

VYTHILINGA
v.
VENKATA-
CHALA

obstruct. The plaintiffs as lessees are clearly entitled to bring the suit. See *Achayya v. Hanumantrayudu*(1).

On these grounds we must reverse the decree of the District Judge and decree plaintiffs' possession of the lands sued for with costs in both Courts against defendants Nos. 2 to 9, who have made a joint defence. The first defendant will bear his own costs in the Lower Court.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Wilkinson.*

KRISHNABHUPATI (PLAINTIFF), APPELLANT,

v.

RAMAMURTI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1892.
March 24.

Civil Procedure Code, s. 154—Fraud—Suit to set aside decree on ground of fraud and collusion.

A Judge cannot dispose of a suit at the first hearing if a party appears and objects to the adoption of that procedure.

Decrees having been passed against the present plaintiff's father and his agent, respectively, property claimed by the present plaintiff was attached. He filed two suits by his next friend to have the attachments set aside, but these suits were dismissed. He now sued to have set aside the decrees dismissing these suits, alleging that his father's agent, defendant No. 2, had colluded with the decree-holder, defendant No. 1, and given false evidence and that the decrees had been obtained thereby :

Held, that the plaint disclosed a good cause of action.

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 37 of 1890.

The plaintiff sued by his next friend praying the Court to set aside the decrees passed in original suit No. 13 of 1887 and original suit No. 19 of 1888 on the file of the District Court of Vizagapatam.

The first of these decrees dismissed a suit brought by the present plaintiff to cancel an attachment of certain property (claimed by the plaintiff) in execution of a decree in original suit No. 374 of 1885 on the file of the District Munsif of Vizianagram obtained

(1) I.L.R., 14 Mad., 269.

* Appeal No. 144 of 1891.

by the present defendant No. 1 against defendant No. 2 who was the agent of the plaintiff's father. As to this part of the case paragraphs 3 and 11 of the plaint stated as follows :

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“ Evidence is forthcoming to show that second defendant, Ramayya, who has, by virtue of a regularly executed and registered Muktyarnama, acted as plaintiff's Muktyar and administered the affairs of the lands comprised in the deed of gift and settlement mentioned in the first paragraph of this plaint, colluded with first defendant on the understanding that the latter would not execute against him the decree in the said original suit No. 374 of 1885 of the District Munsif of Vizianagram, and gave such improbable and palpably untrustworthy testimony as is mentioned in the above transcribed paragraph 14 of the judgment in original suit No. 13 of 1887.

“ The judgment and decree in original suit No. 13 of 1887 are tainted with fraud and *mala fides*, inasmuch as they were obtained by collusion and misrepresentation of facts which will be proved.”

The second of the decrees sought to be set aside dismissed a similar suit brought by the present plaintiff to cancel another attachment of the same property in execution of a decree obtained by the present defendant No. 1 against the plaintiff's father. This was dismissed for the reason that it was governed by the decision in the other case.

The District Judge held that the suit was not maintainable, observing that to hold otherwise would render nugatory the provisions of Civil Procedure Code, s. 13, and added :

“ It further appears to me that an action to set aside a decree on the ground of fraud can be brought only in those cases when, under section 44, Indian Evidence Act, a party may show that the decree was obtained by fraud or collusion.

“ There is no allegation of collusion between the parties in obtaining the decrees now impeached and as regards fraud. I take it that fraud in such cases must be what is described in the case of *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*(1) as bilateral fraud. In the present case unilateral fraud is alleged.”

The District Judge disposed of the case at the first hearing,

(1) I.L.R., 5 Bom., 703.

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although the plaintiff's pleader objected to the adoption of this procedure and he passed a decree dismissing the suit.

The plaintiff preferred this appeal.

Ramachandra Rau Saheb for appellant.

Mahadeva Ayyar for respondents.

In the course of the argument COLLINS, C.J., said, with reference to paragraph 3 of the plaint above set out, that if the nature of the fraud was held not to be sufficiently pleaded, the plaint should be amended.

JUDGMENT.—Two objections are taken to the decree of the District Judge. First, it is argued that the Judge was wrong in disposing of the case at the first hearing, inasmuch as the plaintiff's pleader objected (section 154 proviso of the Civil Procedure Code). The pleader has put in an affidavit in support of his assertion. We see no reason why we should not accept this affidavit, and must hold therefore that the Judge was not justified in acting under section 154.

It is further contended that the plaint discloses a sufficient cause of action. We think that this is so. Reading together paragraphs 3 and 11 it appears that the plaintiff charges that first defendant fraudulently obtained a decree in original suits Nos. 13 of 1887 and 19 of 1888, the second defendant having colluded with him and assisted him to obtain that decree by giving evidence which plaintiff is in a position to prove false. There is no question of *res judicata* if the plaintiff can prove that the decree in the former suit was obtained by fraud and collusion and section 44 of the Evidence Act does not bear the construction put upon it by the Judge.

The plaint discloses a cause of action, and we must set aside the decree of the District Judge and remand the suit to be heard and determined on its merits. Costs hitherto incurred to abide result.