

ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

1905.

October 14.

THE ADVOCATE GENERAL OF BOMBAY, PLAINTIFF, v. ADAMJI MAHOMEDALLI AND ANOTHER, DEFENDANTS.*

Advocate General—Affidavit of documents by order of the Prothonotary against Advocate General—Power of the Court—Prerogative of the Crown—Practice—High Court Rule 80a—Civil Procedure Code, section 129.

The position of the Advocate General in India corresponds by statutory enactments to the position held by the Attorney General in England and there is ample authority for the view that generally speaking the Attorney General is not called upon to make discovery on oath. An order by the Prothonotary calling upon the Advocate General to show cause why a suit instituted by him should not be dismissed for want of prosecution is not one which is within the jurisdiction of the Prothonotary to make.

SUMMONS in Chambers.

The Attorneys for the 1st defendant served the Attorneys for the plaintiff with an order signed by the Prothonotary for an affidavit of documents. The plaintiff's Attorneys accordingly furnished the Advocate General with a draft affidavit of documents for his approval. The Advocate General declined to approve it on the ground that it was not the practice for the Advocate General to make such affidavits, but he stated that there was no objection to the relators by whom he was put in motion making such affidavit as the defendants desired.

The Attorneys for the 1st defendant, thereupon, took out a summons calling upon the Advocate General to show cause why the suit should not be dismissed for want of prosecution.

Bahádurji in support of summons.

Scott, Advocate General, shewed cause.

Discovery *on oath* cannot be obtained from the Attorney General: *Prioleau v. United States, and Andrew Johnson*⁽¹⁾. Nor can discovery be compelled from the Crown; *Attorney-General v. Newcastle-upon-Tyne Corporation*⁽²⁾. The same points are dealt with in *Kerr* on discovery, Chapter IV, page 94, and Daniell's Chancery Practice, 6th Ed., pp. 158, 1812. A charity suit filed

* Suit No. 125 of 1905.

(1) (1863) L. R. 2 Eq., 659 at p. 661. (2) [1897] 2 Q. B. 384 at pp. 388, 395.

by the Advocate General is filed for the Crown: *Daniell's Chancery Practice*, pp. 48, 49, 157 *cf.* 53, George III, c. 155, sec. 111, Ilbert on Government of India, p. 255, sec. 109. For the Crown to be bound by an Act it must be expressly intimated. See *The Secretary of State for India v. Mathurabhai*⁽¹⁾. The order made in the case by the Prothonotary is not made either under the Code or under the Rules of the High Court. The defendant is to blame for asking such an order of the Prothonotary. Even if this order is covered by High Court Rules 75(f) and 80(a) it was not obtained with the written consent of the parties concerned and is therefore invalid. This consent is requisite under the rules as otherwise the Prothonotary has no jurisdiction to act judicially.

Quasi-judicial acts may be delegated: Civil Procedure Code, section 637; these are acts which the Code requires to be done by a Judge. The High Court's powers to make rules under the Letters Patent to regulate its own procedure as regards its original civil jurisdiction cannot affect the prerogatives of the Crown.

The making of an order for discovery on affidavit of documents falls under section 129 of the Code and may be made through the Court only; and under High Court Rule 153 can only be made by the Court as Judge, this rule not being one of those mentioned in Rule 80 (a) under which applications are to be made to the Prothonotary.

In any event the granting of such discovery is a matter of judicial discretion and not a matter of course. Clearly the present case is not one in which the Court would exercise such discretion for the practice is to offer such inspection as is necessary and this has been done.

BACHELOR, J.:—This is a case of a Chamber order which has been issued by the Prothonotary calling upon the Advocate General as plaintiff in Suit No. 125 of 1905 to show cause why this suit should not be dismissed for want of prosecution.

Unquestionably this is rather a strong order and in my opinion under section 80 (a) of the High Court Rules it is not an order which was within the jurisdiction of the Prothonotary. Admittedly there was no consent of the Advocate General to that

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(1) (1889) 14 Bom. 213 at p. 218.

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order, and when reference is made to the applications which under rule 80 (a) require consent before the Prothonotary has jurisdiction, it will, I think, be recognised that this application is at least on as high a footing as those mentioned in the rule.

Then it is not, I understand, denied that the position of the Advocate General here corresponds by statutory enactments to the position held by the Attorney General in England, and there is ample authority for the view that in general the Attorney General is not called upon to make discovery upon oath. It is relevant to add, as the Advocate General assures me, that so far as he recollects, he has not in the past been called upon to make such discovery. I should certainly be reluctant to introduce a practice different from that which obtains in England in this matter.

It appears to me that the difficulty has arisen almost entirely owing to the form of procedure which the first defendant has elected to adopt. It must have been patent to him from the first that the Advocate General was suing at the instance of relators, and the Advocate General has from the first been willing that the relators should make affidavits concerning the one relevant document in their possession, that is to say, the Will of Piroo Dossa, which is referred to in the annexure to the plaint.

The order must be discharged with costs as against the Advocate General.

As against the second defendant, the fact is that he has now filed his affidavit of documents, but as he did not do so until after this order was taken out, I think that the first defendant is entitled to his costs as against him.

Counsel certified as between plaintiff and first defendant.

I should add that I do not desire by this judgment to curtail the powers which the Prothonotary has hitherto exercised under Rule 80 (a). Here the case was a special one owing to the Advocate General being the plaintiff.

Summons dismissed and order discharged.

Attorneys for the Plaintiff:—*Messrs. Kanga and Patell.*

Attorneys for the Defendants:—*Mr. K. D. Shroff.*

W. L. W.