Burn And Company Ltd vs Its Workmen on 6 December, 1963

Equivalent citations: AIRONLINE 1963 SC 7

PETITIONER:
BURN AND COMPANY LTD.

Vs.

RESPONDENT:
ITS WORKMEN

DATE OF JUDGMENT:
06/12/1963

BENCH:

ACT:
Industrial Dispute-Bonus-Rehabilitation charges-Assessment on insufficient evidence, if binding-Salaries, rates and taxes for previous years-If proper expenses for year in question-Auditor's findings-If binding on Tribunal-Development rebate statutory reserve--Money paid into-If expenditure on revenue account-Provident Fund, contribution-If can be added to net profit for calculating gross profits-Preference & ordinary Dividend rate.

HEADNOTE:
Dispute arose between the company and its workmen over the profit bonus for the year 1960. The company was prepared to pay bonus at 3 1/2 months' wages, but the workmen demanded more. Applying the principles laid down by this Court, the Tribunal worked out, the net available surplus after making deductions for income-tax return on working capital and rehabilitation charges from the gross profit. It appears that the Tribunal calculated the annual rehabilitation charge mainly on the basis of what had been decided on the question of rehabilitation charge in the bonus dispute in a previous year. The evidence adduced by the company, in the present Reference, on the question of rehabilitation was rejected by the Tribunal. In calculating the gross profits the
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Tribunal added back to the net profit in addition to the sum which the company agreed should be added, the sums paid as salaries for the previous years rates and taxes in respect of previous years, contribution for provident fund, the sum paid into the development rebate statutory reserve, certain expenditure said to have been incurred on purchases and

repairs, and certain expenditure shown under the head Miscellaneous expenses. The Tribunal awarded 51 months' wages as bonus to the workmen.

Held: (i) That once the question as to what is necessary for rehabilitation and over how many years it should be spread has been properly decided by industrial adjudication, the assessment made ought not to be lightly disturbed if the question comes up again in any future year. It is necessary for industrial adjudication to project itself into the future and decide the total rehabilitation charges over the years and the number of years over which rehabilitation has to be spread. Rehabilitation is, thus rightly regarded as a long term problem.

But where the decision in one year is more on the basis of lack of evidence than on investigation of the evidence adduced it would be unreasonable to treat this as binding for all years to come. In such cases, if in any future dispute reliable evidence is adduced by the company on the question of rehabilitation due weight should be given to it and the Tribunal should not reject it merely on the basis of what has been found in the previous years.

(ii) The payment of salaries of previous years as also rates and taxes for previous years cannot be considered proper expenses for the year in question for the purpose of ascertaining available surplus. As pointed out by this Court in its previous decisions, the credits and debits referable to the working of previous years cannot be taken into consideration for this purpose for the simple reason that the workman concerned do not remain identical year after year.

(iii) The Tribunal was not bound to accept as correct whatever had been found correct by the Auditors. The Tribunal was justified in refusing, in the absence of proper evidence to accept the company's contention that the expenses shown in the profit and loss account under various heads of purchases and repairs were all revenue expenditure.

(iv) The money paid into development rebate statutory reserve cannot properly be considered as an expenditure on revenue account, for it remained available for the company's use throughout the year.

(v) The payment by way of contribution to the trustees of the provident fund in accordance with the statute cannot be properly regarded as a provision to meet a future liability. This payment should be regarded as payment made for a demand for liability of the year in question and cannot be added back to the net profits to ascertain the gross profits.

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Indian Hume Pipe Co. Ltd. v. Their workmen, [1959] Supp. 2 S.C.R. 948, referred to.

(vi) The rate of 7% on preference share being a contractual one should not be diminished and that an increase of 30% was also allowable under s. 3 (1) of the

Preference Shares (Regulation of Dividends) Act, but such an increase was not admissible in respect of ordinary shares.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 97 to 99 of 1963.

Appeal by special leave from the Award dated October 11, 1961, of the 2nd Industrial Tribunal, West Bengal in case No. VIII-534 of 1960.

A.V. Viswanatha Sastri and D.N. Mukherjee, for the appellant (in C.A. No. 97/1963) and respondent No. 1 (in C.A. No. 98 and 99 of 1963).

H.N. Sanyal, Solicitor-General and B.P. Maheshwari, for the appellant (in C.A. No. 99/1963).

D.L. Sen Gupta and B.P. Maheshwari, for the appellant (in C.A. No. 98/1963) and respondent No. 3 (in C.A. No. 97/1963).

Dipak Datta Chaudhuri, for respondent No. 1 (in C.A. No. 97/1963).

N.C. Chatterjee, Ajit Roy Mukherjee and A.K. Nag, for respondent no. 4 (in C.A. Nos. 97 and 98 of 1963). December 6,1963. The Judgment of the Court was delivered by DAS GUPTA, J.-This dispute between Burn & Company Limited, (Iron Works), Howrah and its workmen is over the profit bonus for the year 1960. Previous disputes between this Company and its workmen on the question of bonus for the years 1951-52, 1953-54 and 1955-56 ended with awards of Industrial Tribunals in West Bengal. The dispute for the bonus payable for the year 1955-56 came up to this Court in appeal and was disposed of by its Judgment dated March 8, 1960. For the Company's financial year from May 1, 1958 to April 30, 1959, the bonus, if any, would be payable in 1960. The Company was prepared to pay bonus equivalent to 3 1/2 months' wages but the workmen demanded much more. It appears that the Company has already made an advance of three months' wages on the suggestion of the Deputy Labour Commissioner during negotiations for settlement. But the talks for settlement ultimately failed. On applying the principles laid down by this Court in the matter, the Tribunal worked out the net available surplus out of which the claim for bonus had to be made at Rs. 53.31 lacs. After taking into consideration that the Company had contributed Rs. 10.74 lacs towards the employees' provident fund and the income-tax rebate which would be available to the Company in respect of the bonus payment, the Tribunal was of opinion that a sum of Rs. 35.20 lacs could be fairly distributed to the workmen as bonus. It has accordingly awarded bonus to the extent of 5 1/2 months' wages. It has further directed that the amount of wages already paid in advance towards the bonus shall be set off against the bonus now awarded. Both the Company and the workmen have appealed against the award by special leave. The main controversy, as it always is in these cases, is on the computation of the available surplus. Different statements have been filed by the several Unions by whom the workmen were represented showing a gross profit at rupees seven crores and thirty-five lacs and available surplus only a few lacs less than this. The Company's statement showed

the gross profits at Rs. 1,48,891.72. From this prior charges which have to be deducted in arriving at the available surplus were shown as On account of income tax ... Rs. 58,92,925 On account of return on paid up capital... Rs. 95,55,300 As return on working capital... Rs. 5,73,326 For rehabilitation inclusive of Rs. 20,37,103 the normal no-

tional depreciation for the year ... Rs. 72,64,579 The figure thus reached for available surplus is Rs. 1,95,932 which would be equivalent to less than 10 days' wages for the workmen. The Tribunal in arriving at the figure of Rs. 53-31 lacs as available surplus has calculated the gross profits at Rs. 181-82 lacs. From this it has deducted Rs. 71.36 lacs for income-tax, Rs. 7-39 lacs as return on working capital and a further sum on account of rehabilitation. For rehabilitation it has deducted Rs. 23.66 lacs as "rehabilitation charges" exclusive of the sum of Rs. 20.37 lacs under the head Notional Normal Depreciation. As Mr. Sen who appeared before us for the Company in these appeals, fairly pointed out that there is an obvious mistake in this calculation inasmuch as the Tribunal having decided that Rs. 23.66 lacs should be the annual rehabilitation charges should not have deducted this entire amount after having already deducted Rs. 20.73 for Notional Normal Depreciation. Mr. Sen admits that if the decision that Rs. 23-66 lacs should be the annual rehabilitation charge, allowable in the year in question, only an amount of Rs. 3.29 lacs should be deducted as prior charge in addition to Rs. 20.37 lacs already deducted under the head Notional Normal Depreciation. If the other figures stood as calculated by the Tribunal this would result in the increase of the available surplus to Rs. 73.68 lacs. It is also clear that if the Tribunal's decision that Rs. 23.66 lacs is the proper rehabilitation charge allowable for the year in question is left undisturbed the available surplus would remain at about Rs. 51 lacs, even if all the other figures as computed by the Company in its statement were allowed to stand. For, as already stated the Company's claim for rehabilitation charges inclusive of Notional Normal Depreciation is over Rs. 72.64 lacs, i.e., about 49 lacs more than what the Tribunal has found as allowable. Mr. Sen's main attempt has therefore been to persuade us to reject the Tribunal's conclusion or, the question of rehabilitation charge allowable for the year 1958-59. It appears that the Tribunal calculated the annual rehabilitation charge at this figure of Rs. 23.66 lacs mainly on the basis of what had been decided on the question of rehabilitation charges in the bonus dispute for the year 1954-55. It pointed out that in the said award the annual rehabilitation cost was assessed at Rs. 14.30 lacs for machinery and Rs. 4.00 lacs for buildings, a total of Rs. 18.30 lacs. To this it added an additional charge of Rs. 5.36 lacs in respect of the period that had elapsed since 1954-55. The evidence that was adduced by the Company in the present Reference, on this question if rehabilitation was rejected by the Tribunal. Mr. Sen's argument is that the Tribunal fell into error in considering itself bound to proceed in the present reference on the assessment of the rehabilitation cost in the bonus dispute for the year 1954-55 and that this error was really the basis of his rejection of the evidence given by the Company in the present case. There can, in our opinion, be no doubt that once the question as to what is necessary for rehabilitation and over how many years it should be spread has been decided by industrial adjudication after proper investigation and careful scrutiny if the evidence adduced in any one year the assessment thus made ought not to be lightly disturbed when the question comes up again in any future year in respect of rehabilitation. The very nature if the problem makes it necessary for industrial adjudication to project itself into the future and decide the total rehabilitation charges over the years and the number of years over which rehabilitation has to be spread. There is bound to be some amount of unreality in its conclusions because of the difficulty of

ascertaining in the present what will be necessary in the future. In spite of that however the calculations thus made give on the whole a firm basis for making deductions for calculating the available surplus a reasonable sum for rehabilitation of machinery and buildings and other items of capital as may require rehabilitation. Once however any particular amount has been found necessary as the total rehabilitation charge for a number of years and from that an assessment is made for the particular year in dispute of the amount allowable for that year, it will be unreasonable and indeed meaningless for the matter to be re-investigated year after year. Re- habilitation is rightly regarded as a long term problem and that is why once the matter has been investigated and the proper figure ascertained, that calculation should ordinarily be adhered to for future years.

Mr. Sen does not seriously contest the correctness of this proposition. He however contends that where the decision in one year is more on the basis of lack of evidence than on an investigation of the evidence adduced it would be unreasonable to treat this as binding for all the years to come. He pleads that when the question of rehabilitation charges was raised in the bonus dispute for the year 1954-55 the employer was not in a position to adduce full evidence and that is how the assessment of Rs. 18-30 lacs as necessary amount for rehabilitation of machinery and building came to be made. Now that he is in a position to adduce proper evidence he should not be deprived of the opportunity of convincing the Tribunal of the actual needs for the purpose. There is, in our opinion, considerable force in this contention. We have examined the award in the bonus dispute of 1954-55 and are satisfied that in making the assessment for rehabilitation charges the Tribunal did not get the benefit of proper evidence in the matter We agree that in these circumstances it would not be reasonable to treat the assessment made in that year as binding on the employer in the present dispute also.

We are unable to agree however with Mr. Sen's contention that the real reason why the Tribunal rejected the evidence adduced on behalf of the employer was that it considered itself bound by the previous assessment. On the contrary, it appears to us clear that the evidence that was adduced was examined fully and carefully by the Tribunal independently of the assessment for the year 1954-55 and it was when that evidence was found unreliable that the Tribunal gave the employer the benefit of the previous assessment. The Tribunal has given clear and cogent reasons for rejecting the evidence that was adduce and we find nothing that would justify us in re-assessing the same for ourselves. One of the main reasons which weighed with the Tribunal was that while q notations were received from Western European countries no quotations were obtained from Eastern European countries like, East Germany, Poland, Czechoslovakia and U.S.S.R. etc. Mr. Sen has rightly urged that it must be left to the Company to decide from which country the new machinery should be obtained and if it decided that rehabilitation could properly be made by obtaining replacements of the machinery from Western European countries from where the original machinery was obtained, it would be unreasonable to ignore the quotations received from those countries. The Tribunal however points out that Mr. Mukherjee, the Company's witness has himself admitted that rehabilitation could be conveniently made by importing from Eastern European countries. The only reason this witness has given for not obtaining quotations from those countries was that all kinds of machines would not be available there at a time. This explanation is obviously beside the point. Because it will not be ordinarily necessary to replace all the machines at any one time. In this connection one is bound to take notice, as the Tribunal has done, of the fact that it is easier to

arrange payments for purchase from Eastern European countries which would accept payments in rupees than for similar purchases in Western European countries the foreign exchange for which might not be easily available. The Tribunal also pointed out that Mr. Mukherjee has produced no records to show the new purchases of machine in recent years which would have shown how the replacements have been made. There is much force also in the Tribunal's comment that when Mr. Nadjarian who has given evidence about the price of buildings says that he got these from records and these records have not been produced it becomes difficult to accept his testimony. On a consideration of the reasons given by the Tribunal we are convinced that it has not acted arbitrarily in treating the evidence adduced by the Company as unreliable.

Having rejected the Company's evidence the Tribunal might have felt inclined to refuse any amount for rehabilitation charge for the year 1958-59. But rightly resisting that inclination the Tribunal gave the Company the benefit of the. assessment made for the year 1954-55. It is therefore not possible for us to disturb the Tribunal's findings on the question of rehabilitation charge.

We think it proper however to add that if in any future dispute reliable evidence is adduced by the Company on the question of rehabilitation due weight should be given to it in coming to a conclusion and the Tribunal should not reject it merely on the basis of what has been found in the previous dispute of 1954-55 or in the present Reference. As has been already pointed out the consequence of leaving the Tribunal's findings on the question of rehabilitation undisturbed is that the available surplus would be about Rs. 51 lacs, even if all other figures as computed by the Company are accepted. On that figure of available surplus it would not be reasonable to disturb the Tribunal's award of 5 1/2 months' wages as bonus to the workmen. This is sufficient to dispose of the Company's appeal. In order however to decide whether the workmen's claim for bonus of more than what has been allowed by the Tribunal is justified or not it is necessary to examine some of the other figures in the calculation of the available surplus. In calculating the gross profits at Rs. 181.82 lacs the Tribunal has added back to the net profit, in addition to the sum which the Company agreed should be added, the sum of Rs. 2,87,342 paid as salaries for the previous years, Rs. 10,74,523 paid as contribution for provident fund, Rs. 2,07,322 paid into the development rebate statutory reserves, Rs. 13,48,403 out of certain expenditure said to have been incurred on purchases of raw and other materials, stores and spare parts, repairs to buildings and repairs to machinery; Rs. 3,27,856 out of the expenditure shown under the head Miscellaneous Expenses; and Rs. 50,871 paid as rates and taxes in respect of previous years. The Tribunal is clearly correct in thinking that payment of salaries of previous years as also rates and taxes for previous years cannot be considered proper expenses for the year 1958-59 for the purpose of ascertaining the available surplus. For, as pointed out in previous decisions of this Court, the credits and debits referable to the working of previous years cannot be taken into consideration for this purpose for the simple reason that the workmen concerned do not remain identical year after year.

It is equally clear that the Tribunal was justified in refusing, in the absence of proper evidence to accept the Company's contention that the expenses shown in the profit and loss account under the head of purchases of (1) raw and other materials, (2) stores and spare parts consumed, (3) repairs to buildings, (4) repairs to machinery, were all revenue expenditure. Mr. Sen has pointed out that the annual accounts of the Company show the expenditure incurred for capital expenditure separately.

He contends that en- tries in the profit and loss account on the items mentioned above having been accepted by the Auditors as properly shown as revenue expenditure, the correctness of that view should not have been doubted. We are unable to agree however that the Tribunal was bound to accept as correct whatever had been found to be correct by the Auditors. A controversy had already been raised whether or not these items had been entirely spent as revenue expenditure. It was up to the Company to adduce further evidence in support of what had been shown in the profit and loss account. That was not done. No fault can be found therefore with the Tribunal in proceeding to calculate 2 1/2% of the total figure of these four items as representing capital expenses. The Tribunal was in our opinion also right in adding back the amount paid into the development rebate statutory reserve. Money paid into this reserve cannot properly be considered as an expenditure on revenue account. For, it remained available for the Company's use throughout the year.

We think however that the Tribunal has fallen into error in adding back Rs. 10,74,523 which was paid during the year by the Company to the trustees of the provident fund. In adding back this amount the Tribunal apparently, relied on an observation of this Court in Indian HUme PiPe Co., Ltd., v. Their Workmen(1) At page 954 of the Report Bhagwati J. speaking for the Court said:

> "It is well-settled that the actual income-tax payable by the Company on the basis of the full statutory depreciation allowed by the incometax authorities for the relevant accounting year should be taken into account as a prior charge irrespective of any set off allowed by the Income-Tax authorities for prior charges or any other considerations such as building up of incometax reserves for payment of enhanced liabilities of income-tax accruing in future. It is also well-settled that the calculations of the surplus available for distribution should be made having regard to the working of the industrial concern in the relevant accounting year without taking into consideration the credits and debits which are referable to the working of the previous years, e.g., the refund of excess profits tax paid in the past or loss of previous years carried forward but written off in the accounting year as also future liabilities, e.g., redemption of debenture stock, or provision for Provident Fund and Gratuity and other benefits, etc., which, however, necessary they may be cannot be inclUded in the category of prior charges."' The reference in this statement to provision for provident fund as one to meet future liability was clearly made on the assumption that the money was being kept apart by the employer himself so (1) [1959] Supp. 2 S.C.R. 948.

1/SCI/64-53 that he would be able to make payment in a future year when the payment would become due. This can have no application to a case where the contribution to provident fund has to be made to somebody else. Indeed, it would be wrong to treat this as payment to meet a future liability inasmuch as the liability to make the payment to the trustees arose under the Act itself. This is not a case where the Company was laying by money for a future liability but was able to use it if it liked. That would be a proper case of provision to meet a future liability. The payment by way of contribution to the trustees of the fund in accordance with the statute cannot be, however, properly regarded as a provision to meet a future liability. This payment should therefore be regarded as payment made for a demand for liability of the year in question, viz., 1958-59 and cannot be added

back to the net profits to ascertain the gross profits. As regards the sum of Rs. 3,27,856 which has been added back out of the expenditure on Miscellaneous ExpEnses a mistake has clearly been made in respect of Rs. 2,83,156 out of it. the break up in Ex. F for the Miscellaneous Expenses showed inter alia Rs. 6,52,230 as spent for freight, customs dutY etc., The Tribunal thinks that as Rs. 2,83,156 has been separately shown in the profit and loss account as freight and shipping charges it is not unlikely that this amount has been again included in Rs. 6,56,230 shown under the head freight, customs duty etc. Mi. Sen contends that it would be unreasonable to think that the same vouchers had been accepted by the Auditors in support of entries of expenditure under two different heads and that it would be proper to think that Rs. 2,83,156 shown as freight and shipping charges was independent and separate from the freight and customs duty etc included under the head Miscellaneous Expenses.

There is much force in this contention and we think it reasonable to believe that the sum of Rs.2,83,156 shown in the profit and loss account under the head freight and shipping charges was not included under the head Miscellaneous Expenses. The Tribunal was therefore wrong in adding back this sum of Rs. 2,83,156. As regards the other items which, together with this Rs. 2,83,156 made up the total of Rs. 3,27,856 that have been added back by the Tribunal we see no reason to disturb its conclusion.

We see no reason also to disturb the Tribunal's findings that the rate of 7% on preference shares being a contractual one should not be diminished and that an increase of 30% was also allowable under s. 3(1) of the Preference Shares (Regulation of Dividends) Act of 1960. We are of opinion that the Tribunal was also right in holding that such an increase was not admissible in respect of the ordinary shares.

On behalf of the workmen an objection was raised to the Tribunal's findings as to the amount of working capital used. It was said that the evidence did not clearly show the periods during which the amounts were used. In this connection the Tribunal has after consideration of the evidence of Mr. Ghose and Mr. Dutt accepted their evidence and the mere fact that it mentioned some weakness in respect of some minute details does not affect the finality of the Tribunal's conclusion.

The result of not adding back the sums mentioned above, viz., Rs. 10,74,523 and Rs. 2,83,156 is that the gross profits became Rs. 168-25 lacs. The Income-Tax on this after making the allowances for statutory depreciation and the development rebate, i.e., a total sum of Rs. 17,86,583 is Rs. 67-67 lacs. The calculations for the available surplus therefore stand thus:-

> (Rupees in lacs) Gross Profits 168.25 Less Normal Notional Depreciation 20.37 Less Income-tax 67.67 Less Return on Paid-up Capital 7.39 Less Return on Working Capital 5.73 Less Rehabilitation Charges 3.29 (23-66 minus 20.37) Available surplus 63.80 The award of bonus at 5 1/2 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 injustified.
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> All the appeals are accordingly dismissed. There will be no order as to costs.

Appealls dismissed.

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 4th 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, 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, when- ever 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 44 1/2 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 56 1/2 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 maindana Kuntamma Varg of Kunvadaji village Nettanige Magne, the one-fourth portion bear- ing a beriz of Rs. 56-14-8 and consisting of land and Bavaities including border trees, soil and field attached thereto.
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> 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) 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. Kumhi Pakki's share in the mortagaeg was thus not represented in Exs. p-2 and P-2(a). KunhiPaki 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 deedes which created a charge and which were to be dischrged along with Ex. P-1 and P-2 have been held by the High Court and the Court below to be fr the principal amount of Rs. 2,000.We may now omitt for the time being a refrence to the further devolution of the share of Kunhi Pakki son of Kunhamm Hajar, in respect of whose share in Ex. P-1 the main dispute in the case has arisen. We shall mention those details later.
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> The present suit was filed for redemption of Ex. P-2 by the first and the secono-respondents. The first respondent purchased schedule A properties in July 1941 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 Elaiiianthi 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, 525 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 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 Hajar and 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. 42-1 1-0, 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 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. If was also mentioned that all the documents relat-

ing to properties in Kumbadaje village bad been handed over to C. Mahamood son of Abdul Rahiman. The total beriz of the Kumbadaje prperties was shown to be Rs. 198-8-0 because it included certain sub-divisions other than those inccluded 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 mortagage 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 Waag 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 propertv enjoyed by us without payment of tirve tinder the registered Karar (Agreement) deed executed. on the 14th of Chitra Bahula of Dundubhi (1862) year (27th April 1862) by your mother Alima Hajumma and others in favour of ourselves and others are as follows:
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> 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;
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> 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 Avadh 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 Beaty shall be got redeemed by us. "

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 Mortgages 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 redemp- tion 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 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 mortgages, tape rate 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 Ex. 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 Iost 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 can not make out a case under Art. 134 of the Indian Limitation Act. He contends that the doctrine of election is but a species of estopped and there can be no estopped 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 Kunnhi 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.

1 SCI/64-54 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 these 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] 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-

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 a-rises, 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-

sensation 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.