

In Re: Manekji Cawasjee

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SooperKanoon Citation : sooperkanoon.com/328098

Court : Mumbai

Decided On : Dec-20-1905

Reported in : (1906)8BOMLR85

Judge : Chandavarkar, J.

Appeal No. : Petition No. 443 of 1905

Appellant : In Re: Manekji Cawasjee

Judgement :

Chandavarkar, J.

1. The applicants claim as mortgagees of the insolvents and an order has been made at the instance of one of the opposing creditors for their examination as witnesses, under Section 36 of the Indian Insolvency Act. Mr. Davar, appearing for them, prays that the order should be set aside, upon the ground that the object of the examination is not any benefit to the insolvents' creditors or estate but simply to obtain information regarding the title of the applicants so as to enable the opposing creditors through the Official Assignee to utilise it against them in a suit which is threatened. The learned Advocate General, who appears for the opposing creditor, disputes Mr. Davar's locus standi on the ground that a person, for whose examination as a witness an order has been made under Section 36, has no right to object to it. In support of his contention the learned Advocate General relies upon the decision of this Court in In the matter of Nursey Kessowji ILR (1879) 3

Bom. 270, where it has been held that a witness appearing for examination by virtue of an order made under Section 36 of the Indian Insolvency Act, is not entitled as of right to appear by Counsel, but ' that Counsel might properly be allowed to attend under special circumstances.' That decision, however, applies only where a witness is willing to be examined under the section but desires to be represented by Counsel during the examination. Mr. Davar's objection in the matter before me now is of a different nature. He objects to the examination itself and contends that the order made under Section 36, is prejudicial to his clients' interests. Though the Act is silent on the point, yet on the principle of natural justice alone, he is entitled, (in my opinion), as of right, to appear by counsel and to satisfy the Court that the order, passed ex parte was erroneously made.

2. But after once the order has been made the party complaining of it ought to take out a rule to have it set aside. It is not the right procedure to apply for its revocation just before the commencement of the examination without any previous notice to the other side.

3. Although the present application is irregular, I do not think I should reject Mr. Davar's prayer upon that technical ground alone and put his clients to further expense, seeing that upon the merits I have heard full arguments and have arrived at a conclusion adverse to him. Section 36 gives a discretionary power to the Court and it must be exercised only for the purposes specified in the section. If the object of the party seeking the examination of a witness is to serve some indirect purpose or to harass or annoy the latter and not the benefit of the insolvent's creditors or estate, the examination should not be allowed. In the present case I am not satisfied at this stage that the opposing creditor who has obtained an order under the section and is supported by the Official Assignee is inspired by any indirect motive. If during the examination it appears that that is his motive, it will be my duty to interfere. Sufficient safeguards are provided by the Evidence Act to protect the applicants if during their examination questions are asked as to which they have a right to claim privilege. I hold that the examination should be allowed as directed by my order. I pass no order as to costs as two of the preliminary points are new and this decision of mine settles them for future guidance.

