(1909) 04 CAL CK 0001

Calcutta High Court

Case No: None

Golab Koer		APPELLANT
	Vs	
Badshah Bahadur		RESPONDENT

Date of Decision: April 14, 1909

Judgement

1. This is an appeal on behalf of the plaintiff in an action for recovery of possession of an estate of considerable value left by her husband, Roy Sultan Bahadur, who died on the 11th April 1892. The circumstances under which the litigation has been commenced have not been investigated by the Court below, but in so far as they are cited in the plaint, they may be thus briefly narrated. Shortly after the death of her husband the plaintiff took out Letters of Ad-ministration with a copy annexed of the deceased''s will, which had been executed on the 23rd March, 1892. The will authorized her to adopt three sons in succession, and on the 4th December 1893, she adopted one Elkhart Abrader, who died on the 30th December 1894. The plaintiff thereupon continued to be in possession of the estate of which she had been divested by the adoption and which, subsequently, reverted in her as the mother of her first adopted son. ''On the 5th March 1897, she took the present defendant Bad shah Abrader as her second adopted son, on condition that she would continue in possession of the entire estate during her lifetime. Shortly after disputes broke out between herself and the natural grandfather of the defendant, who claimed to be entitled to the immediate possession of the properties on behalf of the infant. On the 20th January 1903, the plaintiff instituted a suit to set aside the adoption of the defendant and for declaration that she was entitled to remain in possession of the estate as the mother of her first adopted son. The matter in dispute between the parties was referred to arbitration and, on the 18th August 1903, a decree was made in accordance with the award of the arbitrators. It is not necessary for purr-present purposes to set out in detail the terms of the award. It is sufficient to state that its effect was to confirm the validity of the adoption of the defendant, to appoint the grandfather of the latter as his guardian, to place the entire estate under the management of the Court of Wards and to make various

provisions for the education and maintenance of the infant, for the maintenance of the plaintiff, and for the management of the estate generally. On the 21st May 1904, the plaintiff commenced a second suit to set aside the decree of the 18th August 1903, which she impeached on various grounds, amongst'' others on the ground that it had been obtained by fraud. This suit was compromised, and on the 15th June 1904, a decree was made by consent, the effect of which was to reaffirm the adoption of the defendant, to declare that the plaintiff had no subsisting interest in the estate of her husband, and generally to confirm the result of the decree of the 18th August 1903. On the 9th July 1904, the plaintiff applied for a review of this consent-decree on the ground that her consent to the compromise had boon obtained by coercion and undue influence, that she was not allowed to have independent advice, and that the effect of the compromise was not fully explained to her. The Subordinate Judge enquired into these allegations, and found that they were not established by the evidence, and accordingly dismissed the application for review on the 7th. October 1904. On the 15th December 1006, the plaintiff commenced the action out of which the present appeal arises, for recovery of the estate left by her husband either as his widow or as the mother of her first adopted, son; She further asked for a declaration that the alleged adoption of the defendant was invalid under the Hindu Law and had no legal effect, that the defend-ant had consequently acquired to valid title to the estate, and that the decree on the arbitration award of the 18th August 1903, and the consent-decree of the 15th June 1904, were vitiated by fraud and were of no legal consequence whatever. The claim of the plaintiff was resisted on the merits as well as on the ground that the decrees of 1901 and 1904 which were no longer liable to be set aside presented an effective bar to the suit. The Subordinate Judge on these pleadings raised thirteen issues. Of these the first raised the question, whether the suit was barred by Sections 13 and 43 of the Code of Civil Procedure. The second, third and fourth issues raised the questions whether the decree of 1903 was obtained by fraud and the decree of 1904 by coercion, misrepresentation and undue influence. The fifth issue raised the question, whether the plaintiff was entitled to maintain this suit in view of her unsuccessful attempt to impeach the decree of 1904 by an application for review of judgment. The sixth issue raised the question of the legal effect of the decree of 1904. The remaining seven issues raised various questions on the merits as to the limitation, estoppels, factum and validity of the adoption of the defendant, and the conditions, if any, subject to which it had been made. As previously stilted, the Court below has not enquired into the merits, and there has been no investigation into the truth or otherwise of the allegations of fraud, misrepresentation, coercion and undue influence. The Subordinate Judge has thrown out the suit on the ground that Sections 18 and 43 of the Code of 1882 preclude its trial, that the plaintiff is debarred by reason of her ineffectual attempt to review the decree of 1904, from attacking it by a regular suit, and that, if there are new allegations on which the decree is now sought to be impeached, they might and ought to have been made grounds of attack in the application for review. The Subordinate Judge has further

held that the circumstances in which the consent-decree of 1904 is alleged to have been made, do not constitute fraud, and that in any view, the plaintiff is concluded by the decision on the application for review of judgment. The plaintiff has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been assailed, substantially on three grounds, namely, first, that a consent-decree cannot, under any circumstances, be impeached by an application for review of judgment, and any order of dismissal made upon such an application does not debar the applicant from recourse to a regular suit which is her only remedy; secondly, that even if a consent-decree can be reviewed on grounds other than fraud, it cannot be reviewed when it is assailed on the ground of fraud, misrepresentation, coercion, undue influence or mistake; and, thirdly, that, even if it be assumed that a consent-decree may be attacked on the ground of fraud either by an application for review of judgment or by a regular suit, the mere fact that the injured party had recourse to an application for review of judgment does not debar him from recourse to a regular suit, that the two remedies are not inconsistent and alternative, but cumulative and concurrent, and that the decision upon the application for review does not operate as resjudicata and does not present a full investigation into the matters in controversy in a regular suit. In answer to this contention, it has been argued on behalf of the defendant, first, that a consent-decree may be attacked on the ground of fraud either by an application for review of judgment or by a regular suit, secondly, that the two remedies are alternative, so that when a litigant has made his election of one of these alternatives, he must betaken to have abandoned the other; and thirdly, that even if the remedies be regarded as concurrent and cumulative, the decision upon the application for review of judgment operates as resjudicata in the regular suit, not only in respect of matters directly and substantially raised and decided, but also as regards matters which might appropriately have been made grounds of attack. The questions raised are of considerable importance and by no means free from difficulty, and with a view to determine which of them ought to prevail, we shall begin with an examination of the judicial decisions on the matter, many of which were discussed at the bar.

2. One of the earliest cases in this Court which is usually treated as the leading authority upon the question of the proper mode; of attacking consent-decrees is that of Aushootosh Chandra v. Tara Prasanna Roy 10 C. 612 In this case it was ruled by Mr. Justice Wilson, with the concurrence of Mr. Justice Tottenham, that for the purpose of setting aside a decree passed in pursuance of a come made out of Court, there are two available modes of procedure, namely, first by : a suit and, secondly, by a review of the judgment sought to be set aside, the latter being the more regular mode of procedure. The rule thus laid down, if well-founded on principle, and really Supported by the authorities upon which the learned Judges relied, negatives the first contention of the appellant, the grounds of the decision, therefore, require: careful examination. In that case it appears that there were two

appeals pending in the High Court in which the parties who were appellants in the one, were respondents in the other. Before the hearing of the appeals, negotiations for compromise were set on foot, as a result of which it was intimated to the Court that one of the appeals would have to be dismissed and the other decreed. The precise terms of the compromise were not placed before the Court, but decrees were ordered to be drawn up in the sense just indicated. Subsequently, the appellants in the appeal which had been dismissed, who were respondents in the appeal which had been decreed, applied to the Court to set aside the consent-decree on the allegation that their opponents had failed to carry out the terms of the compromise on the basis of which the Court had been invited to dismiss their appeal and to decree the other appeal. A. rule was issued, in answer to which it was contended that the case was not one in which the Court could set aside the consent-decrees on motion. The learned Judges upheld this objection, but they further went on to explain what would be the proper procedure by which: the consent-decrees could be impeached. In their opinion a suit might lie to set aside the whole transaction which had culminated in the terms of the consent-decrees, but a more proper mode of procedure would be to apply for a review of judgment. It is worthy of note that this expression of opinion was in reality an obiter dictum, because it was sufficient for the Court to hold that the decrees could not be impeached by way of motion. Apart from this circumstance, let us examine for a moment the grounds for this decision. The learned Judges in support of their view relied upon the cases of Lalji Sahu v. Collector of Tirhoot 6 B.L.R. 648 : 15 W.R. 23 (P.C.); Mewa Lal Thakoor v. Bhujhun Jha 13 B.L.R. App.11 : 2 W.R. 1.3 and Gilbert v. Endean 9 Ch. D. 259. The first of these cases is a decision of their Lord- ships of the Judicial Committee, and, if it really decides that an application for review of judgment is the appropriate procedure by which a consent-decree can be assailed, the matter may be taken to have been concluded by a judicial decision of the highest authority. Upon an examination of the actual decision, however, it turns out that it cannot in any sense be treated as an authority for this pro-position. There the Subordinate Judge was invited by the plaintiff to postpone the case until the sanction of the Commissioner could be obtained to a proposed settlement. The Subordinate Judge refused the application and made a decree on the merits, stating expressly in his judgment that, if his decision was contrary to the order of approval of the Commissioner, and was prejudicial to either of the contending parties, they would be at liberty to present a petition for review of judgment. Two months later the Commissioner approved the proposed compromise; and shortly after, the defendant applied for a review of judgment, alleging that his consent to the compromise had been obtained by fraud. The Subordinate Judge granted the review and his order was upheld in appeal by the High Court. Their Lordships of the Judicial Committee confirmed this view, on the ground that there was no compromise concluded in such a way as to prevent the character and particulars of the claim being reconsidered upon a petition of review. Lord Cairns pointed out expressly that provision was made in the original order to keep alive the right of either party, if

dissatisfied, to have a petition of review. It is difficult to appreciate how this decision of their Lordships of the Judicial Committee can be treated as an authority for the proposition that an application for a review of judgment is an appropriate procedure to set aside a consent-decree on the ground of fraud. The second case upon which the learned Judges relied is that of Mewa Lal Thakoor v. Bhujun Jha 13 B.L.R. App. 11 : 2 W.R. 1.3. There the question arose in a suit to sot aside an ex parte decree on the ground of fraud. The District Judge had held upon the evidence that the decree was not impeachable on the ground of fraud, and this Court affirmed that view. The learned Judges, however, went on to observe and these observations were clearly in the nature of obiter dicta, that the suit had been to a considerable extent misdirected. They pointed out that the ex parte decree might have been set aside u/s 119 of the Code of 1859, or might have been reviewed if it was shown to have been obtained by fraud. With reference to this decision, it may be remarked in the first place that the question did not arise in relation to a consent-decree, and, therefore, the case cannot rightly be treated as an authority upon the point before us. And in the second place, it may be observed that, if the learned Judges intended to lay down that an ex parte decree could be either set aside on the grounds mentioned in Section 119 of the Code of 1859, or reviewed on the ground of fraud, but could not be impeached by a regular suit on the ground of fraud, their view is inconsistent with the decision of their Lordships of the Judicial Committee in Radha Raman Shaha v. Pran Nath Roy 28 Cal. 475 which confirmed the decision of this Court In Pran Nath Roy v. Mohesh Chandra Moitra 24 Cal. 546 and Khagendra Nath Mahata v. Pran Nath Roy L.R. 29 IndAp 99 : 29 C. 395. These cases affirm the doctrine that an ex parte decree may be set aside by an application on the ground that summons was not served on the defendant or that he was prevented by sufficient cause from appearing when the suit was called on for hearing, and also by a regular suit on the ground of fraud; they further lay down the principle that the suit is maintainable notwithstanding that the injured party has been unsuccessful in an application to set aside the ex parte decree. The third case upon which the learned Judges placed reliance is That of Gilbert v. Endean 9 Ch. D. 259. In that case Sir George Jessel, M. R., held that a compromise ought not to be set aside on motion on the ground that it was obtained by, misrepresentation on concealment of material facts, but that the substantial question between the parties should form the subject of a new action. This case, no doubt, is an authority in support of the view that a consent-decree ought not to be set aside on motion as the Court was invited to do in the case of Aushootosh Chandra v. Tara Prasanna Roy 10 C. 612. It is, however, in no sense authority for the proposition that an application for review of judgment furnishes the appropriate procedure in a case of this description. An examination, therefore, of the grounds of the decision of this Court in the case just mentioned, shows, first, that the decision of the Judicial Committee relied upon by the learned Judges is not an authority in support of their view; secondly, that the observations in the case of Mewa Lal Thakoor v. Bhujun Jha 13 B.L.R. App. 11 : 2 W.R. 13 upon which reliance was placed were not necessary for the purpose of the

decision in that case, and that their binding effect has been very much weakened by the decision of their Lordships of the Judicial Committee in two subsequent cases; and thirdly that the observations of Sir George Jessel in Gilbert v. Endean 9 Ch. D. 259 do not support the view that a consent-decree can be reviewed on the ground of fraud, though they no doubt support the proposition that such a decree can be attacked in a new action on the ground of fraud. It may further be observed that the consent decree in the case of Aushootosh Chandra v. Tara Prasanna Roy 10 C. 612 was not impeached on the ground of fraud, and the case, therefore, cannot be treated as an authority upon the question as to the appropriate mode in which a consent-decree can be vacated on that ground.

3. In this connection, reference may be made to the decision of their Lordships of the Judicial Committee in Unnoda Dabee v. Maria Louisa Stevenson 22 W.R. 290 which may at first sight lend some support to the view that a consent-decree may be reviewed on the ground of fraud. In that case, a suit was brought against one French for himself and as guardian of his infant daughter. A decree was made in the Court of first instance against French in his personal capacity. French appealed on the ground that he ought not to have been made solely responsible for the debt and that his daughter ought to have been made liable under the decree. A decree was then made by consent in the Sadar Court between French and the plaintiff-respondent, the effect of which was to throw the substantial burden of the decree upon the infant. Many years after, when the daughter of French came of age, she made an application to the High Court, which had taken the place of the Sadar Court, for a review of judgment on the ground that the consent-decree was inoperative against her as she was not represented on the appeal, and that her father in furtherance of his own interests had fraudulently omitted to protect her interest in the way he was bound to do as her guardian. The application for review was entertained and allowed. Upon appeal to the Judicial Committee, the decision of the High Court was affirmed on the ground that it was competent to the Court to set aside on review the decree against the infant who was not represented before the Court and on whose behalf there was no assent to the compromise by any competent person. This case is manifestly distinguishable on the ground that it was in essence an application by a person to vacate a decree which was made in her absence and without her consent. She asked to be relieved from the effects of a decree to which in substance she was not a party, a condition of things entirely different from what we find in the class of cases where a person who is a party to a suit assents to a consent-decree which he subsequently seeks to impeach on the ground that his assent was secured by fraud.

4. We shall next examine the more recent cases on the subject in this Court. In the case of Foolcoomary Dasi v. Woodoy Chunder Biswas 25 C. 649 it was ruled by Mr. Justice P.O. Kenealy that a consent decree could not be set aside on motion on the ground that it was obtained by fraud and misrepresentation, but that a separate suit must be brought for that purpose, as charges of fraud could not properly be tried

upon affidavits. The learned Judge pointed out that the course which he adopted was identical with what had been followed in such cases in the High Court of Judicature in England under the Judicature Acts. We shall deal later on with the decisions in the English Courts upon this point, to some of which the learned Judge referred in his judgment.

5. In the case of Barhamdeo Prasad v. Banarsi Prasad 3 C.L.J. 119 the question was raised as to whether a consent-decree could be set aside upon an application for review. Upon an examination of the earlier decisions on the subject, it was ruled that, where a decree was regular in itself and on the face of it correct, it could be set aside only by a suit, so that where a plaintiff sought to set aside a decree based on compromise entered into by his guardian when he was an infant, merely on the ground that the compromise was fraudulent, his only remedy lay in a fresh suit, and he could not revive the previous suit by an application for review. The learned Judges pointed out that the plaintiff could proceed by way of review of judgment, only where it was clear upon the face of the judgment or decree which was impugned that it was irregular or incorrect or not in compliance with the provisions of the law. In the particular case then before the Court, the decree appears to have been attacked, not merely on the ground of fraud, but also on the ground that, as the compromise had not been considered by the Judge and approved by him, the decree was bad and inoperative as against the minors. As regards this latter ground, it was held that the question could be investigated in an application for a review of judgment. As pointed out, however, in the case of Surendra Nath Ghose v. Hemangini Dasi 34 C. 83 there can be no question that a suit would lie to set aside a consent-decree made in these circumstances. This view was also followed in the case of Biku Halwai v. Mohesh Halwai 8 C.L.J. 266. The question has also sometimes arisen whether a decree can be set aside on the ground of mistake. The affirmative view is supported by the case of Jogeswar Atha v. Ganga Bishnu Ghattack 8 C.W.N. 473 while Sadho Misser v. Golab Singh 3 C.W.N. 370 may be treated as an authority for the contrary opinion

6. In the recent case of Ram Gopal Majumdar v. Prasanna Kumar Samad 2 C.L.J. 508 : 10 C.W.N. 529 the same question arose in a suit which had been commenced to set aside a consent-decree on the ground that the pleader who consented to the compromise, had no authority to do so, and that his consent related to matters beyond the scope of the litigation. The plaintiffs had previously made an unsuccessful attempt to set aside the consent decree by an application for review of judgment, in which they had attacked the validity of the decree solely on the ground of want of authority on the part of the pleader. It was ruled by this Court, on the authority of the case of Aushootosh Chandra v. Tara Prosauna Roy 10 C. 612 that it was open to the plaintiffs to attack the consent-decree either by way of a suit or by an application for review of judgment, and that the latter was the more appropriate procedure. It was further held that as the plaintiffs had failed to get the consent-decree set aside by an application for review of judgment, the suit in so far

as it was based upon the allegation of want of authority of the pleader was barred by the rule of res judicata, as the matter had been directly and substantially in issue in the proceeding for review of judgment, and that, in so far as it was based upon the ground that the consent related to matters outside the scope of the litigation, it was equally barred by the doctrine of constructive res judicata as this particular ground might and ought to have been made a ground of attack in the review proceeding. With reference to this case, it must be observed that the consent-decree was not sought to be impeached on the ground of fraud, and, the decision, therefore, is not a direct authority upon the question now before us. As regards the actual grounds of the decisions it may be observed that the learned Judges merely followed the rule laid down in Aushootosh Chandra v. Tara Prasanna Roy 10 C. 612 the authority of which was apparently not challenged before them. Their attention does not appear to have been directed to the circumstance that the observations in that case wore not only not necessary for the decision of the question then be-fore the Court, but were not really supported by the decisions upon which reliance had been placed. It may further be observed that the cases of Koylash Chandra De v. Tarak Nath Mandal note to Rai Charan Ghose v. Kumud Mohun Dutt Chowdhry 25 C. 571 and Bhugwanbutti Chowdhrani v. A.H. Forbes 28 C. 78 upon which reliance was placed, do not support the view that the trial of the questions raised in the suit was barred by the doctrine of res judicata. In the first of these cases it was held that a judgment in a previous suit might operate as res judicata in a subsequent suit notwithstanding the circumstance that the decision in the previous suit was not appealable under the law, whereas an appeal was allowed by the law from the decision in the subsequent suit. The same view was affirmed in the second case in which it was ruled that in order to make a matter res judicata it was not necessary that the two suits should be open to appeal in the same way. These cases, however, are obviously distinguishable, as they related to the construction of Section 13 of the Code of 1882, which defines the circumstances under which a decision in a former suit operates as res judicata in the trial of an issue in a subsequent suit. Here, however, it is not the decision in a former suit, but the order on an application for review of judgment in a former suit, to which it is sought to attribute the effect of res judicata in a subsequent suit, the object of which is to impeach that very decree. By no stretch of language can the proceedings for review of judgment be treated as a suit within the meaning of Section 13 of the Code of 1882. With all deference, therefore, to the learned Judges who decided the case of Ram Gopal Majumdar v. Prasanna Kumar Samad 2 C.L.J. 508 : 10 C.W.N. 529 it must be observed that the effect of their decision is to extend the rule of res judicata both direct and constructive, to the case of an application for review of judgment when the proceeding on such an application is obviously not a suit within the meaning of Section 13 of the Code. We are not unmindful that in some cases, apart from the provisions of Section 13 of the Code of 1882, a character of finality has been attributed to orders inter partes on the ground that, if they are not treated as conclusive, there would be no end to litigations. As types of this class of cases

reference may be made to the decisions of their Lordships of the Judicial Committee-in Ram Kirpal v. Rup Kuari 11 I.A. 37 : 6A. 269 and Beni Ram v. Nanhu Mal 7 A. 102 : 11 I.A. 181 in which it was ruled that an order made at one stage of execution proceedings is binding upon the parties at every subsequent stage. It has similarly been ruled by their Lordships of the Judicial Committee in Mungul Pershad Dichit v. Grija Kant Lahiri 8 C. 51 : 8 I.A. 123 : 11 C.L.R. 13 that the omission of a party in execution proceedings to take at one stage an objection may debar him from taking the same objection at a subsequent stage, when the effect of such objection, if allowed to be taken, would be to nullify an order previously made, in other words, an objection which might and ought to have been taken at an earlier stage, must be deemed to have been taken and overruled. These cases, however, do not lay down any rate of universal application that an order in any proceeding between two litigants debars the trial of the same question between the same parties in a subsequent proceeding, no matter what the scope of the subsequent litigation may be and no matter what were the circumstances in which it might have been commenced. If we were to lay down any such comprehensive rule of law, we should obviously assume the functions of the Legislature. It is difficult, therefore, in our opinion to support the position taken in the case of Ram Gopal Majumdar v. Prasanna Kumar Samad 2 C.L.J. 508 : 10 C.W.N. 529 that because an application for review of a consent-decree on the ground of want of authority in the pleader has failed, the unsuccessful litigant is debarred, under the provisions of Section 13 of the Code of 1832, from maintaining a suit to set aside such decree on the same ground in a regular suit. It is still more difficult to support the position that, be-cause the unsuccessful petitioner omitted in the review proceedings to impeach the consent-decree on the ground that the consent related to matters beyond the scope of the suit, he is debarred, under explanation II to Section 18 of the Code of 1882, from challenging the decree in a subsequent suit on such grounds. Section 13 has obviously no application to cases of this description.

7. See the observations of Lord Westbury in Hunter v. Slewart 4 DGFJ. 168 to the effect that the trial of a new question ought not ordinarily to be deemed as barred, if the decision of the first question does not involve the decision on the second question. So far, therefore, at any rate as the applicability of the doctrine of constructive res judicata is concerned, the case of Ram Gopal Mujumdar v. Prasanna Kumar Samad 2 C.L.J. 508 : 10 C.W.N. 529 seems to go too far and is not supported by the authorities of which it invokes the aid.

8. There is another recent case Rasik Chandra Chowdhwry v. Rajani Ranjan Chowdhury 10 C.W.N. 286 to which our attention has been directed. In it an application for review of judgment was made with a view to set aside a consent decree on the ground of fraud. The learned judges held that the terms of Section 623 were comprehensive enough to entitle the Court to entertain the application. The facts of the case are not indicated in the judgment or in the res port, and there appears to be some indication that the relief was really asked for on the ground of

mistake, and that the question of fraud was only an after-thought. The matter was not discussed as one of principle, nor were any of the authorities examined. The case, therefore, may at best be treated as an authority for the proposition that a consent-decree may be reviewed on the ground of fraud.

9. The question now before us appears to have been raised before the Bombay High Court in Mirali Rahimbhoy v. Rehmoobhoy Habibbhoy 15 B. 594. In that case a suit on behalf of three infant plaintiffs was compromised. One of the plaintiffs upon attainment of majority obtained a rule to show cause why the consent-decree should not be set aside and the suit heard on the merits. The rule was discharged on the ground that the decree was regular and could be set aside only by a regular suit. This case is, therefore, a direct authority for the position that a consent-decree cannot be vacated on motion. The learned Judges declined to follow the observations of this Court in Eshan Chundra Safooi v. Nundamoni Dassee 10 C. 357 to the effect that when a suit on behalf of an infant has been compromised by fraud and collusion between the guardian and the defendants, the infant, upon attainment of majority, might relieve himself from the consequences of the fraud in one of three ways, namely, first, by an application to the Court in the suit in which the withdrawal took place, secondly, by a regular suit to set aside/the judgment founded upon the withdrawal, and thirdly, by bringing a fresh suit on the same cause and setting up fraud as an answer to the statutory bar. Mr. Justice Farran expressly pointed out that, under the English law as explained in Mower v. Lloyd 6 Ch. D. 297 a decree if attacked for fraud, must be attacked by a suit, and if, for error, by a bill of review. He further referred to the cases of Bibee Solomon v. Abdool Azeez 6 C. 687 and Sharat Chunder Ghose v. Kartik Chunder Mitter 9 C. 810 to show that in India, as in England, the practice in such cases is to proceed by a regular suit, a view which is also supported by the case of Lalla Sheo Churn Lal v. Ram Nandan Dobey 22 C. 8

10. Upon a review, then of the judicial decisions to which reference has been made, it seems to us that the cases lay down the broad rule that a consent-decree may be impeached either by an application for review or by a regular suit, but that no attempt is made to classify the grounds for which the one or the other procedure might be deemed the more appropriate of the two. There is only one decision, namely, that of Rasik Chundra Chowdhury v. Rajani Ranjan Chowdhury 10 C.W.N. 286 which can be treated as an authority for the proposition that a consent-decree may be, reviewed on the ground of fraud, but it is more than doubtful whether the review was there sought really on the ground of fraud. On the other hand, the cases of Foolcoomary Dasi v. Woodoy Chunder Biswas 25 C. 649 and Barhamdev Prasad v. Banarsi Prasad 3 C.L.J. 119 expressly lay down that a consent-decree can be set aside on the ground of fraud only by a separate suit. It is further clear that the other cases which lay down the rule that a, consent-decree may be attacked by an application for review of judgment, were not cases in which the application was based on the ground of fraud. While, therefore, it must be conceded that a large

preponderance of authority is against the contention of the appellant that a consent decree cannot, on any ground, be challenged upon an application for review of judgment, there is no foundation for the suggestion of the respondent that there is a preponderance of authority in favour of his contention that the consent-decree may be reviewed on the ground of fraud. No doubt, the language of Section 623 of the Code of 1882 is comprehensive enough to cover the case of a consent-decree, and it is conceivable that there may be cases, for instance, cases of clerical error in a consent-decree in which an application for review of judgment would furnish a speedy and appropriate remedy. But even if it be conceded that Section 623 is applicable to cases where a consent-decree is sought to be reviewed on the ground that the consent was obtained by fraud, misrepresentation, coercion or undue influence, or was due to a mutual mistake of the parties, there are weighty reasons why a regular suit should be regarded as the more appropriate remedy in such a case. It must not be overlooked that a character of finality is attributed to the decision upon an application for review which it is undesirable should be possessed by any investigation of a Court of first instance into grave charges of fraud. Section 629 of the Code of 1882 provides that an order of the Court rejecting an application for review shall be final. It is also clear from the same section that although an order for the admission of review is open to appeal, the appeal is restricted to extremely narrow grounds other than those on the merits. The order granting a review can be challenged on appeal only on the ground that it was made to a Judge who was incompetent to deal with it, or that it was granted without notice to the opposite party or without strict proof of discovery of new matter or evidence, or on the ground that it was barred by limitation. But once an application for review has been granted or refused on the ground that fraud was or was not established, the correctness of the decision on the charge of fraud cannot be tested by appeal. It cannot also be denied that the investigation upon an application for review of judgment is neither as full nor as searching as the investigation in a regular suit. Moreover, the investigation upon the question, whether the consent upon which the decree is founded was or was not vitiated by fraud, is entirely foreign to the subject-matter of the litigation. In fact a consent-decree can be successfully attacked only 011 the grounds on, and in the circumstances in, which the compromise itself could have been challenged even if it had not received the sanction of the Court. It is obviously desirable, therefore, that the investigation of the validity of the consent should form the subject-matter of a distinct suit, the decision in which will be liable to appeal in the same way as the decree in a suit to set aside a compromise on the ground of fraud. In our opinion, the view that a regular suit is the preferable and the appropriate, though not the exclusive remedy in a case in which a consent-decree is assailed on the ground of fraud, is well-founded on principle and is supported by weighty authorities. We shall now consider the rule as laid down in the English Courts, which has been adopted in some of the cases in this country, notably in the cases of Foolcoomary Dasi v. Woodoy Chunder 25 C. 649 and Karmali Rahimbhoy v. Rahimbhoy Habibbhoy 13 B. 137, subsequently affirmed in appeal in Mir Ali v.

Rahimbhoy Rehmoobhoy Habibbhoy 15 B. 594.

11. The procedure followed in England in cases in which a consent-decree is attacked on the ground of fraud is thus described in a work of high authority:

After a judgment has been passed and entered though taken by consent and under a mistake, it cannot be set aside by a motion in the action, unless either there has been a clerical mistake or an error arising from an accidental slip or omission or the judgment as drawn up does not correctly state what the Court actually decided and intended to decide; in any other case in order to set aside such judgment a fresh action is necessary. In such an action the Court has jurisdiction to set the judgment aside on the ground of mistake or any other ground on which an agreement in the terms of the order would be set aside, but not on any other ground. So if a judgment has been obtained by fraud, relief may be had against it by original action. (Daniel on Chancery Practice, 7th Edition, Vol. 1585). In another passage in the same work (Vol. 11, 1289) it is stated that "a judgment taken by consent cannot be set aside by an action of review, unless by a clerical error something has been inserted in the order as by consent which has not in fact been consented to.

12. The principles thus formulated have the sanction of a long series of judicial decisions of the highest authority. Thus in one of the earliest cases on the subject Webb v. Webb 3 Swanston 658 Lord Nottingham in summarily dismissing a bill of review of a decree by consent, observed that, there can be no error in a decree by consent, consensus tollit errorem; there can be no injustice in a decree by consent, volenti non fit injuria." Again in Smith v. Turner 1 Vernon 274; Lord Keeper North dismissed a bill of review of a consent-decree sought to be impeached on the ground of want of authority in the counsel who had compromised. In Harrison v. Rumsey 2 Ves. Sen. 488 Lord Hardwicke stated it as an established rule that a consent-decree could not be set aside on motion, and thought that, if the procedure were to be allowed, it would be most dangerous. Equally emphatic was his declaration in Bradish v. Gee 1 Ambler 229 that where "a decree is made by consent of counsel, there lies not an appeal or re-hearing though the party did not really give his consent, but his remedy is against his counsel, and if such a decree was by fraud, the party may be relieved against it, not by rehearing or appeal, but by original bill". The proposition that a consent-decree cannot be challenged by way of appeal, which had been previously indicated in. Downing v. Gage 1 Eg. Cases. Abr. 165 was reaffirmed by the House of Lords in Toder v. Sansam 1 Brown P.C. 468 and has been adopted in this country in Biraj Mohini Vasi v. Srimati Chinta Moni Dasi 5 C.W.N. 877, on the ground that, as the validity of the consent was a new and entirely distinct case, raising new and distinct issues of fact and of law, it must be determined in a fresh and distinct proceeding. Again in Anonymous 1 Vas. Jun. 93, Lord Thurlow declined to discharge upon motion a consent-decree, and held that, if by a clerical misprision, anything was inserted in the order as by consent to which the party had not consented, the matter might perhaps be rectified by a bill of

review. A similar view was taken by Lord Cottenham in Morison v. Morison 4 Myl. and Craig 215 in which it was observed that, if a decree be obtained under such circumstances as may justify the Court in considering it as a nullity, it may in some cases be got rid of by motion or petition, but if the decree be regular in itself, no error it may contain can be set right in that manner, and even if it were obtained by fraud, it could only be set aside by a bill." The principles thus laid down have been affirmed in a series of modern decisions. Thus in Flower v. Lloyd 6 Ch. D. 297 Sir George Jessel ruled that the proper mode to impeach a consent-decree for fraud was by an original bill. Lord Justice James added that the question whether the judgment was obtained by fraud must be tried in a fresh action, by evidence properly taken, directed to the issue, and wholly free from and unembarrassed by any of the matters originally tried. In Attorney General v. Tomline 7 Ch. D. 388 Mr. Justice Fry thought that, after a judgment by consent has been passed and entered, it could not afterwards be varied on the ground of mistake, except for reasons sufficient to sot aside the agreement. In Gilbert v. Endean 9 Ch. D. 259 to which reference has already been made, Sir George Jessel observed that the question whether a compromise which formed the basis of a consent-decree was invalid, ought to be made the subject of a new action. This view was accepted by Mr. Justice North in Emeris v. Woodward 43 Ch. D. 185 in which it was ruled that the compromise of an action could not be set aside on motion, and that, if the claim was well-founded, it ought to be raised by means of a fresh action. The question arose again in the case of Huddersfield Banking Company v. Lister (1895) 2 Ch. D. 273 is which an application was made to set aside a consent order on the ground that the parties gave their consent under a common mistake. Mr. Justice Vaughan Williams ruled that the matters could not be set right on motion, and his view was affirmed by the Court of appeal. (39 Solicitor''s Journal, 44) An action was next commenced to set aside the consent-decree and it was then ruled by the Court of Appeal that notwithstanding that the consent order had been drawn up and completed and acted upon, in might be set aside upon any ground which would justify the Court in setting aside the agreement entered into between the parties. It was pointed out that the real truth of the matter is that the order is a mere creature of the agreement, and that, if it be hold that it cannot be set aside because it has received judicial sanction, it would be to give the branch an existence which is independent of the tree." Lord Justice Lindley observed that a consent order can be impeached by an action, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expressed in a, more formal way than usual. Lord Justice Kay remarked that, after all, the consent order is only the order of the Court carrying out an agreement between the parties, and that, as the agreement could be set aside, if it existed alone and the order was out of the way, the Court had jurisdiction to set aside the order founded upon the agreement when it was established that the agreement was invalid by reason of fraud, mistake or any other similar circumstance. It may be observed that the question, whether a consent-order could be set aside by a separate action was not raised in the case of Hickman v. Berens

(1895) 2 Ch. 638 which was apparently heard on motion. In the subsequent case of Ainsworth v. Wilding (1896) 1 Ch. 673 however, it was ruled by Mr. Justice Romer that, after a judgment has been passed and taken by consent under a mistake, the Court could not set it aside otherwise than in a fresh action brought for the purpose, unless there had been a clerical mistake or error arising from accidental slip or omission, or unless the judgment as drawn up did not correctly state what the Court had actually decided and intended to decide, in either of which cases the application might be made by motion in the action. The learned Judge further pointed out that different considerations apply to interlocutory orders, and added that, even if a judgment had not been passed and entered, the Court would not always interfere on motion, for example, where from the nature of the grounds relied on conflicting evidence was essential. In that very case an action was then commenced to set aside or rectify the consent decree on the ground of mistake, and the order made by consent and based upon an intent to carry out the agreement come to between the parties was set aside because there was no real agreement between them, as they were not ad, idem by reason of mistake as to the subject-matter of the contract. Widding v. Sanderson (1897) 2 Ch. 544. See also Horrocks v. Stubbs 74 L T 51. There is only ore other case to which reference is necessary in this connection. In Neale v. Lennox (1902) App. Cas 465 : 1 S.E.C. 309, a decree was made by consent by counsel who exceeded his authority. Before the order had been drawn up the plaintiff took steps to set it aside on the ground that it had been made without her authority and consent and contrary to her express instructions. The Lord Chief Justice set aside the order and directed the action to be restored on the list. The Court of appeal reversed this order. Upon appeal to the House of Lords, the order of the Court of Appeal was discharged, Lord Lindley in his speech (at page 473) proceeded on the assumption that the application was made after the order had been drawn up and apparently held that, although the order had been drawn up, it could he set aside by motion on the ground that it had been made without the consent of the plaintiff and in spite of her express instructions. Such a view would be in conflict with the settled doctrine that, when a final judgment has been passed and entered, the Court cannot set it aside unless a fresh action is brought for that purpose, although it had been taken by mistake. The point, however, does not appear to have been argued, and the statement of facts in the report certainly does indicate that the plaintiff took steps to set aside the order before it was drawn up, the cases we have reviewed, therefore, support the proposition that when a consent-decree has been made and entered, if it is challenged on the ground of fraud, mistake or any other like cause, the party aggrieved must proceed by a fresh action; on the other hand; if the consent order is assailed on the ground of clerical error or on the ground that it does not correctly state what the Court actually decided and intended to decide, the remedy is by a motion or by a bill of review.

13. The rule thus firmly established in England has been adopted in the American Courts as well-founded on principle and based on weighty reasons of justice and

convenience. Thus in Gibson on Suits in Chancery, Section 577, the rule is stated as follows:

A decree by consent is in the nature of a solemn contract and is in effect an admission by the parties that the decree is a just determination of their rights upon the real facts of the case, had such been proved. As a result such, a decree is so binding as to be absolutely conclusive upon the consenting parties, and it can neither be amended nor in any way varied without a like consent, nor can it be re-heard, appealed from, or reviewed upon a writ of error. The one only way in which it can be attacked or impeached is by an original bill alleging fraud in securing consent; whore, however, a decree is based upon a writing authorising a particular decree to be made or otherwise adjusting the controversy, if the decree is not justified by such writing, to that extent it is erroneous, and may, therefore, be re-heard, appealed from or otherwise reviewed, as in the case of a contested decree or, the Court may on motion amend or rectify the decree.

14. The principle is similarly enunciated in Fletcher or Equity, Pleading and Practice, Section 104, and Black on Judgment, Section 319, in which it is pointed out that although a Court cannot alter or correct a judgment by consent, except with the consent of all the parties affected thereby, yet it has power in a regular suit to vacate and set it aside on the ground of fraud, mutual mistake, or surprise (See also Encyclopedia of Pleading new Practice, Vol. III, 572, Vol. V, 960.; Vol. XV, 233). In one of the earliest case on the subject, French v. Shotwell 5 Johnson Ch. 555 Chancellor Kent, upon the authority of the decision of Lord. Hardwicke in Bradish v. Gee 1 Ambler 229 held that it was a settled doctrine that a decree by consent was binding unless procured by fraud, in which case the party may be relieved against it by an original bill. To the same effect is the decision in Walsh v. Walsh 116 Mas 377, 17 A Rep. 162 in which Chief Justice Gray held that a decree made by consent of counsel without fraud or collusion, cannot be set aside by re-hearing, appeal or review. This last case was affirmed by the unanimous decision of the Supreme Court of the United States in Thomson v. Maxwell 168 N.S. 465 in which Mr. Justice Brewer stated that the rule as just enunciated was well-settled. The Supreme Court had previously held in Thompson v. Maxwell 95 U.S. 391 that a bill of review does not lie if the decree sought to be set aside and reversed was a consent-decree. But in the case of White v. Miller 158 U.S. 128 it was pointed out that if a decree which purported to have been made by consent was challenged on the ground that there was not consent and that what purported to be the signature of the solicitor of the defendant was a forgery, a bill of review might well lie. This view, it may be observed, is analogous to what has been adopted by this Court in the case of Bholai Naskar v. Alach Naskar 3 C.L.J. 158. and Kunja Behari Ghose v. Durgamoni Dassi 3 C.L.J. 160 in which it was ruled that a decree which was in reality an ex parte decree, although, the record shows that it was by consent; could be set aside under the procedure prescribed for setting ex parte decrees and that it was competent for the party aggrieved to prove that there was in fact no assent: on his part to the consent

decree. The nature of consent decrees and the grounds and modes of setting them aside were elaborately examined in Morris v. Peyton (1886) 29 W.Va.201; 11 S.E. 954 in which it was pointed out that such a decree does not in reality represent the judgment of the Court upon the merits of the case but it is founded on the contract or agreement of the parties adopted by the Court as the foundation of its decree. It cannot, therefore, be modified, set aside, or annulled without the consent of all the parties, unless the consent was procured by fraud or through a mistake of the parties or any other like ground, in which case the party injured by the fraud or mistake can get it set aside or modified by original bill." The position, however, is different when there is a clerical error which can be set right on motion or review, although questions of some nicety may arise us to whether a particular error falls within the description of a clerical error. To the same effect is the decision in Stibs v. Mc.Gee 37 Oregon 574; 61 Pacific 1129 in which Bean, C.J. observed as follows : " A consent-decree is not in its strict legal sense a judicial sentence or judgment of the Court, but is in the nature of a solemn contract between the parties. When a decree is made by consent of parties the Court does not enquire into the merits or equities of the case. The only questions to be determined by it are, whether the parties are capable of binding themselves by consent and have actually done so. These are the two facts to be determined before the Court orders a decree to he entered, and when thus entered, showing on its face that it is by consent, it is absolutely conclusive upon the consenting parties. It cannot be amended, or varied in any way without the consent of all the parties affected by it, nor can it be re-heard, vacated, or set aside by the Court rendering it, nor can it be appealed from or reviewed upon a writ of error; the only way in which it can be attacked or impeached is by an original bill on the ground of fraud or material mistake." The rule is stated in substantially the same terms in Bewaer v. Jones 114 N.C. 644, 19 S.E. 163. We refer to the English decisions on the subject as well as to the American decisions which adopt and follow the English rule, not because they are in any sense authorities binding upon this Court, but merely because they indicate plainly that the rule that a consent-judgment ought to be attacked on the ground of fraud or mistake not by way of motion or review but by a separate action, is based upon substantial grounds of convenience and justice; it is not a. rule based upon any artificial or technical reasons peculiar to any particular system of jurisprudence.

15. On these grounds we must hold that the first contention of the appellants, that a consent decree cannot, in any circumstance, be reviewed, is too broadly expressed. There may be circumstances in which, (for instance when a consent-decree is attacked on the ground of clerical errors), the party aggrieved may have a speedy remedy by way of an application for review. As regards the second contention of the appellant, that when a consent-decree is assailed on the ground of fraud, misrepresentation, mistake, coercion, undue influence, or any similar grounds, it ought to be attacked by an original suit. We are of opinion that this ground is well-founded and ought to prevail. It may be conceded that the comprehensive

language of Section 623 of the Code of 1882 may make it difficult to sustain the extreme view that the Court has no jurisdiction to review a consent-decree on the ground of fraud or for any similar reason; but we feel no doubt whatever that when a consent-decree is attacked on such grounds, undoubtedly the more appropriate remedy is by a separate suit in which the question, whether the consent is invalidated by any vitiating circumstance,-a question which is entirely foreign to the subject-matter of the controversy between the parties may be fully investigated upon evidence especially directed to that point and tested as to its adequacy not only by the Court of first instance but also by the Court of Appeal.

16. The only other point which requires consideration is, whether in this view after an unsuccessful application for review of the consent-decree has been made, a regular suit is open to the party aggrieved for determination of the question as to how far the consent decree is liable to be set aside on the ground of fraud. The case of Ram Gopal Majumdar v. Prasanna Kumar Samad 2 C.L.J. 508 : 10 C.W.N. 529 to which we have already referred, does appear to show that a suit would not be maintainable, not merely in respect of the point actually raised, but also with regard to points which might have been made grounds of attack in the application for review. That case, however, was not one in which the consent-decree was challenged on the ground of fraud. In order to determine whether a suit would be barred by reason of an unsuccessful application for review of judgment we have to consider whether the two remedies are alternative or cumulative. We have already indicated our opinion that the remedy by way of a regular suit is undoubtedly more appropriate than the remedy by an application for review of judgment. The two remedies, therefore, cannot be regarded as parallel and equally efficacious. Consequently no question of election of remedies arises in a case like this. That a litigant may have more than one remedy open to him in respect of the same matter is obvious from various provisions of the law; we may mention as illustrations the cases of a regular suit after an unsuccessful opposition in execution to an intended sale or after an unsuccessful obstruction by a claimant other than the judgment-debtor to delivery of possession of properties sold, or after an unsuccessful effort by a claimant to recover possession of land by a possessory action. It cannot be affirmed as a general proposition of law that, whenever there are two remedies open to a party aggrieved in respect of any matter, he is bound at his peril to make an election and that, if he chooses one remedy, he is necessarily debarred from recourse to the other. Where different remedial rights arise out of the same facts, the question whether the party aggrieved is bound to make an election depends upon the circumstance whether the remedies are in their nature inconsistent. The essence of the matter is that a litigant cannot come before a Court of Justice and have recourse to repugnant remedies; in other words election is the choice between two or more co-existing and inconsistent remedies. (See Andrew''s Commentaries Vol. II, 1304, where the doctrine of election of remedies is traced to the principle of estoppel). That inconsistency of the remedies in the determining

factor is well illustrated by the decision of the House of Lords in Scarf v. Jardine 7 App. Cas. 345. In that case a, firm of two partners A and B was dissolved; A retired and B carried on the business with a new partner C under the same style. A customer X, of the old firm sold and delivered goods to the new firm after the change, but without notice of it. After notice, however, X sued B and C for the price of the goods, and upon their bankruptcy proved against their estate; X then sued A for the price of the goods. The House of Lords ruled that the action was not maintainable because although A and B might be made liable on the ground of estoppel, or B and C on the ground that they had received the goods, yet was bound to make his election as he could not be allowed to rely oh the estoppel as also on the real facts. In other words, X could not by a combination of the true facts and of the principle of estoppel make A, B, and C jointly and severally liable. Lord Selborne observed that when X chose to go upon the facts and sought to make B and C liable, he entirely disavowed the estoppel and could no longer set it up. Lord Blackburn observed as follows : Where a man has an option to choose one or other of two inconsistent things, when once he has made his election, it cannot be retracted, it is final and cannot be altered. Quod semel placuit in electionnibus amplius displicere non potest. That is Coke upon Littleton (146 a); when once there has been an election to do one of the two things, you cannot retract it and do the other thing; the election once made is finally made." The test of inconsistency in the matter of election of remedies thus laid down by the House of Lords had been applied in substance in earlier cases; see for instance, Moses v. Macferlan 2 Burrows 1005 at 101 and Buck-land v. Johnson 15 C.B. 145. In the second of these cases it was ruled that when there had been a conversion of goods, the party injured might either treat the conversion as a wrongful act and recover the value of the goods at the time of the sale in an action of trover, or adopt the sale as an act done with his sanction and sue for the proceeds as for money had and received to his use; if he elected the former course, he was bound by it and could not have a new action for money had and received. The principle has also been recently applied by Mr. Justice Farwell in British Homes Assurance Corporation v. Paterson (1902) 2 Ch. 404 in which that learned Judge relied upon the decision of the House of Lords in support of the proposition that, where A had the choice of his two inconsistent remedies, one against B, the other against B and C jointly, if he made his election and adopted the remedy against B, he could not subsequently fall back upon the other remedy.

17. The question of election of remedies has been frequently considered by American Courts, and the test of inconsistency has been uniformly adopted there. Mr. Justice Blake thus explained the principle applicable to cases of this description in Mills v. Parkhurst 126 N.Y. 89:

The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party, where several courses were open for obtaining relief, to his first election, where subsequently he attempts to avail himself of some further and other remedy not consistent with but contradictory of his previous attitude and action

upon his claim. The basis for the application of the doctrine is in the proposition that where there is by law or by contract a choice between two remedies which proceed upon opposite and irreconciliable claims, the one taken must exclude and bar the prosecution of the other." To the same effect is the statement by Rogers, C.J. in Bowen v. Mandeville 95 N.Y. 237 namely, that a party may prosecute as many remedies as he legally has, provided they are consistent and concurrent." The learned Judge gave an illustration how an election might arise in the case of inconsistent remedies; when a party has been induced by fraud to enter into and execute a contract for the purchase of property, he may, upon discovery of the fraud, prosecute one of two classes of remedies. He may rescind the contract and recover the consideration, restoring to the other party any benefit he has received; or he may retain what he has received and sue for damages. But these remedies are obviously inconsistent and cannot both be prosecuted and maintained. One proceeds upon the theory of a rescission of the contract, the other upon its affirmance and the election to pursue one constitutes the rejection of the right to adopt the other. The true nature of election was also explained by Mr. Justice Holmes in Snow v. Alley 156 Mass.30 N.E. selection exists when a party has two alternative and inconsistent right and it is determined by a manifestation of choice." The learned Judge then went on to add that if a party wrongly supposes that he has two such rights and attempts to choose the one to which he is not entitled, this fact is not enough to prevent his exercising the other if he is entitled to that other; there would be no sense or principle in such a rule. This observation would apply to a case of the description now before us, where the party aggrieved has had first recourse to what is undoubtedly the less appropriate of two remedies, and then seeks to avail himself of the more regular mode of relief. The principle in question was explained by Mr. Justice Sullivan in the recent case of State v. Bank of Commerce (1900) 61 N.W. 406. The defence of waiver by election." Says Wells J. in Conniham v. Thomson 123 Mass. 270 arises where the remedies are inconsistent, as when one action is founded on affirmance and the other on disaffirmance of a voidable contract for sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with the knowledge of the facts, determines the legal rights of the parties once for all. Before a case can arise for the application of the principle of election, there must be, first, two co-existing remedies, and, secondly, these remedies must be so inconsistent that a party cannot logically choose the one without renouncing the other. An apt illustration of the rule is found in some of the cases in which it is held that one who has sued on the theory of an unauthorized act done in his name has been ratified, cannot afterwards maintain an action on the theory that such act and the assumed agency of the person by whom it was performed have been repudiated." The principles deducible from these decisions make it manifest that to make a case for the application of the elective principle, a party must be actually in command of two inconsistent remedies. The whole doctrine of election of remedies was elaborately discussed upon first principles in the recent case of Rowell v. Smith 113 Wis. 510 : 102 N.W. 1 and it was observed that failure to note the true test,

whether the doctrine of election applies or not has led to so many inconsistent and improper references thereto that great care must be exercised in the selection of judicial guides in a given circumstance or one will be liable to go astray. It was further pointed out that the doctrine of election of remedies applies only when there are two or more proper ways to vindicate the rights of the parties, but the relations between the parties necessary to the pursuit of the one successfully are such that concurrent existence of those necessary to the pursuit of the other or others is impossible. Unsuccessful use of a remedy supposed to be, but in fact not, appropriate to vindicate the right of a particular matter because the facts turned out to be different from what the plaintiff supposed them to be and the law applicable to the facts is found to be different from what was supposed, though the first action proceeded to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy. The Court also laid down the important principle that although the doctrine of election or res judicata might not apply to the situation, if it was established that the defendant might be seriously prejudiced should the plaintiff be permitted to proceed a second time, the Court as a Court of Equity might apply the principle of estoppel in pais if deemed necessary to prevent injustice. We may take it, therefore, as well-founded on principle that no question of election of remedies arises unless the remedies are inconsistent and alternative. No doubt, as pointed out by this Court in the case of Baikunta Nath Dey v. Nawab Salimulla Bahadur 6 C.L.J. 547 it may occasionally be difficult to determine whether the remedies are concurrent or alternative, and whether what has been done amounts to an exercise of option of election on the part of a litigant so as to estop him from the pursuit of an alternative remedy. The case before us, however, is reasonably free from any such difficulty. No intelligible principle has been suggested upon which the view can be maintained that the remedy by a regular suit is inconsistent with the remedy by a review. The object of the two proceedings is the same, namely, to obtain a reversal of the consent-decree which it is alleged is vitiated by fraud, misrepresentation, coercion, or undue influence. The allegation of facts are substantially the same. The only difference is that the allegations in the suit are fuller and more comprehensive than those in the application for review of judgment, and the determination in the regular suit is likely to be more searching than what is possible upon an application for review of judgment, and the correctness of the determination in the suit will be liable to be tested by a Court of Appeal. In these circumstances it is impossible to say that the two remedies are inconsistent. The fact, therefore, that the plaintiff has failed in the application for review is not a sufficient ground to debar her from the prosecution of her remedy by a regular suit.

18. As we have previously seen, the order upon the application for review of judgment does not operate as res judicata u/s 13 of the Code of 1882, nor does the application for review bar the present suit on the principle of election of remedies, as there is no inconsistency between the remedies by way of review and by way of a fresh action. This conclusion is consistent with the well-recognised principle that,

although ordinarily it is not open to a litigant to have recourse to two different proceedings for enforcement of his right, there are cases in which different concurrent remedies may be pursued without trenching upon the rule of res judicata or the doctrine of election of remedies; this is, however, subject to the restriction that, if the party aggrieved is successful in one proceeding, the judgment absorbs all his other judicial remedies. (Encyclopedia of law, vol. 24, p. 815 and Encyclopedia of Pleading, vol. VII, p. 362.) We may add that it was contended by the learned vakil for the appellant that, as the application for review of judgment is not on the record now before this Court, no question of res judicata or election of remedies arises and he placed reliance upon the decisions of their Lordships of the Judicial Committee in Chaudhari Ahmad Baksh v. Seth Raghubar Dayal 32 I A. 229 : 2 C.L.J. 413 and Nawab Akbari Begum v. Nawab Nuzhat-ud-dowla Abbas Hossein Khan 32 I.A. 244 : 1 C.L.J. 594 and the decision of this Court in Surjiram Marwari v. Barhamdeo Persad 1 C.L.J. 337 and the earlier cases mentioned there to show that in order to determine whether a question is res judicata or not, it is essential to ascertain what were the points in dispute between the parties and what were alleged between them, and this must be done, not merely from the decree, but also from the pleadings and judgment. In answer the learned vakil for the respondent contended that, if necessary, the Court might call for the record of the review case, and he further suggested that the judgment of the Subordinate Judge indicated that he had before him the original application for review. We are not unmindful of the observations of their Lordships of the Judicial Committee in Knssowji Issur v. The Great Indian Peninsula Railway 34 I.A. 115 : 6 C.L.J. 5 : 31 B. 381 in which they disapproved of the unjustifiable reception of additional evidence at the appellate stage of the case. The present case is of an entirely different description. We have consequently sent for the application for review, the allegations in which are less full than those in the present plaint. The facts alleged, however, are substantially identical. The only difference is that coercion and undue influence were then alleged as grounds for relief, whereas misrepresentation is now urged as an additional ground. We hold, therefore, that the present suit to set aside the consent-decree, on the ground of fraud, or misrepresentation, undue influence and coercion is maintainable notwithstanding the fact that the previous application to review the same decree was dismissed.

19. The result is that this appeal must be allowed the judgment and decree of the Subordinate Judge set aside and the case remitted to him to be heard on the merits. The costs of this appeal will abide the result.

20. As the suit was dismissed in the Court below upon a preliminary ground, we direct u/s 13 of the Court Fees Act that the Court-fees paid on the memorandum of appeal to this Court, be returned to the appellant.