

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1894.

December 1.

NATHMULL NARSINGDA'S, PLAINTIFF, v. MALHARRA'O HOLKAR,
AN INFANT, AND ANOTHER, DEFENDANTS.*

Practice—Procedure—Inspection—Affidavit of documents—Minor.

An affidavit of documents may be required from a minor defendant.

SUMMONS for inspection. The plaintiff sued the defendants, who were both minors, as the legal representatives of their father Yeshwantráo Holkar, who died on the 22nd July, 1890. The plaintiff claimed payment of a large sum of money which he alleged to be due by the said Yeshwantráo Holkar, and also specific performance of a certain agreement, or damages.

On the 15th November, 1894, the plaintiff took out a summons calling on the defendants to "show cause why they should not produce, for the inspection of the plaintiff, all books, papers, &c., in their possession, power or control, or in the possession, power or control of any person or persons on their behalf, &c."

On behalf of the defendants it was objected that an infant defendant could not be required to make an affidavit of documents.

Scott, for the defendants, showed cause.

Macpherson, for the plaintiff, *contra*.

FARRAN, J.:—This is a summons taken out by the plaintiff seeking production of the documents in the defendants' possession for the purpose of inspection. The defendants are the minor representatives of their deceased father, and according to the practice hitherto observed in this Court, no affidavit of documents has been required to be made by them or on their behalf, and no such affidavit has been, in fact, made. It is not denied that there are documents in the possession of the defendants, or of their guardian *ad litem*, relating to matters in question in the suit.

Section 129 of the Civil Procedure Code (Act XIV of 1882) provides that the Court may order any party to the suit to declare by affidavit all the documents in his possession or power relat-

* Suit No. 132 of 1894.

ing to the suit; and any party to the suit may apply to the Court for a like order. Section 130 enables the Court to make an order for the production of documents. These sections follow the wording of Order XXXI, rules 12 and 14 of the Rules of the Supreme Court in England framed under the Judicature Act; and under these rules it has been held that an infant party to a suit should not be called on to make an affidavit of documents—*Curtis v. Mundy*⁽¹⁾. The hardship, not to say injustice, arising from that rule was pointed out in *Mayor v. Collins*⁽²⁾, but the Judges there felt that they were bound by the established practice of the Court of Chancery, which had not been abrogated by the new rules, and was binding upon the Courts—*Redfern v. Redfern*⁽³⁾. That practice has of itself no binding force on this Court, which is governed by the Civil Procedure Code, though it is followed as a guide in cases where the path is unmarked. The practice of not requiring an affidavit did not prevail in the Divorce Court, as appears from the judgment of Lindley, L. J., in *Redfern v. Redfern*⁽³⁾, where the Lord Justice speaks of it as applied in Courts of Equity, as in his opinion “too rigid.” It appears from the same case that it had been the practice to order infants to make affidavits of documents in the Queen’s Bench Division, until in *Mayor v. Collins*⁽²⁾ it was decided that the practice was opposed to the rules. Now by rule 29 of Order 31 the old practice of the Court of Chancery has been swept away in this respect, and an affidavit may be required, in the Supreme Court in England, from an infant or from his guardian or next friend. The practice here has not been crystalized into a rule, or established by the decision of an appellate Court; nor has it, I believe, been laid down after argument. There is, therefore, no reason for retaining it, if it is an incorrect practice. To me it appears to be incorrect. Written statements are required from infant defendants, and are constantly filed on their behalf. I can see no reason why an affidavit of documents should not be similarly required. It would in many cases amount to a denial of justice to refuse to allow a plaintiff inspection of his opponent’s documents vouched by affidavit.

(1) L. R. (1892), 2 Q. B., 178.

(2) 24 Q. B. D., 361.

(3) L. R. (1891), P., 139 at p. 143.

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I shall, therefore, make the order that the defendants do produce upon affidavit the documents in their possession relating to the suit in the usual form. As to how it is to be obeyed, or what will be the consequence if it is not obeyed, I need not now determine. I understand that there will be no difficulty in complying with it in the present case. The guardian will, I understand, make the affidavit. To the order the proviso asked for by counsel for the defendants will be added that inspection need not be given until the plaintiff has made his affidavit of documents.

I do not by this order decide that the next friend or guardian of an infant can be directly ordered to make an affidavit of documents. Different difficulties stand in the way of the making of such an order, such as are pointed out in *Waghji Thackersey v. Khatdo Rowji*⁽¹⁾, *Ingram v. Little*⁽²⁾ and *Dylke v. Stephens*⁽³⁾, which the alteration of the Supreme Court Rules in England does not get rid of, and which apparently the Legislature only can remove; but I give no opinion upon this point. Costs to be costs in the cause.

Attorneys for plaintiff:—Messrs. *Dikshit and Hirálál*.

Attorneys for defendants:—Messrs. *Tyabji, Dayabhai & Co.*

(1) I. L. R., 10 Bom., 167.

(2) 11 Q. B. D., 251.

(3) 30 Ch. D., 189.

ORIGINAL CIVIL.

Before Mr. Justice Candy.

DORA'BJI JEHA'NGIR RANDIVA, PLAINTIFF, v. MUNCHERJI
BOMANJI PANTHA'KI, DEFENDANT.*

Limitation—Limitation Act (XV of 1877), Sch. II, Art. 60—Deposit—Loan.

The plaintiff claimed to recover from the defendant, who was his grandfather, the sum of Rs. 4,917, which was the amount standing to his credit in an account in the defendant's books. In November, 1869, the plaintiff being then one year old, his mother (the defendant's daughter) paid over to the defendant the sum of Rs. 650,

* Suit No. 363 of 1894.

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