

**(1922) 02 CAL CK 0054**

**Calcutta High Court**

**Case No:** Civil Rule No. 649 of 1921

Ramnath Misra

APPELLANT

Vs

Ramranjan Misra

RESPONDENT

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**Date of Decision:** Feb. 27, 1922

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### **Judgement**

1. On the 9th February, 1920 an application was made under Sch. II of paragraph 20 of the CPC to the Munsif at Asansole to file a private award dated -22nd Aswin 1325. The Munsif held that there was no arbitration in the case by all the arbitrators jointly and he refused the application. It appears that there were five arbitrators and that they were to act jointly under the submission. One Rakhal Upadhaya, the Munsif says, was present one day for a short time but did not hear the evidence or take part in the deliberations of the arbitrators and the Munsif states that there was no evidence to show that Rakhal Upadhaya signed the award after actually going through the papers and considering them. Against the Munsif's decision an appeal was preferred to the Subordinate judge and the Subordinate Judge formed this issue.

Whether the defendant waived his right to have his case tried by the continuous presence of Rakhal Upadhaya during the judicial portion of the arbitration case?

2. The Munsif held on this issue that the defendant did not object on the ground of the absence of Rakhal Upadhaya from the judicial portion of the arbitration proceedings and from that his waiver of the objection might be inferred. The matter came back to the Subordinate Judge with the Munsif's finding and he decreed the appeal and ordered the award to be filed. This Rule was obtained at the instance of the present applicant but we cannot say that the decision of the Subordinate Judge was wrong having regard to the Munsif's finding, and we do not think that this is a matter in which we ought to interfere. No doubt the arbitrators must be present during the whole of the deliberation, but it is open to the parties to waive the absence of one of them.

This is, it appears, what the defendant has done in the present case. But then it is said that whatever the defendant has done with regard to Rakhal's absence for the evidence he did not waive his absence from the final deliberation and that consequently his waiver does not extend to this.

3. But we think, on the whole, that we must find with the learned Subordinate Judge that the defendant has waived the whole of the irregularity caused by Rakhal Upadhaya's absence from any part of the proceeding having regard to the form in which the issue was framed and the finding of the Munsif thereon.

4. This being so, the Rule must be discharged with costs; hearing fee two gold mohurs.