1963

Burn and Company Ltd. v. Its Workmen

Das Gupta J.

The award of bonus at 5½ months' wages appears to be reasonable and proper on this figure of the available surplus. The employers' plea for reduction of the bonus and the workmen's claim for increase of it appear to us equally unjustified.

All the appeals are accordingly dismissed. There will be no order as to costs.

Appeals dismissed.

1963

December 6

C. BEEPATHUMMA & ORS.

v.

V.S. KADAMBOLITHAYA & ORS.

(K. SUBBA RAO, M. HIDAYATULLAH AND J.C. SHAH, JJ.)

Mortgage—Suit for redemption—Mortgagee enjoying benefits under a deed—If must also accept the obligations thereunder—Doctrine of election.

The properties in plaint Schedules A, B & C were mortgaged to one Kunjamu and others. By a partition in the Mortgagees' family Kunjamu go ¼th shares of the interests in these properties. Subsequent to the death of Kunjamu the mortgagors and mortgagees entered into an agreement evidenced by Ex. P-2 and P-2(a) in which the original mortgage deed Exp. was referred but it released certain properties shown in C Schedule. The mortgagors agreed that the mortgagees would enjoy the remaining properties shown in A and B Schedules for a period of forty years and it was agreed that on the expiry of this period the mortgagors would have an option to redeem the mortgage land on payment of the amount due. At the time of the execution of Exp. 2 and P-2(a) Kunj Pakki the grandfather of the third respondent in this appeal was a minor (son of Kunjamu). His mother signed for herself but did not sign Ex.P-2 and P-2(a) on his behalf and no legal guardian signed it either. The first respondent purchased Schedule A & B properties and filed a suit for redemption. He claimed that since under Ex. P-2 the mortgagors were entitled to remain in possession for 40 years from 1862 the right of redemption accrued in 1902 and the suit filed in 1944 was within sixty years as contemplated by Art: 148 of the Limitation Act. The defence was that so far as

the share of Kunjamu was concerned Kunhi Pakki who inherited it was not bound by Ex. P-2(a) since he was a minor and he was not a signatory to it nor was it signed by any legally constituted guardian on his behalf. Therefore it was contended the Kunhammu's share inherited by Kunhi Pakki and subsequently by third respondent was hit by limitation and was not liable to be redeemed.

The trial court held that since Kunhi Pakki had taken benefit under Exp. 2 and P-2(a) his successors could not avoid them and therefore the suit was not barred by limitation and the properties were liable to be redeemed. The High Court upheld the decision of the lower court on the main question. The present appeal was filed by certificate granted by the High Court.

Held: (*i*) Kunhi Pakki was not directly bound by Ex. P-2 and P-2(a) since he was a minor and no legal guardian signed these documents on his behalf. Ex. P-2(a) cannot be used to show either an acknowledgment by him or an extension of the terms of the original usufructuary mortgage.

(*ii*) The evidence in the present case shows that Kunhi Pakki accepted benefit under Ex. P-2 and therefore neither he nor his successors could be heard to say that the mortgage in Ex. P-1 was independent of Ex. P-2 and that the limitation ran out on the lapse of 60 years from 1842. The doctrine of election was properly applied in respect of his 1/4th share now in possession of the present appellants. That doctrine is that a person who accepts a benefit under a deed or will or other instrument must adopt the whole contents of the instrument, must conform to all its provisions and renounce all rights that are inconsistent with it, in other words a person cannot approbate and reprobate the same transaction.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 446 of 1960.

Appeal from the judgment and decree dated November 3, 1955, of the Madras High Court in A.S. No. 138 of 1957.

S.T. Desai, M.S. Narasimhan and *M.S.K. Sastri*, for the appellants.

C.B. Agarwala, K. Jayaramand and *R. Ganapathy Iyer*, for the respondents.

December 6, 1963. The Judgment of the Court was delivered by

HIDAYATULLAH, J.—This is an appeal by certificate granted by the High Court of Madras against its common judgment and decree dated November 3, *Hidayatullah J.*

1963

C. Beepathumma & Ors. v. *V. S. Kadambolithaya & Ors.*

Hidayatullah J.

1955 in A.S.Nos. 88 and 138 of 1947. The appellants are 7 of the original 139 defendants and the respondents are the two plaintiffs and the original defendant No. 1. The appeal arises from a suit for redemption of a usufructuary mortgage dated April 26, 1862 and for delivery of possession of properties described in schedules A and B of the plaint together with mesne profits from the date of redemption till delivery of possession. The mortgaged property had passed into the hands of several persons and this is why so many defendants were joined. We shall now give the facts which go back for an incredibly long period.

The plaint incorporates three schedules distinguished as A, B and C Schedules and they describe properties which belonged to the *Alyasantana* family of the second respondent. On April 14, 1842, one Madana, who was then the *Ejaman* of the family, usufructuarily mortgaged the A, B and C schedule properties in favour of one Kunhammu Hajar for 1250 *varahas* or *pagodas* (equal to Rs 5,000) under Ex. P-1. This deed did not contain any provision for repayment of the amount or for the usufructuary mortgage to be worked off. It contained a clause to the following effect:

> "At the end of the cultivation season, whenever you state that the said land is not required, the said one thousand, two hundred and fifty *varahas* due to you and also the value of improvements shall be paid to you in one lump-sum and the said land, house, cattle-shed, out-house, etc. shall be obtained back from you, and this document as well as the previous documents shall be got redeemed."

Though the mortgage deed was taken ostensibly in his own name by Kunhammu Hajar, he did so on behalf of his brothers, sisters, nephews and nieces etc. The mortgaged property was described as land bearing a *beriz* of 44½ pagodas (equal to Rs. 227-10-8) situated in Warg No. 34 of Kumbadaje village, Netanige Magne. Bekal taluk (the whole Warg bore a *beriz* of 56½ pagodas), comprising 37 fields which

were described by their names without boundaries. The mortgagees who were given possession of lands were also placed in possession of some heads of cattle and other movables and for the redemption of the movables there was a separate term in the deed.

In 1857, the family of the mortgagees effected a partition by registered documents which are marked collectively as Ex. P-6 series. This partition was not by metes and bounds or by the allotment of whole fields but a division of lands with reference to the fraction of the *beriz* payable. We are concerned in this appeal only with the share which went to Kunhammu Hajar whose share was 1/4th. In Ex. P-6 which is the partition deed concerning him, his share was described as follows:

> "Further, out of *Belinjada* land bearing a *beriz* of Rs. 227-10-10 and entered in No. 34 maindana Kuntamma *Varg* of Kunvadaji village Nettanige Magne, the one-fourth portion bearing a *beriz* of Rs. 56-14-8 and consisting of land and *Bavaities* including border trees, soil and field attached thereto.

Other members of the family received shares according to their own right, mentioned in separate documents. The earliest such document was of April 3, 1857 and the last of April 30, 1857. Kunhammu Hajar died after this partition and on April 26, 1862, the mortgagors and mortgagees entered into an agreement evidenced by Exs. P-2 and P-2(a) by which Ex. P-1 was re-affirmed; the mortgagees, however, released from Ex. P-1 certain properties which are now shown in schedule C to the plaint. The mortgagors on their part agreed that the remaining properties (which are now shown in schedules A and B to the plaint) would be enjoyed by the mortgagees for a period of 40 years from the date of the document together with improvements made thereon. The mortgagors covenanted that if after the expiry of the stipulated period this land was required by them and if at the time of the cultivation season of that year the mortgage amount of the usufructuary mortgage (Ex. P-1)

1963

C. Beepathumma & Ors. v. *V. S. Kadambolithaya & Ors.*

Hidayatullah J.

together with the amounts of two other deeds creating a charge and Rs. 100 taken at the execution of Ex. P-2 together with the amounts relating to improvements were paid in one lump-sum, the land and the bond would stand redeemed. Ex. P-2 was executed by the mortgagors and a counterpart (Ex. P-2(a)) was executed, among others, by Aliamma, the widow of Kunhammu Hajar, who signed for herself but not on behalf of Kunhi Pakki her minor son by Kunhammu Hajar. Kunhi Pakki's share in the mortgage was thus not represented in Exs. P-2 and P-2(a). Kunhi Pakki died in 1934 and the first defendant, also Kunhi Pakki who is the third respondent in this appeal, is his grand-son . It may be mentioned that the two deeds which created a charge and which were to be discharged along with Ex. P-1 and P-2 have been held by the High Court and the Court below to be for the principal amount of Rs. 2,000. We may now omit for the time being a reference to the further devolution of the share of Kunhi Pakki son of Kunhammu Hajar in respect of whose share in Ex. P-1 the main dispute in the case has arisen. We shall mention those details later.

The present suit was filed for redemption of Ex. P-2 by the first and the second respondents. The first respondent purchased schedule A properties in July 1943 by Ex. P-83 and undertook to redeem the mortgaged properties described in schedules A and B and to hand over possession of schedule B properties to the legal representative in the family of Madana. Respondent No. 2 the then *Elamanthi* is that representative. This suit was filed on April 20, 1944 and it would clearly be barred under Art. 148 of the Indian Limitation Act unless Exs. P-2 and P-2(a) and the term of 40 years for which the mortgagees were to remain in possession from 1862 were taken into consideration and saved limitation. The plaintiffs in their suit stated that the claim was within time, because under Ex. P-2 the mortgagees were entitled to remain in possession for 40 years from April 26, 1862 and the right of redemption thus

accrued for the first time on April 27, 1902 and the claim made in 1944 was within 60 years of that date as required by Art. 148. The defence was that in so far as the share of Kunhammu Hajar was concerned, Kunhi Pakki, who inherited it was not bound by Ex. P-2(a) because he was neither a signatory to it being a minor, nor had any legal guardian executed Ex. P-2(a) on his behalf. It was pleaded that there was no doctrine of representation in Mohammedan Law, and the mother, even if she had signed Ex. P-2(a), would have been a *fazuli*, that is to say, an unauthorised person. It was further pleaded that in respect of Kunhi Pakki's share Exs. P-2 and P-2(a) could not save limitation and 1/4th share of Kunhammu Hajar was not liable to be redeemed. It was also claimed that the plaintiffs must pay for improvements.

The trial Judge held that suit to be within time applying to the 1/4th share of Kunhammu Hajar than owned by C. Mahamood deft. 8, the equitable doctrine of election on the ground that Kunhi Pakki had approved and adopted Exs. P-2 and P-2(a) and taken benefit under them and his successors could not therefore avoid them. With regard to improvements, the trial Judge found that an amount of Rs. 4,089-2-0 was due. The trial Judge accordingly passed a decree *inter alia* for the redemption of the share of C. Mahamood on payment of the price of redemption and improvements together with interest thereon. From this judgment, A. S. 138 of 1947 was filed by defendants 3, 5, 8, 9, 49, 50, 52, 67, 68 and 121 and A.S. 88 of 1947 was filed by defendant 58. The plaintiffs also cross-objected. The judgment of the High Court modified the decree in the matter of the amounts due for improvements but on the main question, it endorsed the views of the trial Judge with regard to limitation and the application of the equitable doctrine of election to Kunhi Pakki in respect of documents Ex. P-2 and P-2(a).

In this appeal, it is contended that the conclusions of the High Court with regard to limitation and the

1963

C. Beepathumma & Ors. v. *V. S. Kadambolithaya & Ors.*

Hidayatullah J.

doctrine of election were erroneous and further that the High Court was in error in awarding mesne profits from the date fixed in the preliminary decree for redemption, in view of the fact that the High Court found an increased amount in respect of improvements and the amount of improvements had to be paid for in full before redemption could be claimed. Before we deal with these points, we must narrate more facts.

The present appeal has been filed by Beepathumma the legal representative of deft. 8-C. Mahamood son of Abdul Rahiman Haji, who died during the pendency of the appeal in the High Court and by the daughter (deft. 9) and the sons (defts. 52, 67 and 68) of C. Mahamood; the other appellants are Abdulla (deft. 49) son and Bipathumma (deft. 50) daughter of Mammachumma (deft. 48). This Mammachumma was the sister of Kunhi Pakki son of Kunhama Hajar. These names have to be borne in mind, because they are connected with the 1/4th share which on partition went to Kunhamu Hajar by Ex. P-6, and will figure in the narrative which follows. It must also be remembered that Warg No. 34 was also called "Belinja Mainda-Kinhana".

After the partition, Kunhammu Hajar executed a usufructuary mortgage (Ex. P-16) in favour of his elder sister Cheriamma in respect of his 1/4th share on September 23, 1857. Cheriamma had received 1/8th share (*beriz* of Rs. 28-7-4) at the partition *vide* Ex. P-6(c). In the mortgage deed (Ex. P-16) it was stated that Kunhamu Hajar would redeem the property whenever he wanted it. Ex. P-2 and P-2(a) then came into existence. Cheriamma was not a signatory to Ex. P-2(a), because she had died earlier. After cheriamma's death, her share of 1/8th and the mortgagee rights were divided between Mammachumma and Aisumma by Exs. P-17 and P-17(a) on October 6, 1861. Each of these two sisters was allotted property of the *beriz* of Rs. 28-7-4 from the 1/4th share mortgaged by Kunhammu Hajarand of Rs. 14-3-8 from the share proper of Cheriamma. Mammachumma and

Aisumma thereafter held properties of a total *beriz* of Rs. 42-11-0 each and each share was 3/16th of the entire mortgaged property.

After Kunhammu Hajar's death, his son Kunhi Pakki ignored the usufructuary mortgage in favour of Cheriamma (Ex. P-16). On July 10, 1884, he took a sale deed (Ex. P-59) from Hammadekunhi son of Mammachumma. The property was described as of *beriz* of Rs. 28-7-4 in Warg No. 34 and of the *beriz* of Rs. 14-3-8. In other words, though the property was shown in two lots, he obtained the 3/16th share of Cheriamma. No boundaries were mentioned in the deed because it was stated that Kunhi Pakki was in possession of a portion of the properties in the same Warg. In this way, Kunhi Pakki obtained properties of a total *beriz* of Rs. 42-11-0, which had belonged to Mammachumma.

Kunhi Pakki then executed a simple mortgage (Ex. P-60) in favour of one Laxmana Bhakta on January 18, 1887 for Rs. 5,500. The property was said to be of Belinja Mainda Kinhana (Warg No. 34) and to be in two lots, one lot bearing a *beriz* of Rs. 28-7-4 and the other a *beriz* of Rs. 14-3-8. This showed that Kunhi Pakki was mortgaging the above 3/16th share acquired by him by Ex. P-59. This conclusion is reinforced by the fact that the boundaries in Ex. P-60 are said to be as mentioned in Ex. P-59. The right of Kunhi Pakki in this property was said to be "Avadhi-Ilidarwar" (usufructuary mortgage for a fixed term in lieu of interest) (Ex. P-1 read with Ex. P-2). Later, Kunhi Pakki executed a simple mortgage Ex. P-61 for Rs. 2,000 on February 11, 1892 in favour of one Anantha Kini. The property, this time, was said to be of the *beriz* of Rs. 56 odd and also property of the *beriz* of Rs. 28-7-4 and Rs. 14-3-8. In other words, he was mortgaging the entire 7/16th share (1/4th plus 3/16th). No boundaries were given but it was stated that the boundaries were the same as in the mortgage deed of January 18, 1887 in favour of Laxmana Bhakta. This document recited that no other documents were handed

1963

C. Beepathumma & Ors. v. *V. S. Kadambolithaya & Ors.*

Hidayatullah J.

over, but the mortgagor undertook to send them latter. On September 29, 1902, Kunhi Pakki, his wife Beepathumma and his son Kunhammu executed a usufructuary mortgage (Exs. P-62) for Rs. 32,000 in favour of one Vaikunta Bhakta. Several lots of properties were included and item 18 referred to property of the *beriz* of Rs. 98-11-0 in Belinjada Maindana Kinyana (Warg No. 34). This showed that he was mortgaging his 1/4th share and 3/16th share of Cheriamma. A recital showed that all "Vola-documents" were handed over and evidence has established that Ex. P-2 was one of them. Vaikunta Bhakta transferred the mortgagee rights under Ex. P-62 to Abdul Rahiman and Korgappa by Ex. P-64 dated April 10, 1913; item 18 in Ex. P-64 is land of Warg No. 34 of the *beriz* of Rs. 98-11-0 and the boundaries are said to be as shown in the Ilidarwar (Ex. P-1 and P-2). Kunhi Pakki also executed on August 26,1924, a document (Ex. P-65) creating a charge on the same properties in favour of the assignees. These properties were again said to be those that had been usufructuarily mortgaged under the Ilidarwar of September 29, 1902 in favour of Vaikunta Bhakta by Ex. P-62.

On January 23, 1930, the heirs of Abdul Rahiman and the heirs of Koragappa executed a partition dated (Ex. D-54) and at that partition, the Kumbadaje properties which were the subject-matter of the mortgages and charge fell to the share of Abdul Rahiman's heirs. It is stated in Ex-D-54 that all the documents were handed over to the heirs of Abdul Rahiman. C. Mahamood was the son of Abdul Rahiman and on September 23, 1930, he obtained a release of the shares of his mother, brother and sister by Ex. P-66. In Ex. P-66, there is a mention that the properties of Kumbadaje village had been obtained by an assignment from Vaikunta Bhakta and were being enjoyed as a usufructuary mortgage *with a term.* It also mentioned the charge created by Kunhi Pakki for Rs. 9,500 on August 26, 1924. It was also mentioned that all the documents relat-

ing to properties in Kumbadaje village had been handed over to C. Mahamood son of Abdul Rahiman. The total *beriz* of the Kumbadaje properties was shown to be Rs. 198-8-0 because it included certain sub-divisions other than those included in Exs. P-64 and P-65. In this manner, the 8th defendant acquired the 7/16th share of Kunhi Pakki.

We have now to see three other documents which were executed either by Kunhi Pakki or were in his favour. The most important of these is Ex. P-3 dated September 4, 1871. This was a mortgage by the original mortgagors in favour of Kunhi Pakki. It will be recalled that schedule C properties were released at the time when Ex. P-1, which was without any time limit, was converted into a mortgage with a time limit by Ex. P-2 in 1862. Kunhi Pakki now obtained a mortgage of the released properties with a term of 32 years' enjoyment, thus putting all the three properties described in schedules A, B and C in the plaint and mentioned in Ex. P-1 on the same footing. The significance of 32 years' term is quite clear. This mortgage was to run for the same period for which the other mortgage deed was to run. It was stated in this document that Kunhi Pakki was already enjoying the other property out of property bearing a *beriz* of Rs. 227-10-10 of Warg No. 34 under a usufructuary mortgage *with a time limit* by virtue of a registered document of 1862 executed by Kunhi Pakki's mother Aliamma. Certain recitals of that document may be reproduced here:

> "Out of the property enjoyed by you previously under usufructuary mortgage with time-limit *i.e.*, out of the property bearing a *beriz* of Rs. 227-10-10 and entered in Muli No. 34 our ancestor, Maindana Kinhanna varg in Kumbadaje village, the said Nettanige magne attached to the sub-district of Kasaragod, South Kanara district, in respect of which property the entire *tirve* is paid by yourself, the particulars of the property enjoyed by us without payment of *tirve* under the registered Karar (Agreement) deed executed on the

1963

C. Beepathumma & Ors.
v.
V. S. Kadambolithaya & Ors.

Hidayatullah J.

14th of Chitra Bahula of Dundubhi (1862) year (27th April 1862) by your mother Alima Hajjumma and others in favour of ourselves and others are as follows:

x x x x x

"All this entire property is mortgaged to you with a time-limit of thirty-two years from this *Prajothpathi* year onwards; and the one said Karar document obtained by us and mentioned above is given to you;

x x x x x

"If the principal amount and interest fall into arrears, that arrears of interest also shall be paid, after the due date, at that time only when the mortgage amount relating to your *Avadhi Ilida Arwar* (usufructuary mortgage with time-limit) is paid and when the property and the documents are redeemed; and, the property, this document, and the documents mentioned herein and also to be got redeemed by you from the said Hammada Kunhi Beary shall be got redeemed by us."

x x x x x

The consideration of this mortgage was to go to pay off the dues of Hammada Kunhi and others amounting in all to Rs. 565-8-0. The mortgagors also acknowledged receipt of an amount of Rs. 234-8-0. By this document, Kunhi Pakki placed all the properties on the same footing and neutralised so to speak the effect of the release of properties by Ex. P-2(a). Kunhi Pakki appears not to have paid these amounts himself, because on September 21, 1872, he executed a simple mortgage in favour of Hammada Kunhi for an amount of Rs. 800 (Ex. P-3(a)). He stated in that deed that the property was mortgaged without possession and was still in the enjoyment of the original proprietors.

The last document to be mentioned is Ex. P-4, which was a usufructuary mortgage by the original mortgagors in favour of Hammada Kunhi dated May 29, 1877. This document makes a reference

to the earlier documents of Kunhi Pakki in respect of the released properties. It refers specially to Ex. P-2 and states that that property was now being held on a usufructuary mortgage with a time-limit.

It was contended in this case on behalf of the mortgagees that the 1/4th share of Kunhi Pakki, on which time-limit was not imposed, because Kunhi Pakki was a minor when Ex. P-2 and P-2(a) were executed, could not be redeemed by the plaintiff as the suit in respect of them was time-barred. To understand this contention, it is necessary to give a short history of the Law of Limitation between the years 1842 and 1902. In 1842 when Ex. P-1 was executed, there was no law prescribing a period of limitation for the redemption of a usufructuary mortgage. Such limit came in 1859 for the first time and a period of 60 years from the date of the mortgage was prescribed. It is this statute which seems to have been the cause for the execution of Exs. P-2 and P-2(a); the mortgagees were perhaps afraid that the mortgage could be redeemed at any time within 60 years from the date of the mortgage of 1842. The last date for redemption thus was 1902. By getting the term certain for 40 years, the date for redemption was shifted by them to 1902 and redemption could not take place till that year. The mortgagors also benefited, because they obtained a release of some properties and received Rs. 100 in cash. The period of 60 years was repeated in the Act of 1871; but it contained a rider that if during the period of 60 years, there was an acknowledgment then the period would run from the date of that acknowledgment. Art. 148 of the Limitation Act as it stands today was introduced by the Act of 1877. It makes the 60 years' period run from the time when redemption is due. The mortgagors contend that they have the benefit of the present Act read with Exs. P-2 and P-2(a) and the time for redemption will expire at the end of 60 years from the date on which redemption became due under Exs. P-2 and P-2(a), that is to say 1902. There is no doubt that the Law of Limitation

1963

C. Beepathumma & Ors. v. V. S. Kadambolithaya & Ors.

Hidayatullah J.

is a procedural law and the provisions existing on the date of the suit apply to it. This suit was filed in 1944 and the Act of 1877 governs it. The only dispute is when did the mortgage become due for redemption. According to the mortgagees, time ran from the date of the mortgage under the Act of 1859 and did not stop in respect of the share of Kunhi Pakki, because he was not bound by Exs. P-2 and P-2(a). The mortgagors, on the other hand, contend that Kunhi Pakki had accepted Exs. P-2 and P-2(a) as his own documents and had obtained benefit under them in various ways and the appellants are either estopped from contending the contrary or having approved and adopted those documents and taken benefit, cannot repudiate them. In other words, they seek to apply the equitable doctrine of election to Kunhi Pakki and thus to deft. 8 who derived title from Kunhi Pakki. This plea of the mortgagors was accepted by the High Court and the Court below. It is contended that these courts erroneously applied the doctrine to the present case.

Mr. S.T. Desai learned counsel for the appellants admits that the mortgagors had not lost their right to the properties comprised in Ex. P-2 and that Ex. P-2 incorporated Ex. P-1. Exs. P-63 and P-63(a) were filed to establish the connection which, in view of the admission, it is not necessary to set forth here. He also admits that he cannot make out a case under Art. 134 of the Indian Limitation Act. He contends that the doctrine of election is but a species of estoppel and there can be no estoppel against law especially against the Limitation Act, because of s. 3 of that Act. He relies upon a decision of the Madras High Court reported in *Sitarama Chetty and Anr.* v. *Krishnaswami Chetty*[1] where White C.J. quoting a passage from Mr. Mitra's book on the Law of Limitation, observes that an agreement by a person against whom a cause of action has arisen, that he would not take advantage of the statute, cannot affect its operation on the original cause of action, unless

(1) [1915] I.L.R. Mad., 38 374.

such agreement amounts to an acknowledgment of liability which the statute recognises as an exception to the rule. Mr. Desai also relies upon *Govardhan Das v. Dau Dayal*(1) for the proposition that no one can contract himself out of the statute of limitation, nor can estoppel be pleaded against a statutory bar of limitation. Some other cases cited by him are not in point and need not be mentioned. On the basis of these cases, Mr. Desai contends that unless Exs. P-2 and P-2(a) can be pleaded as an acknowledgment limitation cannot be saved in respect of Kunhi Pakki's share and the suit itself must be dismissed under s. 3 of the Limitation Act. He contends that the equitable doctrine of election does not apply to the present case, because the documents on which reliance is placed refer not to the 1/4th share of Kunhi Pakki but to the 3/16th share of Cheriamma which Kunhi Pakki subsequently obtained. He states that the latter conclusion is inescapable if Exs. P-59, P-60 and P-61 are read together. He submits that in these documents Kunhi Pakki no doubt connected the 3/16th share with Exs. P-2 and P-2(a) but treated his own 1/4th share separately.

There is no doubt that Kunhi Pakki was not directly bound by Exs. P-2 and P-2(a). Mr. Desai is right in contending that as Kunhi Pakki was a minor and no guardian signed on his behalf, Ex. P-2(a) cannot be used to show either an acknowledgment by him or an extension of the term of the original usufructuary mortgage. The only question thus is whether by reason of the later documents and the conduct of Kunhi Pakki it can be said that Kunhi Pakki had obtained the benefit of Ex. P-2(a) which bound him to accept Exs. P-2 and P-2(a) in their entirety. In binding Kunhi Pakki in this way, no question of extending the period of limitation or of acknowledgment arises, and section 3 of the Limitation Act is not in the way because time would run only from 1902. This result follows because the mortgagors could not redeem the property including the share of Kunhi Pakki for 40 years from 1862.

(1) [1932] I.L.R. 54 All. 573.

1963

C. Beepathumma & Ors. v. *V. S. Kadambolithaya & Ors.*

Hidayatullah J.

The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland—

> "That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."

(*see* Maitland's Lectures on Equity, Lecture 18) The same principle is statedin White and Tudor's Leading Cases in Equity Vol. 18th Edn. at p. 444 as follows:

> "Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.....That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

The Indian Courts have applied this doctrine in several cases and a reference to all of them is hardly necessary. We may, however, refer to a decision of the Madras High Court in *Ramakottayya* v. *Viraraghavayya* (1) where after referring to the passage quoted by us from White and Tudor, Coutts Trotter, C.J. observed that the principle is often put in another form that a person cannot approbate and reprobate the same transaction and he referred to the decision of the Judicial Committee in *Rangaswami Gounden* v. *Nachiappa Gounden* (2). Recently, this Court has also considered the doctrine in *Bhau Ram* v. *Baij Nath Singh and others* (3).

The short question is whether, in the words of the Scottish lawyers Kunhi Pakki can be said to have approbated Ex. P-2 and P-2(a) and therefore his successors in title cannot now reprobate them. In this connection, Ex. P-3 and P-4 quite clearly show that Kunhi Pakki considered that he was bound by Ex. P-2(a) and the mortgagors were bound by

(1) [1929] I.L.R. 52 Mad. 556(F.B.) (2) [1918] I.L.R. 42 Mad. 523.
(3) [1962] 1 S.C.R. 358.

Ex. P-2. His taking of the mortgage of the released properties clearly indicated that he accepted that the mortgagors were released from the obligations of Ex. P-1. In Ex. P-3, he took the mortgage of the released properties for a period of 32 years which made the two mortgages run for an identical term, and that document referred to the earlier transaction as one under an *Avadhi Illida Arwar* (usufructuary mortgage with a time limit) which indicated that the time limit imposed by Exs. P-2 and P-2(a) was in his contemplation. In all subsequent documents, reference is to be found to the *Illida Arwar* and the reference is not only to the 3/16th share of Cheriamma but to the entire 7/16th share of Kunhi Pakki, that is to say, his original share of 1/4th obtained by him through his father by Ex. P-6 and 3/16th share which he obtained later. In view of the fact that in this way, Kunhi Pakki obtained the enjoyment of the mortgage in respect of his 1/4th share for a period of 40 years certain, he must be taken to have elected to apply to his own 1/4th share the terms of Ex. P-2. Having in this way accepted benefit and thus approbated that document, neither he nor his successors could be heard to say that the mortgage in Ex. P-1 was independent of Ex. P-2 and that the limitation ran out on the lapse of 60 years from 1842. In our opinion, the doctrine of election was properly applied in respect of Kunhi Pakki's 1/4th share now in the possession of the present appellants through defendant 8.

The next point that was urged was that the High Court and the Court below should not have awarded mesne profits against the appellants till they were paid the full price of redemption including the compensation for improvements. The trial court had found that an amount of Rs. 4,089-2-0 was due to defendant No. 8. This amount was increased by the High Court to Rs. 6,625-7-0. This was a substantial increase and even though the plaintiffs had earlier deposited the entire amount for redemption including the sum of Rs. 4,089-2-0, they cannot be said to have fulfilled the condition on which redemp-

1963

C. Beepathumma & Ors. v. *V. S. Kadambolithaya & Ors.*

Hidayatullah J.

tion was to be allowed to them. Under Ex. P-1, from which we have quoted the relevant passage earlier it was agreed that the sum of 1250 varahas and the value of improvements would be paid in one lump sum. In the subsequent documents also the same term was included. The respondents contend that interest on the extra amount of compensation for improvements has been awarded by the High Court and this makes it equitable that the appellants should pay mesne profits for the period of their possession after the deposit of the amount found by the trial Judge in court. No question of equity really arises, because the mortgage had to be redeemed according to its own terms. The mortgagors undertook that they would redeem the properties by paying the principal of the mortgage amount and the compensation for improvements in a lump sum and cannot complain if the mortgagees are not compelled to hand over the property or to pay mesne profits till the mortgagors have paid the full amount. Both sides referred to certain cases which are really not in point because the facts were entirely different. It is not necessary to refer to them, because no principle can be gathered from them. In the present case, April 15, 1946 was fixed for redemption and the mortgagors put into court a sum of about Rs. 17,000. The appellate decree was passed on November 3, 1955 and possession was delivered in 1957. We were informed that a sum of Rs. 11,800 per year was deposited in court by way of mesne profits.

Now the mortgagees cannot claim to hold the lands and use the amount paid as price of redemption. Even if they were not required to hand over possession till the amount together with the compensation for improvements was paid in full to them, they could not have the use of the money as well. In our opinion, the mortgagees must pay interest on the amount paid by the mortgagors from the date of withdrawal of the amount till possession was delivered to the mortgagors at 6% per annum simple. The extra amount due to the mortgagees by way of com-

pensation will be deductible and accounts shall be adjusted between the parties accordingly.

The appeal is thus partly allowed as indicated above. In view of the failure on the main point, the appellants must pay the costs of the appeal to the respondents.

Appeal partly allowed.

1963

C. Beepathumma & Ors.
v.
V. S. Kadambolithaya & Ors.

Hidayatullah J.

BAI ACHHUBA AMAR SINGH

v.

SRI KALIDAS HARNATH OJHA AND OTHERS

1963

December 6

(K. SUBBA RAO, RAGHUBAR DAYAL AND J.R. MUDHOLKAR JJ.)

The Bombay Tenancy and Agricultural Lands Act, 1948 (67 *of* 1948) *ss.* 84, 84*A—Scope of s.* 84*A—If prospective—If affects adjudication where transfer has already been declared invalid—Application under s.* 84*—If must be by landlord.*

The appellant was the owner of fields bearing survey numbers 231 and 260 in a village in Gujarat. Respondent No. 1 was the manager of her estate for some time and while occupying that position, he obtained from her a sale deed in respect of those fields. The appellant made an application to the Mamlatdar for a declaration that the sale was invalid as it was in contravention of ss. 63 and 64 of the Bombay Tenancy and Agricultural Lands Act, 1948. Certain villagers also made an application the Collector under s. 84 for the summary eviction of respondent no. 1 on the ground that the transaction was void as being in violation of provisions of ss. 63 and 64 of the Act. The Collector passed an order that the sale made by the appellant should be treated as void and the village records be corrected accordingly. The revision was dismissed by the Revenue Tribunal. A writ petition was filed in the High Court which remanded the case to the Collector. The Collector again declared the sale to be void and his order was confirmed by the Revenue Tribunal. A writ petition against the order of Revenue Tribunal was dismissed by the High Court.

In 1956, the Act of 1948 was amended and s. 84-A was added. Fresh proceedings were started by respondent No. 1 under s. 84-A