

**(1947) 07 CAL CK 0018**  
**In the Calcutta High Court**

Sadhan Kumar Bhattacharjee

APPELLANT

Vs

Sunil Kumar Bhattacharjee and Others

RESPONDENT

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**Date of Decision :** 07-07-1947

**Acts Referred:**

**Citation :** AIR 1948 Cal 59

**Hon'ble Judges :** Lodge, J;Amin Ahmad, J

**Bench :** Full Bench

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### **Judgement**

Lodge, J.—This rule was issued upon the opposite parties to show cause why an order passed u/s 84, Arbitration Act, 1940, should not be set aside.

2. The material facts are as follows: The present petitioner, Sadhan Kumar Bhattacharjee, son of late Dwijendra Nath Bhattacharjee, instituted a suit against a number of defendants asserting that under a deed of partnership, dated 21st September 1933, a deed of agreement dated 20th September 1933, his father Dwijendra Nath Bhattacharjee, had been, a partner of the defendants and since his father's death, he had become a partner of the defendants in the firm Chatterjee Shaw and Co. He asserted further that the partnership deed was executed by three persons, viz.: Jatindra, Manmatha, and Sunil, of whom Sunil was a benamdar of the plaintiff's father Dwijendra and the plaintiff's uncle Birendra. The plaintiff further asserted that for some time accounts were rendered and payments duly made to his father Dwijendra, but after a time accounts were no longer supplied and a large sum of money was due to Dwijendra from the firm when Dwijendra died on 12th May 1941. The plaintiff further averred that after the death of Dwijendra, accounts had not been furnished to him as partner of the firm and only a sum of Rs. 650 had been paid although a much larger sum was due. Any attempts made by the plaintiff to inspect the books of the firm had been resisted and the other partners were denying that the plaintiff was a partner in the firm. In these circumstances the plaintiff prayed for a declaration that his father late Dwijendra Nath Mukherjee had been a partner of the firm, and that on the death of Dwijendra, the plaintiff

and his brothers had become partners in the firm. He prayed further for accounts from 1936 onwards, and for a final decree of the amount ascertained by the Court to be due to the plaintiff on adjustment of accounts.

3. On 21st October 1944, defendants 1 and 2 filed an application u/s 84, Arbitration Act, 1940, praying for a declaration that the matter be referred to arbitration inasmuch as under the partnership deed it had been agreed that all disputes between the partners and their representatives-in-interest should, be referred to arbitration.

4. The learned Subordinate Judge by his order dated 7th March 1946 refused to stay the hearing of the suit u/s 34, Arbitration Act, 1940. The actual order passed was in these terms:

The point as to objection to jurisdiction will be taken up first for trial after filing of written statement and framing of issues. Defendants to file written statement on 25th March 1946.

Defendants 1 and 3 appealed against this order treating it as an order refusing to stay the hearing of the suit u/s 34, Arbitration Act, 1940. The learned Additional District Judge after hearing the parties reversed the decision of the learned Subordinate Judge, allowed the appeal and directed the suit to be stayed and the parties referred to arbitration as provided for in the deed of partnership. The plaintiff has obtained this rule.

5. On behalf of the plaintiff, it has been argued in the first place that as the status of the plaintiff as partner has been disputed, by the other partners, in the firm, Section 84, Arbitration Act, 1940 has no application, and the hearing of the suit cannot be stayed while the matter be referred to arbitration. In the second place, it has been argued that the application u/s 84, Arbitration Act, 1940, was not tiled in accordance with the provisions of that Section inasmuch as the person making the application had already taken other steps in the proceeding before applying to the Court for stay of proceedings. In our opinion, the second argument is well founded, and therefore, there is no reason for us to consider the first argument.

6. The material facts are as follows: After the plaint was presented, defendants 1, 2 and 4 appeared on 28th August 1944 and filed a petition for time to file written statements. The application for stay of proceedings u/s 34, Arbitration Act, 1940, was filed by defendants 1 and 2 on 21st October 1944. It has been decided in *Sarat Kumar Roy v. Corporation of Calcutta* ("07) 11 C.W.N. 306 and *The Karnani Industrial Bank Ltd. Vs. Satya Niranjana Shaw and Others*, that the filing of an application for time is taking other steps in the proceedings as provided in Section 19, Arbitration Act, 1899, or Section 34, Arbitration Act, 1940 and, therefore, a person who has applied for time to file a written statement is not entitled at a later date to apply for stay of proceedings" u/s 34, Arbitration Act, 1940.

7. For the opposite party, it is contended that defendant 3 adopted the application u/s 34, Arbitration Act, 1940, that at the time when that application was filed, defendant 3 had not been even served with a notice of the suit, and he had not taken any step whatsoever. It is, therefore, contended that the application is a good application so far as he is concerned and should be allowed. It is true that defendant 3 was not a party to the application for time made on 28th August 1944 nor was he a party to the application for stay of proceedings filed on 21st October 1941. There is nothing whatever on the record to show that he associated himself with the application for stay of proceedings at any time prior to the filing of the appeal against the order passed by the learned Subordinate Judge. The order passed by the learned Subordinate Judge was dated 7th March 1946. In the meantime, defendant 3 had made an application for time to file written statement on 24th May 1945. It follows, therefore, that defendant 3 had himself made no application for stay of proceedings before taking other steps in the proceeding. We are unable to hold that the application filed by defendants 1 and 2 on 21st October 1944 can also be treated as an application by defendant 3 to the same effect made on the same date. In our opinion, the application for stay of proceedings u/s 34, Arbitration Act, 1940, was made by the parties to the proceeding after these parties had already taken other steps in the proceeding. In this view, the Court had no jurisdiction to pass a stay order u/s 34, Arbitration Act, 1940. In our opinion, the learned Additional District Judge exceeded his jurisdiction in passing the stay order.

8. This rule is accordingly made absolute. The order of the learned Additional District Judge is set aside and the application for stay is rejected. We make no order as to costs in this Court.

Amin Ahmad, J.

9. I agree.