 200(Supra), that where a document was made and it bound the parties to abide by the defendant's statement. made on ordinary oath, there is nothing illegal in. such a contract; it is merely a binding contract for good consideration.

72. In *Mithu Lal v. Sri Lal*[17], a party had agreed to abide by the oath" of the other party and the Court, notwithstanding such an agreement, entered into the evidence as to the truth or falsehood of the statement made. It was held by Daniels J., that the Court acted illegally and with material irregularity and that the procedure adopted by the Court below had the effect of entirely nullifying the agreement, and therefore, could not be supported.

73. In Himanchal v. Jatwar Singh AIR l924 All 570, decided by a Division Bench, of which one of us was a member, the plaintiff and the contesting defendants and their respective pleaders had entered into an agreement duly signed by them to the effect that a certain vakil should hear out the whole affair and that they shall accept any statement that he might make before the Court. A sworn statement was made by the referee named to the Court and a decree in accordance thereof was duly passed. It was held that the parties could not be permitted to resile from the agreement entered into by them and that the decree must stand. It was pointed out that the case might be looked at from two points of view. The statement amounted to an agreement to be bound by the statement of the referee who was a person to whom the parties had expressly referred for information in reference to the matters in dispute. and the statement was an admission within the meaning of Section 20 of the Indian Evidence Act. The Bench regarded it as an admission made

by the parties in a pending suit and the statement of the nominee of the party-was considered to be an admission of the party. It was also remarked that the agreement amounted to a compromise of their dispute and that there was nothing to prevent the parties from compromising the suit and agreeing to a decree being passed in terms to be stated by a person named and that such an agreement would be an adjustment of the suit and a party could not be allowed to go back upon it.

74. In *Ram Sundar v. Jai Karan* [18]the defendant had made an offer to the plaintiff that, if a certain witness in the case would eat kachcha food served by the plaintiff, the suit should be decreed. The plaintiff accepted the offer and the witness did eat kachcha food served by the plaintiff. It was held by Mears, C.J., and Ryves, J., that the offer was perfectly lawful, and as it had been complied with the suit must be decreed even though Order 23, Rule 3 did not apply to the case. The learnt ed Judges held that the case must be regarded as one of an offer capable of acceptance or rejection by the person to whom it was made and that if the offer was accepted in proof of the terms and complied with the promise made by the offerer must be carried out by him.

75. In the Full Bench case of *Gajendra Singh v. Durga Kumari*[19] Walsh and Kanhya Lall, JJ., (Mukherji, J., dissenting) held that, where the plaintiff and the defendant had come to an agreement that a certain appeal pending in the High Court and an application for leave to appeal to the Privy Council were to be withdrawn and the defendant was to pay certain sums of money to the plaintiff on account of claims for costs to be ascertained by the Collector as arbitrator, and the Collector arbitrated and made an award and the plaintiff applied for the dismissal of the appeal, the agreement and arbitration operated as an adjustment of the matters in dispute between the parties within the meaning of Order 23. Rule 3, Civil P.C. Walsh, J., further held that on general principles of law, even independently of any provision in the Code the High Court had inherent discretion to decline to allow an appellant to prosecute an appeal the moment he was satisfied that the appellant had by his solemn act and deed testified to by his signature, for what he considered adequate consideration, expressly abandoned his right and undertaken to withdraw his appeal.

76. Mukherji, J., held that the main consideration had failed and that therefore the award fell to the ground; but in any case the agreement and award could not be treated as an adjustment by an agreement of parties.

77. In Sita Ram v. Piari Lal AIR.995 All 553(Supra), decided by a Bench of which one of us was a member, the sole question at issue in the Munsif's Court was whether a certain rain water spout belonging to the defendant should be closed or left open; the parties agreed that they would not call any more evidence but would abide by the decision of the Munsif after he had inspected the locality. The Munsif made an inspection and then decided in favour of the plaintiff. On appeal the appellate Court set aside the decision and remanded the case for trial de novo. It was held by the Bench that the parties could not resile from their agreement and were bound by the decision

of the Munsif, whether it was right or wrong, and that the decision must be treated as one based on compromise between the parties and was not open to appeal.

78. In Ram Devi v. Ganeshi Lal AIR 1926 All 501(Supra), the parties agreed to refer the whole matter in dispute to arbitration without the intervention of the Court, the agreement providing that the award would be accepted by the parties. When the award was delivered, and filed in Court it was held by the Bench that the award was binding on the parties and that it must be deemed to be an adjustment under Order 21, Rule 2, Civil P.C.

79. In the case of Madan Mohan v. Munna Lal AIR 1928 All 497(Supra), the ownership of two adjoining houses was in dispute and the parties agreed that the Court might pass any decision it liked after inspecting the locality in the presence of the parties and their pleaders. The Subordinate Judge inspected the premises, called for certain documents and then heard arguments on points of law. Before he actually delivered the judgment one party came to the High Court for a transfer repudiating the agreement. Weir & Sen, JJ., dismissed the application holding that no case had been made out for transfer and that they should not take a course which would enable the applicant by a side wind to repudiate the agreement which he had made with the respondents. They quoted the remark of Lord Halsbury, L.C, in *Burgess v. Marlon*[20] It has been held in this house that where, with the acquiescence of both parties a Judge departs from an ordinary coarse of procedure and as in this case, decided upon a question of fact, it in incompetent for the parties afterwards to assume that they have then an alternative mode of proceeding and to treat the matter as if it had been heard in due course.

80. The learned Judges expressed the view that it may not be improper for a Judge to try a question of fact by some method other than that prescribed by law governing this Court if the parties request him to do so.

81. In *Salik Ram v. Wali Ahmad AIR 1927 All 590(Supra)*, Lindsay, J., held that where in a case falling under the Indian Oaths Act the plaintiff wanted to retract, the proper course for the Court was to examine the ground upon which the plaintiff wanted to withdraw from the reference1 and it had in a proper case discretion to refuse to administer the oath.

82. In Gordhan Das v. Husain (A.I.R. 1927 All. 659)(Suupra), the parties to a proceeding agreed to abide by the statement of a third person. Dalai, J. held that the statement made by such a person was a statement made within the meaning of Section 20 although it was true that ordinarily mere admissions are not conclusive, but admission of this kind must be taken to be admissions made in a suit by the nominee of a party thereto and are therefore conclusive and effectual, the effect being to prevent each party from resiling from the statement made by such a nominee.

83. In Deo Narain Singh v. Ajodhya Prasad AIR 1927 All 575(Supra), decided by two of us, the

parties had agreed to abide by the statement of one A, but before, A's statement had been recorded the defendant resiled from the agreement; but the Court in suite of it passed a decree in terms of A's statement, it was held that the defendant could not be pinned down to his statement and that the agreement did not come within the purview of Order 23, Rule 3, as that rule refers only to adjustments which have already been made.

84. The latest case of this Court which has been cited before us is the case of Bishambhar v. Radha Kishunji AIR 1931 All 557(Suupra) decided by a Bench of which one of us was a member. The parties agreed to abide by the statement of a pleader without an oath being administered to-him, but before the pleader had made a statement and before any decree had been passed by the Court in accordance with that statement the plaintiff resiled from the agreement. It was held that it was open to the plaintiff to resile from the agreement and that the agreement did not amount to an adjustment but only to an agreement on a procedure which might eventuate in an adjustment, and that until the referee had given his statement there could be no question of any adjustment, and also that as the pleader had not made any statement of fact, there was no question of any admission by the pleader which would have any binding effect on the plaintiff.

85. It would be noted that in the last three cases the question of resiling from the agreement, before it had been carried out by the statement of the referee, arose. That question does not arise in the present case.

86. It is not necessary to cite cases decided by the other High Courts where the trend of opinion seems to be in line with the course of decisions in this Court. But I may refer to the Full Bench case of Chanbasappa v. Basalingayya AIR 1927 Bom 565(Supra). In that case the parties to a suit had referred their differences to arbitration without an order of the Court, and an award was made. It was held that a decree in terms of the award thus made could be passed by a Court under Order 23, Rule 3, Civil P.C., but not otherwise. The Full Bench held that he words "agreement" or "compromise" in the rule had a wide scope? and included even an arbitration out of Court.

87. No case has been cited before us in which a decree passed on the basis of a settlement of a referee made in strict accordance with the agreement of the parties entered into in the suit and acted upon by the Court has been held to be ultra vires and therefore not binding on the party against whom it goes, on the ground that the agreement and the whole procedure were contrary to public policy or were in any other wav illegal. The main difficulty has arisen in ascertaining what the true basis for the binding character of the agreement is.

88. Now, an agreement that the parties will abide by the statement of a witness may amount to (1) A reference under the Oaths Act. (2) A reference to arbitration. (3) A mutual admission of the parties creating an estoppel. (4) If carried out, an adjustment of the claim.

89. If the case comes under Section 8 of the Oaths Act, admittedly there can be no difficulty. Under Section 11 the evidence so given shall, as against the person who offered to be bound, as aforesaid, be conclusive proof of the matter stated. In the present case both the learned Judges agreed that the Oaths Act does not apply; so the question of its applicability does not arise before us. It is therefore not necessary to decide in this case, as the matter has not been referred to us, whether the oath contemplated in Section 8, is necessarily exclusive of the oath referred to in Section 7 of the Oaths Act. Indeed, it may well be argued that the form of the oath adopted by the Courts under Section 7, has now become a recognised form common amongst the people of this Province. If such a view were accepted the reference would then be under the Oaths Act itself. Similarly both the learned Judges have thought that this was not a case of a reference to arbitration. So far as that opinion may be based on the language of the statement it cannot be questioned in this reference. But as the true nature and the legal effect of the agreement has to be considered the position may be briefly examined.

90. If any matter, owing to difference between the parties is actually referred to arbitration then the case would fall within para. 1 of the second schedule and the reference would be one to arbitration. But for the purposes of arbitration it is necessary that all the parties interested should agree to it and should apply to the Court for an order of reference; their application must be' in writing though it need not be signed by all of them.

91. In concurrence with the opinions of the learned Judges who have made this reference, I hold that an agreement to abide by the statement of a particular witness is in substance not a reference to arbitration. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment which is later on incorporated into a decree of the Court. The arbitrator can either proceed on the basis of his own knowledge or make enquiries and take evidence and then give his decision on such evidence. But where parties agree to abide by the statement of a third person or a referee, the referee merely makes a statement according to his knowledge or belief and the Court then decides the case and pronounces its judgment on the basis of such a statement and passes a decree thereon. The referee is not authorised to make enquiries and take evidence, and then announce his decision on the basis of such evidence. He is called upon to make a statement according to his knowledge or belief. In the case of an arbitration, as the arbitrator's award is an expression of an opinion and his procedure resembles that of Court, a party is entitled to file objections and challenge the validity of the award. The making of a statement by a referee or a third person has no resemblance to a proceeding conducted by him as if he were a Court of law, and accordingly there can be no procedure for filing objections as to its validity. It is for the Court, in pronouncing judgment, to consider its effect. But under Section 20 of the Indian Evidence Act statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are deemed to be admissions of the party himself. If the parties have agreed to abide-by the statement of a third person to be made in Court, he may well be a person to whom the parties have expressly referred for information in

reference to the matter in dispute.

92. It may be noted in this connection that for purposes of a reference to a third party under Section 20 of the Indian Evidence Act it is not necessary that the reference should be on questions of fact within the knowledge of the referee. In Taylor on Evidence Vol. 1, para. 761, it is stated that these principles 'apply whether the question referred be one of law or of fact; whether the persons to whom reference is made, have or have not any peculiar knowledge on the subject, and whatever the nature of the action in which the statements of the referee are proposed to be adduced in evidence.

93. Accordingly, where two parties agreed to abide by the opinion of counsel upon the construction of a statute,, the party against whose interest the 'opinion operated was held bound thereby ; and a disputed fact regarding a mine having been referred by consent to a miners' jury, their decision was afterwards received in evidence.

94. There is considerable difficulty in basing the binding character of the agreement only on the hypothesis that they are mere admissions under Section 20 of the Evidence Act. Such admissions primarily are unilateral. Under Section 31 of the Indian Evidence Act they are not conclusive. It would therefore follow that if there were other evidence on the record it may be open to the parties to argue and it may be quite proper for the Court to accept such other evidence and give a go-by to the admission. Furthermore, in such an event, in spite of an agreement by the parties that the statement of the third person should be accepted as final and that there should be no appeal from it, parties may yet appeal and urge that the case should be decided on the basis of the other evidence on the record which outweighs the inconclusive admission. Obviously such a course of action cannot be tolerated. If any party be allowed to go behind the admission on the ground that it is not conclusive the whole object of the agreement would be frustrated. It. is therefore unsafe to rest the finality of the agreement on the basis of a mere admission under Section 20 of the Indian Evidence Act. Nor can one base it solely on the ground of estoppel by admission. The estoppel will only arise by the circumstance that the other party has been prevented from producing evidence in view of the agreement to abide by the statement of the third person. But if the trial Court, or for the matter of that, an appellate Court is prepared to allow the opposite party as well, full opportunity to produce additional evidence, it may well be said that there1 is no prejudice and that accordingly there is no estoppel under Section 115 of the Indian Evidence Act. In such a view the agreement can be reopened and the agreement utterly nullified. I do not think that such a course can be allowed.

95. When both parties make such admission simultaneously it amounts to an offer by one and acceptance by the other. Such reciprocal admissions would therefore be a valid agreement between them. Consideration is good because there is reciprocity. The statement of the referee would then be the admission of both the parties binding upon them. No doubt admissions are not conclusive; but where there has been mutuality of this kind and they have matured into an

agreement, their conclusiveness follows from the principle of estoppel. The parties cannot be allowed to go back upon it and therefore the admission is conclusive as against both, and can be said to operate as an estoppel.

96. In my opinion the true basis of the binding character of such an agreement is that the original contract to abide by the statement of a third person is perfected into an adjustment of the claim in terms of the statement made, as soon as the referee makes the statement. After that stage, neither party can resile from the agreement because the claim has been duly adjusted and it has become the duty of the Court not only to record it, but also to pass a decree in terms of it, It is true that under Order 23, Rule 3, before a Court can order an agreement or compromise to be recorded, and pass a decree in accordance therewith, it has to be satisfied that the suit has been adjusted wholly or in part by such agreement or compromise. Where the parties agree to abide by the statement of a third person their agreement is still in the nature of a contract, and it may well be said that so long as that third party has not made his statement, and the contract has not been carried out, there is yet no adjustment of the suit. Matters have not proceeded beyond the domain of an agreement and the stage of the adjustment of the claim has not yet been reached. Strictly speaking an agreement is not identical with a compromise of the suit, and may amount to a mere contract. But as no decree can be passed forthwith in terms of a mere contract to abide by the statement of a third person, I am prepared to hold that there can be no adjustment of the suit by such a contract until the statement has been made. But as soon as the agreement has been fully carried out by the Court and the referee has made his statement in favour of one party or the other, it is too late for either party to go back upon the agreement; and at this stage the agreement must be deemed to have eventuated into an adjustment of the claim in accordance with the statement already made. A party cannot be allowed to retract his solemn promise for consideration made before that Court after he has come to know the nature of the statement by which he had agreed to abide. It is no longer a question of the carrying out of a promise or the specific performance of a contract. The compromise must be deemed to have been carried out and accordingly the claim already adjusted. The Court cannot therefore entertain an application to withdraw from the previous agreement and to resile from it unless fraud, misrepresentation, coercion, influence or mutual mistake were established.

97. In the present case there can be no doubt that there was a valid agreement between the parties to accept the statement of Rahmat Husain if made in Court and not to produce any other evidence. Such an agreement is not contrary to any provisions of the Contract Act. An agreement not to product further evidence can, in no sense, be against public policy, or in any way illegal. Even an agreement to accept the statement of a named person as final is not necessarily repugnant to any of the provisions of the Code of Civil Procedure, nor does it defeat the provisions of that Code, nor is it forbidden by any law. Indeed, inasmuch as such a course may save the parties considerable expense, and also save the time of the Court which would otherwise be taken up in examining witnesses, it may be considered to be salutary and not at all opposed to public policy. It is therefore impossible to hold that the argument ab initio was illegal and was

void in law.

98. Nor can it be said that the Court in acting upon that agreement acted illegally to such an extent as to make its procedure ultra vires. It may be that there was a slight deviation from the ordinary course which the suit would have otherwise taken, but this departure was with the full concurrence and indeed in pursuance of an express agreement of the parties. The. moment Rahmat Husain made his statement the agreement was fully carried out, and it became binding upon the parties and the suit could not be decided otherwise than in accordance with that statement.

99. My answer to the first question referred to us is that the parties to a suit can validly agree, even apart from the Indian Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit and that they can leave the decision of all points including costs arising in the case to be made according to the statement. The second question is:Did the vakalatnama in favour of Mr. Abdur Rauf authorize him to make the application dated 16th May 1929?

100. The plaint has been originally filed by Mr. Jiaram Saxena, advocate, and had been signed by the plaintiffs. It was attested by Hikayat Yar Khan, husband of plaintiff 2. On 19th January 1929, Mr. Abdul Rauf of Lucknow also appeared for the plaintiffs and filed a vakalatnama, paper No. 90. Its operative portion is in the following terms:We have of our own free will and accord appointed Maulvi Abdul Rauf, Vakil, High Court, to conduct the case on our behalf, to take other proceedings, to put questions, to set up defence in the above case on the prescribed fee. We do covenant that whatever is done by the above named person shall be accepted as done by us. The said Vakil may take back court-fee, appoint arbitrators, file a deed of compromise, realize money, execute receipt, file and take back papers, verify plaint, draw lots, verify arbitration agreement and deed of compromise, obtain copies, take out execution of decree on our behalf. We shall have no objection. We have, therefore, executed this so that it may serve as evidence.

101. The learned Judges have assumed that Hikayat Yar Khan who signed the application as a pairokar of the plaintiffs, did not have authority to bind them, and that the whole question turns on the authority of Mr. Abdur Rauf.

102. No doubt their Lordships of the Privy Council in the leading case of Sourendranath Mitra v. Tarubala Dasi AIR 1930 PC 158 laid down that a power to compromise a case was inherent in the position of an advocate of a High Court in India, but that no advocate had actual authority to settle a case against the express instructions of his client. But their Lordships also made it clear that they desired to confine their decision on this point to the case of advocates, whatever their qualifications, admitted as such by the respective appropriate Courts in India who derived their general authority from being briefed in a suit on behalf of a client. Where the legal representative in court of a client derives his authority from an express written authority, such as a vakalatnama,

different considerations may well arise and in such cases their Lordships expressed no opinion as to the existence of any implied authority of the kind under discussion. In the case of an ordinary power of attorney their Lordships in Bank of Bengal v. Ramanthan Chetty AIR 1915 PC 121 (at p. 540 of 43 Cal.)(Supra) quoted the observation made In an English case with approval and observed:Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

103. In the present case Mr. Abdur Rauf was merely a vakil of the Court and not an advocate and the authority was conferred by a written document. There could therefore be no question of any inherent authority outside the terms of that document.

104. Now under the vakalatnama first of all a general authority was given to conduct the case and to take other proceedings, and it was covenanted that whatever was done by the vakil shall be accepted by the executants. In the second place there was an express authority given to appoint arbitrators. In the third place there was authority given for a deed of compromise. It is not necessary to mention other matters expressly referred to therein. No doubt the use of an expression which is equivalent to "an authority of (really for) deed of compromise" is a defective expression, but there can be no doubt that it does not mean merely the filing of a deed of compromise duly executed by the ladies, but that it means the power to compromise the suit.

105. A similar view was expressed by Walsh and Piggott, JJ., in *Hukum Singh v. Tunda*[21] I am accordingly of opinion that there was a general power to conduct the case and take all necessary proceedings in the case and, in particular, to appoint arbitrators and to compromise the suit apart from doing other minor matters.

106. No doubt it has been held in several cases that in the case of an ordinary power of attorney the document should be construed strictly against the attorney. In 1870 it was held in the case of Mt. *Sardar Begum v. Mt. Izzafunnissa*[22] that even pleaders, unless specially empowered so to do have1 no authority to compromise cases conducted by them. But in the case of Jang Bahadur Sjngh v. Shankar Rai (1891) 13 All 272(upra), Sir John Edge, C.J., presiding over a Full Bench of five Judges, after laying down that a counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client, referred to Sardar Begum's case (1870) 2 NWPHCR 149(Supra) and observed at p. 276:When the authority of vakils to bind their clients is called in question that authority must depend entirely on the terms of the particular vakalatnama. For my part, I should read a. vakalatnama widely and liberally unless it appears that the client intended to limit the authority of his vakil.

107. The other four learned Judges were of the same view and concurred in the view expressed

by the learned Chief Justice. It was not the solitary opinion of the Chief Justice, but the unanimous opinion of all. The following observations of Lord Bowen, C. J., and Fry, were quoted:This state of things raises the question of the relationship of counsel and his client which is sometimes expressed as if it were that of an agent and principal. For myself, I do not adopt and never have adopted that phraseology, which seems to me to be misleading....The duty of counsel is to advice a client out of Court and to act for him in Court and until his authority is withdrawn, he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client.

108. The observation of Cotton, L.J., in another case was also quoted:The questions were raised in argument whether an undertaking not to appeal could be given at all by counsel without express authority and if it could, whether it could be given after decision on the merits. Now every compromise involves an undertaking; it therefore cannot be beyond the authority of counsel to undertake that his client shall not appeal....That is a compromise. The undertaking therefore is prima facie binding.

109. It therefore follows that in the case j of an appointment of a vakil by vakalatnama to conduct a case, it is prima facie implied that he has full power to conduct the case in the way he considers best, and that therefore such! a document should be Construed liberally. If one finds that a vakalatnama confers very wide powers in very general terms on the vakil, and authorises him to conduct the case and to take other proceedings and expressly states that whatever is done by the above-named person should be accepted by the litigant, and then it goes on to specify certain particularly in portent powers like those of appointing arbitrators and compromising disputes, etc., it would seem, that unless there is a special clause excluding his authority to act in a particular way in the course of the suit, such an authority should be implied. The mere fact that certain important powers are emphasised in particular does not in any way derogate from the general authority conferred upon him. Indeed, the conduct of a case in accordance with rules of procedure and evidence must necessarily be within his authority by necessary implication.

110. The observation made by a Single Judge in Ramjiwan Ram v. Kali Charan Singh (1907) 29 All 429 that authority in general terms was wholly insufficient to authorise a vakil to refer to arbitration was in the nature of an obiter dictum as the decree was actually upheld in revision, and in any case it applied to power to refer to arbitration where no such specific authority had been given. In the case of Sadashiv Rayaji v. Maruti Vithat (1890) 14 Bom 455 no doubt it was held that an agent holding a power of attorney authorizing him to act and appear for a party to the suit cannot bring a suit to a close by offering to be bound by the opposite party in a particular form; nor can a pleader so bind his client. The learned Judges of the Bombay High Court thought that the general words implying authority to do all that the defendant could do himself did not give him any such authority, and they went further and held: that the power to refer under the Oaths Act is confined to the party himself and not to his agent.

111. This case was expressly dissented from by a Division Bench of this Court in Wasiuzzaman Khan v. Faiza Bibi (1916) 38 All 131(Supra). In that case the husband of a lady had a special power of attorney to conduct the case in her behalf as he should deem fit and was authorised to compromise or withdraw the suit, to refer it to arbitration and to nominate arbitrators and it was stated that every step that be might take in the conduct of the case shall be considered as having been taken by herself. In the course of the suit the husband slated to the Court that if the defendant would take his oath on the Quran and swear against the plaintiff the latter would abide by that oath and the case should be decided accordingly The learned Judges dissenting from, the view expressed in Sadashiv Rayaji's case (1890) 14 Bom 455(Supra) held that the authority conferred was wide enough to include the agreement to be bound by such an oath. It is noteworthy that this was the case of a special attorney, and not even a vakil of the Court. Sitting as a Single Judge I followed this Division Bench ruling in Mt. Mnsita Babi v. Khuda Bakhsh A.I.R. 1923 All. 65(Supra). In that case the parties had agreed to abide by the statement of a mukhtar, but later on one of them resiled from the agreement. The Court did not accept the statement and disposed of the case, on the merits. It was held that the case was 'not that of a reference to arbitration and that it not being understood that the statement was to be on oath or solemn affirmation the case did not fall under the Oaths Act; and that therefore it was open to the Court to refuse to refer the matter to the referee if sufficient cause were shown. But as regards the vakalatnama it was held that the vakalatnama executed by the plaintiff gave sufficient authority to the vakil to proceed with the case in any way he liked and that whatever he did in the case was accepted as binding on the plaintiff. In the case of Deoraj Misra v. Abhairaji AIR 1927 All 584(Supra), a case, in which a minor was a defendant, was referred to a pleader at the instance of the parties who undertook to abide by his decision and the suit was ultimately decreed on the basis of the pleader's statement. It was held that the minor was bound by the statement of the pleader in view of the provisions of Section 11, Oaths Act. As regards the contention that the defendant was not bound by the undertaking given by the pleader and not by the parties, as under the vakalatnama special power was not given to refer the matter, the learned Judges repelled it and considered that there was no force in it and relied on Wasiuzzaman Khan's case (1916) 38 All 131(Supra). They also treated the mukhtar as a witness who gave his statement before the Court and who had been specially referred to by the parties.

112. It would thus appear that at least in this High Court so far as vakalat-namas in favour of qualified vakils are concerned they are construed liberally, particularly when there are general powers to conduct the case conferred upon them. And it may be fairly assumed that since the pronouncement of the Full Bench in Jang Bahadur Singh's case (1891) 13 All 272(Supra), a vakalatnama which says that whatever is done by the vakil in the conduct of the case will be accepted, has been considered to be very comprehensive.

113. When counsel in England have such wide powers, there seems to be no| good ground for holding that vakils in this country who perform the same duties should be debarred from possessing similar powers. It would therefore seem to follow that when general authority to

conduct a case is conferred upon a vakil and it is followed by special powers to compromise a case and to refer the dispute to arbitration there is no justification for holding that the power to abide by the oath of a witness whether under the Oaths Act or by way of an agreement or compromise is not by necessary implication implied. A stage may arrive in a case at which the counsel may feel that in view of the paucity or weakness of evidence, his client is likely to lose and may be mulcted in costs. He may, in such circumstances, think that it is in the interest of his client that the decision of the matter may be left on the oath, solemn affirmation or even a mere statement of a person who is considered to be reliable, honest and trustworthy. If the vakil decides to 'examine one of the defendants whose interest, as it happened in this case, was practically not adverse to the plaintiff, as the sole witness for the plaintiff, it cannot be said that his action was so ultra vires as to vitiate the decree biased on that evidence. The vakil is in charge of the conduct of the case, and his client is bound by the decision to produce any witness he likes. I can see no essential difference between such a decision and a joint agreement that only one particular witness should be produced for both the parties. When he has full authority to compromise the case and by implication, authority to withdraw the claim, and also authority to refer the dispute to an arbitrator appointed by himself, it is too much to say that he should not be deemed to have authority to abide by the statement of a particular witness and not to produce any other evidence. Indeed, if after the witness has made the statement, the vakil were to take the further step of agreeing to abide by his statement on condition that the parties are to hear their own costs, the case would clearly be one of compromise or adjustment and it would be binding upon his client. There seems to be no real justification for holding that he cannot under a compromise agree not to produce any evidence except the statement of a particular witness.

114. It is said that an agreement of this kind is a reference to arbitration and the statement made by the witness is in the nature of an arbitration award. On such a hypothesis the plaintiff would be all the more bound, because in the vakalatnama express authority was given to the vakil to "appoint arbitrators...and verify arbitration agreement." Then it is said that inasmuch as the agreement was that the parties would abide by the statement of the witness and the case might be decided in accordance therewith, there was an implied waiver of the right to rile an objection to the award within ten days which took the agreement outside the scope of the vakil's authority. I cannot see that there was any such express waiver. In most agreements for reference to arbitration there is no recital as regards the right to object to the award within ten days, because at the time of the agreement the parties do not contemplate going back upon the award at all; and further because there is a statutory right under Schedule 2, Rule 16, entitling a party to file objection to the award within ten days (Article 158, Limitation Act). If such a view were to be accepted, then one would be compelled to say that the agreement would be within the vakil's authority if it does not imply a waiver of the right to file objections within ten days and would be outside his authority if such a waiver be implied. But the agreement does not say that the case should be decided forthwith without opportunity to either party to file objections. Moreover, I think it would be too much to say that incase of a valid reference to arbitration the client is not bound by the statement of his vakil made in Court that he would not file any objections, and that

a decree passed, after such a statement has been made, is not binding on the litigant.

115. It has not been disputed before us that under the "vakalatnama" the vakil would have authority to exempt witnesses for the plaintiff or to state before the Court that he would not produce any other evidence, or even to say that he would produce only one witness whom the defendant also agrees to produce. But it is said that if that witness happens to be one of the defendants to the suit, then the vakil would be acting outside his authority. I see no distinction in law between the witness being a stranger to the suit or being a party to the suit, whom the vakil may consider to be in fact much more reliable. If he has authority to refuse to produce any other witness except one particular witness, who is a stranger to the suit, he has, in my opinion, an equal authority to produce no one but one of the defendants as the sole witness in the case, for in either case he is conducting the case on behalf of the plaintiff and taking proceedings therein within the meaning of the vakalatnama. Of course, if an advocate commits gross negligence in the conduct of the case or acts contrary to the instructions of his client, he may be liable in damages.

116. An agreement to be bound by the statement of a third party is in no way opposed to public policy nor in any way repugnant to the provisions of any law, nor does it defeat any law. Indeed, it may be salutary inasmuch as it tends to shorten the production of evidence and in that way saves the time of the Court. There is nothing in the Contract Act which offends against such an agreement. After all the procedure so adopted is analogous to the procedure referred to in the Oaths Act and also analogous to the admission contemplated in Section 20, Evidence Act, and is also analogous to the agreement or compromise referred to in. Order 23, Rule 3. It is really a waiver of the right to produce any other evidence. It is not in any way more extraordinary, more unusual or more drastric than a compromise or withdrawal of the suit or reference to arbitration or agreement to abide by special oaths under the Oaths Act. There seems to be no good ground why when there are these other matters well within his power, this particular action should be considered to be without authority even though the vakalatnama says that whatever is done by him will be accepted by the client. I therefore think that in view of the opinion expressed in this Court, and particularly the observation made by the Full Bench referred to above, it must be held that the power to abide by the statement of Rahmat Husain was necessarily implied in the general authority given under the vakalatnama. My answer to the second question is therefore in the affirmative. The third question refered to is:Is it open to the appellant in the present appeal, which is from the original decree, to call in question the propriety of action taken by the lower Court on the subsequent application, dated 22nd May 1929; and if so, whether an opportunity should be given to the plaintiffs to produce evidence to prove that the vakil had not been authorized to make the application dated 16th May 1929?

117. I regret I am not able to find that the learned Judges have actually differed on those two parts of the third question. Apart from what may be implied from the general conclusion of one learned Judge that the appeal should be dismissed and of the other learned Judge that it should be

remanded. I do not find that they have specially expressed divergent opinions on this third question. I am not in a position to say what special reasons have appealed to one Judge and what other special reasons to the other Judge. It may be that as the learned-Judges were referring the whole case for disposal they thought it convenient to state the third question which also arose in the case, although as a matter of fact they had not actually differed on that point. As at least one part of the question may be a mixed question of law and fact, I consider it inappropriate that we should take upon ourselves the task of going into this question when it is not clear that there has been a difference of opinion.

118. Under Clause 27, Letters Patent, when all the Judges have expressed their opinions the point has to be decided according to the opinion of the majority of the Judges who have heard the case, including those who first heard it. That therefore implies that the opinion of the learned Judges who first heard it should also be recorded. I therefore think that we should not answer this question at this stage and should leave it to the learned Judges to record their divergent views and make a fresh reference under Clause 27 of the Letters Patent, if they consider it necessary. I would accordingly not return any answer to the third question.

**Mukerji, J.**

119. There being a difference of opinion between two learned Judges of this Court three questions have been referred for decision to this Full Bench. The first question is:Can the parties to a suit agree, apart from the Indian Oaths Act, that they will abide by the statement of the witness including one who is a party to the suit? Can they leave the decision of all points, including costs arising in the case to be according to his statement?

120. Ordinarily, the rules laid down in the Civil Procedure Code are meant to determine the procedure by using which a Court is to determine the questions arising before it. But the steps taken by the parties are the most important factors in the procedure. It is for a party to decide how many witnesses to examine and whom to examine. He alone determines what documents he will produce before the Court and what documents he will withhold. No doubt the Court, if it thinks fit to do so may ask for particular documents to be produced by a party or a stranger to the suit and it. may also examine any person if he happens to be present in the Court or summon him for producing any document or for giving evidence (O. 16, Rule 14) ; but, ordinarily, it does not do so. Primarily it is for a party to place his evidence before the Court and for the Court to pronounce judgment on such evidence. It is for this reason that a judgment is not ordinarily binding on a person who was not a party to the litigation. Such being the rule, it is open to a party to examine anybody he likes in support of his case, including a person who is a party to the litigation. If all the parties to a litigation agree that one person shall be examined on their behalf, that person becomes a witness for all the parties. If over and above this all the parties agree that they will not examine any other witness in the case, the person examined will furnish the only material to the Court on which to pronounce judgment. There is nothing wrong or illegal in

parties agreeing to examine the same person as their witness. Their freedom to choose the evidence to be produced cannot be controlled by the Court except for an adequate reason. There is nothing in the Civil Procedure Code to prevent the parties from agreeing to such procedure. I am therefore of opinion that the first part of the question must be answered in the affirmative, and I do answer accordingly.

121. The second portion of the question No. 1. When the parties to a suit agree that a third person who is not a party to the suit or one of themselves shall decide the point arising in the case as also the question of costs, they really agree to an arbitration in the case by the said person or party. There is nothing illegal in such an agreement. Such an agreement will attract all the rules laid down in Schedule 2, Civil P.C. If the award be oral and if it be taken down and signed by the person examined at the instance of the parties, the award will be in writing and signed by the arbitrator, and Clause 10 of Schedule 2 will be complied with. Ordinarily, it is for an arbitrator to decide a case after taking such evidence as the parties may produce before him and not to use his own information. But there is nothing illegal in parties agreeing that they shall not adduce any evidence before a sole arbitrator and that the arbitrator may decide from his personal knowledge or such information as he may already possess, whether such information be based on hearsay or otherwise, or on such information that he may gather, never mind how. If there be any agreement that the arbitrator is to decide on the information possessed by him and on such knowledge of law as he possesses or does not possess, the decision will still be an award and will be binding on the parties subject to the rules mentioned in Clauses 12, 14 and 15. Schedule 2, Civil P.C. A party has a right to 10 days' time for filing such objection as he may have to the award. But he may waive such right, and if he waives it and if all the parties waive their right, the Court may pronounce the judgment in accordance with the award, as soon as the statement has been recorded. From what I have said, it follows that the answer to the question should be in the affirmative, and I would answer the question accordingly. The second question put before the Bench is:
Did the vakalatnama in favour of Mr. Abdul Rauf authorize him to make the application dated 16th May 1929?

122. We can decide the question put to us only as a question of law. The question whether the vakalatnama was executed by a purdanashin lady and whether therefore the Court should have taken greater care in the matter is not before us.

123. The language of the vakalatnama will be found printed at p. 11 of the printed record. It gives the vakil power to make a compromise and also to refer the case to arbitration. It says that all acts done by the vakil would be as much binding on the plaintiff Akbari Begam as any act done by herself.

124. The first question that arises is whether the vakalatnama gives an express power to Mr. A. Rauf to agree to the case being decided according to the information and opinion of Rahmat

Husain, one of the defendants. The nature of the statement expected of Rahmat Husain has been analysed by the referring Judges themselves and forms the subject-matter of the first question. Rahmat Husain was to inform the Court according to his light and honest opinion, on the questions of fact involved in the case and to give his opinion on the Questions of law involved including the question of costs. He was, then, to be partly the sole witness for the plaintiff, provided he was made the sole witness for the defendants other than Rahmat Husain (who did not sign the application of 16th May 1929) and he was further to act as the sole arbitrator and the plaintiff undertook not to file any objections to the award (which was to oe oral and which might or might not be signed by the arbitrator) objections which the law allowed her to file within 10 days of the filing of the award.

125. Such being the nature of the petition filed by Mr. Rauf we have to see whether the vakalatnama authorised him to give the undertaking. As a vakil appointed to conduct the case, it was open to Mr. Rauf to decide whether he would examine one witness or more. So far therefore as the number of witnesses to be examined for the plaintiff goes, the power did authorise Mr. Rauf in the act. The next thing is whether he was authorised to decide whether one of the defendants, who had contested the suit was going to be his sole witness. Now a vakil does not decide and cannot decide whom to examine and whom not to examine as a witness without instructions from the client. He would not possess the information as to who know the facts of the case and who are not likely to give biased evidence in favour of the opposite party. I should not think that a vakil, as such, has a right to select the witnesses of his own accord. The client may bring before him several persons as possible witnesses in the case and he may make' his own selection after examining them, just as be would select out of the documents shown to him what documents he would produce and what he would not. But if the client should fail to bring any witnesses to him or should he fail to give instructions as to witnesses, I do not think that a vakil can make a selection of his own and produce as his witness anybody on whom his choice falls.

126. It is a question of fact whether Akbari Begam gave Mr. Rauf instructions to examine Rahmat Husain and we have nothing to do with it. I should simply say that the vakalatnama, of its own force, did not authorise Mr. Rauf in examining Mr. Rahmat Husain as the plaintiff's sole witness.

127. So far as Rahmat Husain was to act as the sole arbitrator, the same remarks apply to the question as to the selection of Rahmat Husain as the sole witness for the appellant. The vakalatnama did authorise Mr. Rauf to agree with the other side as to arbitration but the selection of the arbitrator was with the client and not with himself. He had no personal knowledge and even if he had any he could not use it. The appointment could be only on instructions. This would be a question of fact. I hold that, by virtue of the vakalatnama alone, Mr. Rauf was not authorised to select one of the contesting defendants as the sole arbitrator in his client's cause.

128. Before I proceed to examine the other matters to which Mr. Rauf agreed, I would like to point out that there is an essential difference between selecting an arbitrator and entering into a compromise. When a vakil accepts the terms of a compromise on behalf of his client, he decides what terms would be the best for his client, having regard to the merits of the case, so far as they are known to him. This is a matter depending on his own judgment alone and it is possible that by virtue of the power in the vakalatnama he can bind his client, without waiting for any special instructions. A vakil cannot, by virtue of the power given in the vakalatnama, enter into a compromise which involves matters not involved in the suit. This is an axiomatic truth. He is authorised to act in a particular litigation. He has no authority to deal with any other property or matter in which the client may be interested. When in England, where the power of the counsel (who acts without a written engagement) is believed to include a power to compromise, he cannot compromise in a matter which does not appertain to the suit, without express instructions. Therefore it cannot be argued that because a counsel may effect a compromise without further instructions from his client, he may select an arbitrator of his own accord and agree that the award shall bind the client.

129. Next, let us consider what are the implications of power to refer a case to arbitration. An arbitration must mean an ordinary arbitration on which the rules as to arbitration, as contained in Schedule 2, Civil P.C., apply. These rules empower a party to insist on the award being in writing and on it being signed by the arbitrator; Clause 10. If an award be not in writing and if it be not signed, a party to the reference may object to the validity of the award. When Mr. Rauf agreed that the statement of Rahmat Husain would bind his client as to matters which did not relate to facts, he agreed by necessary implication that he would not raise any objection to the award being oral or if it be not signed. Assuming that the statement was to be taken down in writing, there is no provision in the application that it should be signed by Rahmat Husain. The Civil Procedure Code does not contain any provision for the statements of witnesses being signed by them. The statement of Rahmat Husain may therefore very well have been left unsigned by him (Rahmat Husain).

130. Then, an arbitrator is bound to take down such evidence as the parties may adduce, examine such documents as they may produce and to hear such arguments as they may choose to advance. A power given to a vakil to refer a case to arbitration implies an arbitration which would enable the client to do all this, viz., examine witnesses, adduce documentary evidence and to address the arbitrator. By agreeing to the application of 16th May 1929 Mr. Rauf offered to waive all these rights of his client.

131. Then an arbitration implies that a party may object to an award if it does not fulfil all the requirements mentioned expressly or by necessary implication in Clauses 12, 14 and 15, Schedule 2 and also to have 10 days time to consider if the award should be objected to. Mr. Rauf by his application waived all these rights of his client. On the other hand, he agreed that not only no evidence would be adduced but the arbitrator shall be the sole Judge of facts on such

information (based on hearsay or otherwise) as he might possess or on no information at all. Surely this was not the power given to Mr. Rauf by the clause relating to the reference of the matter in dispute to arbitration.

132. On what I have said, it is clear that the act of Mr. Rauf was not authorised by the express power of reference to arbitration. The act, again, of Mr. Rauf was not a mere reference to arbitration, but constituted a combination of reference to arbitration, a limitation of witnesses before the Court, the selection of a witness and the selection of an arbitration. Surely a power for such a combination of acts cannot be spelt out of the vakalatnama. The general power to conduct a case according to the ordinary procedure contemplated by the Civil Procedure Code cannot be invoked to support Mr. Rauf's act. Akbari Begam or any other litigant could not have thought that she or he was giving his vakil such large and complicated power which was-neither a compromise nor an arbitration nor the conduct of a case in the usual way.

133. It was argued by the learned Counsel for the respondents that the English Law allowed counsel to enter into a compromise [Surendra Naih v. Toru Bala AIR 1930 PC 158] and therefore in India also larger powers should be implied than are given by the vakalatnama. The argument is fallacious. In the case just quoted their Lordships of the Privy Council refused to pronounce any opinion on the Indian question. But it is argued that unless larger powers are. given to vakils and advocates, who are not barristers of England, grave difficulty would arise in the conduct of cases. But the powers of an English barrister are well understood in practice, although there is no written contract. The client is supposed to know what powers the counsel wields. In_ India the appointment is a matter of written contract, and an agent cannot be allowed to possess powers which are not either expressly given or which-do not follow from the express powers. The rules of the High Court meant for the guidance of Subordinate Courts require that no money shall be taken out by a legal practitioner who does not bold a vakalatnama expressly authorising him to withdraw money belonging to his client. A vakil combines within him the duties of an English counsel and an English solicitor. No authority has been produced to show that any tradition has grown up, giving him certain implied authorities to bind his client apart from his written powers. All vakalatnamas contain express powers and the vakalatnama filed in the High Court which we examined was an elaborate document giving and denning powers of many kinds. If it had been the tradition in India that the mere appointment of a vakil or a pleader to conduct a case would carry with it all sorts of powers, the vakalatnamas would have been simplest documents. As I have said, not a single case has-been cited before us in which it may have been stated that a legal practitioner's powers need not be defined and' would be implied from the very nature of the appointment.

134. I am not impressed by the argument that in this country the same powers should be assumed as existing in favour of a legal practitioner as are said to be wielded by counsel in England. We are not considering what powers should be given to legal practitioners, in this country. The question is what powers are held by them outside the vakalatnama. The fact that details of

powers given find place in vakalatnamas raises a presumption that there are no powers outside the vakalatnama. The fact that, as a matter of practice, no compromise is accepted by Courts from pleaders who are not specially authorised in that behalf and the fact that, in the case of a reference to arbitration, the pleader's vakalatnama has to be scrutinised, go to establish that, in India, at least in the Province of Agra, of which I have. 37 years' experience at the bar and on the Bench, there are no powers outside the vakalatnama.

135. In the case of Jang Bahadur v. Shankar Rai (1891) 13 All 272(Supra) the remarks of Sir John Edge, C.J., that he would read a vakalatnama liberally and widely was a mere obiter dictum in which none of the other Judges concurred. Even Sir John Edge remarked as follows, viz:When the authority of vakils to bind their clients is called into question that authority must depend entirely on the terms of the particular vakalatnama.

136. When the terms of a contract have been reduced into writing that document alone can furnish us with the definition of the powers conferred. I hold that the vakalatnama did not authorise Mr. Rauf to enter into the agreement of 16th May 1929.

137. As regards the third question, there does not appear to be any difference of opinion between the learned Judges.. The judgment of Niamatullah, J., is silent on the point and the reference may be due to the fact that the learned Judges thought that they were referring the whole case to a Judge or Judges. This could not be very well done having regard to the language of the Letters Patent, which says that only points in difference should be referred. I do not in the circumstances, wish to express any opinion on the third point, which, I may add, was not allowed to be argued before the Full Bench.

**King, J.**

138. The first part of the first question submitted to us must, I think, be answered in the affirmative.

139. It is undoubtedly open to a party to a suit to limit the number of his witnesses. He can undoubtedly produce-only one witness, if he pleases, and can leave the Court to decide, the disputed points according to the testimony of that witness. So if both the parties have confidence in one and the same witness, who knows the truth about the matters in dispute, they can, in my opinion, agree to abide by the statement of that witness, and to produce no other evidence, and to let the Court decide the case according to the testimony of that witness only. Such an agreement seems to me perfectly lawful and unobjectionable. If the agreement is carried out, and the testimony of the witness is recorded, then I think the parties are bound by their agreement and cannot resile from it. In the first place I think the parties are bound by contract. If the parties agree to abide by the statement of one witness and his statement is recorded in pursuance of their agreement, neither party can then be permitted to repudiate the agreement by challenging the

truth of the statement or by producing any further evidence. This result follows from the law of contract. Moreover when the statement of the single witness has been recorded in pursuance of the agreement. I think the suit has for all practical purposes been "adjusted" by a lawful agreement or compromise, within the meaning of Order 23, Rule 3. The Court merely has to decide the matters in dispute in accordance with the testimony of the single witness and to pass a decree accordingly. But whether the provisions of Order 23, Rule 3 are strictly applicable or not J think that the parties are clearly bound by their agreement and no Court of justice would permit either party to repudiate it.

140. In the second place I think the principle of estoppel would come into operation. When a party has expressly declared his intention to rely upon the statement of a witness as correct, then the statement made by the witness (who is commonly called a "referee") must be treated as an admission by the party himself under Section 20, Evidence Act. The admission is not conclusive, but it may operate as an estoppel, and in the circumstances of this case I think it would so operate. If a party has refrained from calling any further evidence, in reliance upon the agreement that neither party should call further evidence and that both parties should accept the testimony of a single witness as correct, then the opposite party cannot be heard to say that the: testimony is not correct.

141. The question whether the "referee" is, or is not, a party to the suit seems to me quite immaterial. If both parties have confidence in him, and agree to abide by his testimony, it makes no difference whether he is a party to the suit or a stranger. My opinion is that the parties can agree, apart from the Oaths Act, to abide by the statement of a witness and that they are bound by their agreement when the statement has been recorded.

142. My answer to the second part of the first question has partly been given above. Omitting the question about costs, I think it is clear that the parties can agree to rely upon the testimony of one witness (referee) and to produce no further evidence and to leave the Court to decide the suit according to the referee's testimony. It must be noted that the parties did not agree that Rahmat Husain should deride the disputed points. They agreed that the decision should be in accordance with his statement. This meant that the statement was to be accepted as correct and the Court should decide the disputed points in accordance with his testimony. As I have already said, I see nothing unlawful or objectionable in such an agreement. Quite apart from the agreement the Court had no option but to decide the suit according to his testimony, which was decisive on the matters in dispute, and which stood unchallenged by cross-examination and unrebutted by any other evidence. Rahmat Husain was not constituted an arbitrator for the purpose of deciding the controversial points, nor did he profess to decide those points. He merely testified that certain gifts of certain property had been made and perfected by delivery of possession and that the gifts were not invalidated by undue influence, or marzulmaut, and so forth. If his testimony was correct it destroyed the plaintiffs' claim, and the Court had no option but to dismiss the suit

accordingly.

143. There remains the question of costs. The parties agreed that the question of costs should also be decided according to Rahmat Husain's statement. This has furnished ground for the argument that Rahmat Husain was to be recorded as an arbitrator and not merely as a referee, and that the provisions relating to arbitration should have been followed, and therefore the procedure actually adopted was contrary to law. The point seems to be of technical rather than practical importance. In my opinion, the mere fact that the parties agreed that the question of costs should, together with the questions in dispute, be decided according to Rahmat Husain's statement, does not invalidate the agreement. The parties were at liberty to compromise the suit as they thought fit. The agreement was that the suit should be adjusted in a specified manner, i. e., it should be decided according to the statement of a single witness which was to be accepted as correct. So far there was nothing unlawful or improper. Nor could the referee be regarded as an arbitrator. If they further agreed that even the question of costs should be decided according to the referee's opinion, I do not think this further stipulation can be treated as converting the referee into an arbitrator. The parties merely agreed that the Court might award costs in accordance with the referee's opinion. If the Court in its discretion acceded to this joint request it was certainly not open to either party to raise any objection. I think the agreement, when acted upon, amounted to an "adjustment" of the suit and the question of costs was rightly decided in accordance with the agreement. The Court had full authority and discretion so to decide, even in the absence of any agreement between the parties.

144. There are numerous rulings of this Court in support of the views expressed above but I would refer specially to Mohammad Asghar Ali Khan v. Muhammad Imtiaz Ali (1898) AWN 200(Supra) and Himanchal Singh v. Jatwar Singh AIR l924 All 570(Supra). The second question referred to us depends upon the language of the vakalatnama in favour of Mr. Abdur Rauf. This document gives Mr. Abdur Rauf very wide and general powers to conduct the case on behalf of the plaintiffs. They say:We agree that everything done by the pleader will be considered our own action and we shall accept the same.

145. In particular he is empowered to refer to arbitration and enter into a compromise. There is certainly no express power granted to agree to abide by the statement of the witness, but I regard that power as included in the power to enter into a compromise. The application of 16th May 1929 was essentially an agreement to compromise, i.e., the parties agreed that the suit should be decided simply on the basis of a statement to be made by Rahmat Husain. I think the language of the vakalatnama is wide enough to authorize Mr. Abdur Rauf to present the application on behalf of his clients. It was observed in a Full Bench decision of five Judges of this Court in Jang Bahadur Singh v. Shankar Rai (1891) 13 All 272(Supra) that a vakalatnama should be "widely and liberally" construed.

146. No opinion need be expressed on the third question submitted to us because, as my learned

brothers have pointed out, it does not appear that 'the two learned Judges who made this reference have differed in opinion on this point.

Cases Referred.

1(1916) 38 All 131
2A.I.R. 1923 All. 65
3(1898) AWN 120
4AIR 1923 All 443
5AIR 1924 All 126
6AIR 1930 PC 158
7(1890) 14 Bom 455
8AIR 1930 Cal 463, (at 313 of 34 C.W.N)
9(1890) 14 Bom 455
10(1916) 38 All 131
11(1890) 14 Bom 455
12AIR 1931 All 557
13AIR 1924 All 126
14AIR 1923 All 443
15(1898) A W N 200
16AIR 1923 All 443
17AIR 1924 All 126
18AIR 1925 All 271
19AIR 1925 All 503
20(1896) AC 136 (at 138)
21(1921) 60 IC 912
22(1870) 2 NWPHCR 149