

**(1922) 02 CAL CK 0060****Calcutta High Court****Case No:** None

Rama Nath Misra

APPELLANT

Vs

Ramranjan Misra

RESPONDENT

**Date of Decision:** Feb. 27, 1922**Citation:** 67 Ind. Cas. 866**Hon'ble Judges:** Greaves, J; Ghose, J**Bench:** Division Bench**Judgement**

1. On the 9th February 1920 an application was made under Schedule II, paragraph 20, of the CPC to the Munsif at Asansol to file a private award dated 22nd Aswin 1325. The Munsif hold 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 Upadhy, 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 Upadhy 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 framed this issue "whether the defendant waived his right to have his case tried by the continuous presence of Rakhal Upadhy during the judicial portion of the arbitration case." The Munsif held on this issue that the defendant did not object on the ground of the absence of Rakhal Upadhy from the judicial portion of the arbitration proceedings and that 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 from the evidence he did not waive his absence from the final deliberation and that, consequently, his waiver does not extend to this. 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 Upadhyas absence from any part of the proceeding having regard to the form in which the issue was framed and the finding of the Mnnsif thereon.

2. This being so, the Rule must be discharged with costs. Hearing-fee two gold mohurs.