no proper application having been made within the prescribed period from the death of Nigahia, this appeal has abated.

We accordingly accept this appeal as well and setting aside the order of the learned District Judge restore that of the learned Senior Subordinate Judge. As, however, Gulli himself claimed to be the legal representative of his son, we direct that the parties in this appeal should bear their own costs in this and in the Lower Appellate Court.

A. R.

Appeals accepted.
Revision rejected.

APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Campbell.

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June 29.

KHOTA RAM (PLAINTIFF) Appellant,

versus

NAWAZ AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 128 of 1918.

Civil Procedure Code, Act V of 1908, Order II, rule 2—Previous suit by mortgagee for possession on default of payment of interest—Subsequent suit under section 12 of the Redemption of Mortgages (Punjab) Act, II of 1913, for a declaration that in addition to the amount fixed by the Collector a large sum is payable on account of arrears of interest (and interest thereon) before the mortgaged land can be redeemed—High interest—whether Court can give relief in absence of proof of undue influence.

Under the terms of a mortgage of 1895 interest in the form of a certain quantity of grain was payable yearly and in default of payment of any year's interest the mortgagee was empowered to take possession and compound interest at 25 *per cent. per annum* was chargeable on the unpaid amount of interest. In 1902 the mortgagee sued for possession on the ground that interest for that year had not been paid, and he further stated that previous instalments had not been paid in full. He obtained a decree for possession and the Court expressly declined to go into the question of what was due for arrears of interest, remarking that the plaintiff could seek his proper remedy in

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respect of anything outstanding. Under that decree the mortgagee obtained possession on 3rd April 1904. The mortgagor subsequently applied to the Collector for redemption under the provisions of the Redemption of Mortgages (Punjab) Act, II of 1913, and obtained a decision that the mortgage could be redeemed on payment of Rs. 570. The mortgagee then brought the present suit for a declaration that there was a further charge on the land mortgaged of Rs. 5,015 and that there could be no redemption without payment of that amount. The trial Court dismissed the plaintiff's suit holding that it was barred under Order II, rule 2 of the Code of Civil Procedure.

Held, that the present suit was not barred under the provisions of Order II, rule 2 of the Code of Civil Procedure, by reason of the previous suit being for possession only.

Kiman v. *Sultani Mal* (1), followed.

Parmeshri Das v. *Fakiria* (2), referred to.

Chhabil Das v. *Massu* (3), *Chaudhri Kundan Mal* v. *Sardar Allah Dad Khan* (4), and *Alia Khan* v. *Kanshi Ram* (5), distinguished.

Held also, that although the rate of interest fixed, *viz.* 25 *per cent.* compound interest was high, in the absence of proof of undue influence on the part of the mortgagee there was no reason for holding that the latter was not entitled to it.

Aziz Khan v. *Duni Chand* (6), and *Balla Mal* v. *Ahad Shah* (7), followed.

Alia Khan v. *Kanshi Ram* (5), distinguished.

Held further, that as the law of limitation allowed the mortgagee to sue for interest within 12 years of the first default and 12 years had not elapsed when he took possession, there could be no presumption that he gave up his claim to receive arrears of interest at redemption.

Mahadaji v. *Joti* (8), *Balwantrao* v. *Narhar Gangaram*, (9) *Partab Bahadur Singh* v. *Jagmohan Singh* (10), *Jhunku Singh* v. *Chhotkan Singh* (11), and *Khuda Bakhsh* v. *Alim-un-Nissa* (12), distinguished.

Held, however, having regard to the terms of the mortgage deed, that it was not the intention of the parties that compound interest should be charged after possession had been taken, *i.e.*, the 3rd April 1904.

First appeal from the decree of Sheikh *Fazal Ilahi, Senior Subordinate Judge, Mianwali, dated the 8th October* 1917, *dismissing the claim.*

(1) 66 P. R. 1912.
(2) (1920) I. L. R. 1 Lah. 457 (F. B.).
(3) 4 P. R. 1914.
(4) 19 P. R. 1916.
(5) 45 P. R. 1913.
(6) 101 P. R. 1918 (P.C.)
(7) 124 P. R. 1918 (P. C.).
(8) (1892) I. L. R. 17 Bom. 425.
(9) (1919) 54 Indian Cases 814.
(10) (1902) I. L. R. 24 All. 521 (P.C.).
(11) (1909) I. L. R. 31 All. 325.
(12) (1904) I. L. R. 27 All. 313.

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TEK CHAND, for Appellant.
JAGAN NATH, for Respondents.

The judgment of the Court was delivered by—

CAMPBELL J.—This first appeal is the result of a suit under section 12, Punjab Act II of 1913. The mortgagors, in a certain transaction to be described presently, applied for redemption to the Collector and obtained a decision that the mortgage could be redeemed on payment to the mortgagee, Khota Ram, of Rs. 570. Khota Ram has sued for a declaration that there is a further charge on the land mortgaged of Rs. 5,015 and that there can be no redemption without payment of this amount. There was a prayer in the alternative for possession if it be found that he (the mortgagee) is not in possession, but the fact of the mortgagee's possession in now conceded.

The mortgage was entered into on the 26th July 1895 by registered deed for an area of 214 *kanals* 7 *marlas*. The mortgage price was Rs. 560, and the conditions were that the mortgagors should remain in possession and should pay interest yearly in the form of a certain quantity of grain; on default of any year's interest the mortgagee was to be empowered to take possession and thenceforth payment of interest should cease. The term of mortgage was four years after which the mortgagors were to redeem on payment of the mortgage-money in the month of *Har*. Then follow in the deed two sentences which are important. The first is this:—

"Compound interest shall be charged on the unpaid amount of interest at 25 *per cent. per annum*, and the same shall be paid by the mortgagors to the mortgagee along with the aforesaid mortgage-money."

The other is the following which comes a little lower down:—

"The aforesaid mortgaged lands and the persons of the mortgagors shall both be liable for payment of this debt."

On the 27th June 1898 a further advance of Rs. 10 was made to Charagh, one of the mortgagors, by Khota Ram and a document was drawn up reciting that interest was payable on this amount at Re. 1-9-0 *per cent. per mensem*, that principal and interest were

payable on demand, that the debt should be considered as an additional charge on the lands mortgaged, that if those lands were redeemed, payment of the said principal and interest would be made along with the mortgage money due under the previous deed, and that other lands and the person of the debtor would be liable for the debt.

In 1902 the mortgagee, Khota Ram, sued for possession on the ground that the interest for that year had not been paid, but he further stated that previous instalments had not been paid in full. He was given a decree for possession and the Court expressly refused to go into the question of what was due for arrears of interest remarking that the plaintiff could seek his proper remedy in respect of anything outstanding. A concession was given to the mortgagors that should they pay the 1902 and 1903 instalments in *Jeth, Sambat* 1960 (May 1903) possession should not be delivered to the plaintiff. No payments, however, were made and Khota Ram obtained possession on the 3rd April 1904. He now asks for a declaration that the value of unpaid grain instalments with compound interest at 25 *per cent* up to the date of suit should be declared to be included in the mortgage charge. The calculation is set forth in the plaint, and shows that the balance of grain due for each year from *Sambats* 1953 to 1961 has been taken in local weight measures of *paths, choths,* and *topas*. Compound interest at 25 *per cent* up to the date of suit has been calculated on each balance in terms of weight of grain. The total weight of grain due has thus been ascertained and a fixed rate of Rs. 3-8-8 per maund has been applied with the result of a sum of Rs. 4,981-4-0.

The mortgagors have been credited with small payments in each of the five years—1953 to 1957—but with nothing thereafter. Rs. 33-12-0 interest on the second advance of Rs. 10 brings the total up to Rs. 5,015.

Of the seven issues framed by the lower Court the first three relating to limitation, valuation of the suit and the possession of the plaintiff need not be considered since these are not questions now in dispute. The remaining four were as follows :—

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1. Is the suit barred under Order II, rule 2, Civil Procedure Code?
2. Is the rate of interest penal or excessive and not enforceable?
3. Have the defendants paid interest?
4. To what relief is the plaintiff entitled?

The lower Court held on No. 1 that when the plaintiff sued for possession as mortgagee in 1902 he could have recovered the interest then due at the same time and should have done so. Quoting Chaudhri *Kudan Mal* v. Sardar *Allah Dad Khan* (1), *Chhabil Das* v. *Massu* (2) and *Alia Khan* v. *Kanshi Ram* (3), the learned Subordinate Judge found that the plaintiff was barred from bringing a second suit for recovery of interest under Order II, rule 2. On issue No. 2 the lower Court recorded a brief decision that the rate of interest was unconscionable, and that no debtor with his eyes open could agree to it. There was no specific finding on the other issues, and the suit was dismissed. The plaintiff has appealed.

In our opinion both the above findings by the learned Subordinate Judge are wrong. An obvious commentary on the first is that the plaintiff is not bringing a suit for the recovery of interest. He is to all intents and purposes a defendant resisting the claim of the mortgagors to turn him out of possession on payment of a comparatively small sum. He has been forced to become a plaintiff in a declaratory suit by the action of the Revenue Officer under Punjab Act II of 1913, but what he says is that he wants to remain in possession of the land, and that if he is evicted he must be paid a certain sum.

We have heard a lengthy argument from Mr. Jagan Nath for the respondents in support of the lower Court's finding on this issue. He has contended that all the annual defaults from the date of the mortgage up to the date of the suit in 1902 constituted one cause of action, and that the plaintiff, having an inherent right to sue for interest not paid at that time, omitted, when he sued merely for possession, to sue for all the

(1) 19 P. R. 1910. (2) 4 P. R. 1914.
(3) 45 P. R. 1913.

reliefs to which he was entitled. In support of the argument as to the inherent right to sue for interest, counsel has quoted *Chhabil Das* v. *Massu* (1). In that case, as in the present, the mortgage bond provided that interest was to be paid to the mortgagee every year, and that in default the mortgagee should have the right to take possession of the land. In 1897 the mortgagee sued the mortgagors and obtained a decree for the value of produce then due, but did not claim possession. In his subsequent suit for possession the Chief Court held that the fact that the mortgage deed did not specifically give the mortgagee the right to sue for produce on default did not take away his inherent right to do so ; that he should have sued for possession at the same time, and that an admission by the mortgagors of payment of produce between the dates of the decree and that of the second suit did not create a new cause of action. In the first place, it will be seen that this ruling was delivered on different facts, and in the second it appears to be contrary to what was laid down in the Full Bench ruling in *Parmeshri Das* v. *Fakiria* (2), although it was not expressly mentioned or overruled there. The Full Bench decision was that a mortgagee is not debarred under Order II, rule 2, from suing for possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of a mortgagor's failure to pay interest at the stipulated time, by the fact that on the occurrence of a previous default he sued only for interest and not for possession.

This was the ruling in a case where there was a distinct provision in the mortgage deed enabling the mortgagee to sue for interest on default as well as for possession. Here and in *Chhabil Das* v. *Massu* (1) there was no such express condition ; but the learned Judges who delivered *Chhabil Das* v. *Massu* (1) read such a condition into the deed in the guise of an inherent right. In any event the fact that the first suit was for interest and not for possession clearly distinguishes the present case from *Chhabil Das* v. *Massu* (1). The cause of action for the 1902 case was the default

(1) 4 P. R. 1914. (2) (1920) I. L. R. 1 Lah. 457 (F. B.).

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of payment of interest for that year. The present suit is not one for payment of interest. It is a declaratory suit, and the cause of action lies in the steps taken by the mortgagors to put an end to the mortgagee's possession. A direct authority for the view that the previous suit has no effect upon the present is *Kiman* v. *Sultani Mal* (1) where it was held when a mortgagee sued for possession on default of payment of interest, that he was entitled to a decree for possession *simpliciter*, and that the matter of the amount of the lien should be left to be decided on redemption. In this connection the other two rulings quoted by the lower Court Chaudhri *Kudan Mal* v. Sardar *Allah Dad Khan* (2) and *Alia Khan* v. *Kanshi Ram* (3) are not in point.

Coming to the second of the four issues detailed above the effect of the Privy Council rulings *Aziz Khan* v. *Duni Chand* (4) and *Balla Mal* v. *Ahad Shah* (5) is that Courts as a general rule are bound to give effect to what the parties are proved to have agreed to, even if lapse of time and accumulation of interest may have swelled the principal sum enormously beyond its original figure. The Lower Court has not considered those rulings, and in the present case no specific undue influence on the part of the mortgagee was pleaded by the defendants. There was a general plea of undue influence only and no evidence of any sort of undue influence was produced. It has been argued further before us that the interest is not a charge on the mortgaged land, but it is expressly made so by the sentences in the deed quoted above, and *Alia Khan* v. *Kanshi Ram* (3), which is cited, is distinguishable, since the terms of the deed in that case were quite different. High as the rate of 25 *per cent.* compound interest may be we can find no reason for holding that the mortgagee is not entitled to it.

Counsel for the respondent-mortgagors admits that the *onus* was on the defendants to prove that any more had been paid to the mortgagee in respect of interest than what has been allowed for in the plaint, and that no evidence has been produced on the question

(1) 66 P. R. 1912.
(2) 19 P. R. 1910.
(3) 45 P. R. 1913.
(4) 101 P. R. 1918 (P. C.).
(5) 124 P. R. 1918 (P. C.).

by his clients. He has suggested that it was difficult for them to prove anything after 20 years, and that the mortgagee had special knowledge, but we do not see why the knowledge of the creditor should be presumed to be more special than that of the debtor.

In regard to the last issue another lengthy argument has been addressed to us to the effect that the plaintiff-mortgagee is not entitled to any arrears of interest on account of his acquiescence in non-payment which should be presumed from the fact that he did not sue to take possession earlier. This is a point which was never raised in the pleadings in the lower Court at all and in any case there is no force in it. The law of limitation allowed the mortgagee to sue for interest within 12 years of the first default and 12 years had not elapsed when he took possession. There can be no presumption that he gave up his claim to receive arrears of interest at redemption. The rulings quoted to support this proposition of the appellants need not be discussed since they are not applicable. They are *Mahadaji* v. *Joti* (1) *Balwantrao* v. *Narhar Gangaram* (2), *Jhunku Singh* v. *Chhotkan Singh* (3), *Partab Bahadur Singh* v. *Jagmohan Singh* (4) and *Khuda Bakhsh* v. *Alim-un-Nissa* (5). The three latter are cases of the mortgagees accepting a diminished security and remaining apparently satisfied with it for some years, and all the cases deal with mortgages which were *usufructuary* from their commencement.

The second point raised in connection with this issue is that the amounts of the second bond with the interest due on it cannot be a charge on the land. Again this was not pleaded in the lower Court, and the principal sum Rs. 10 has been paid by the mortgagors as part of the redemption money fixed by the Revenue Officer. In our opinion according to the terms of the bond the parties intended it to be a charge on the land and the case is similar to that reported as *Parabh Dial* v. *Kharku* (6) where the money due on a similar bond was made so chargeable.

Finally, it remains to be decided what amount of

(1) (1892) I. L. R. 17 Bom. 425.
(2) (1919) 54 Indian Cases 814.
(3) (1909) I. L. R. 31 All. 325.
(4) (1902) I. L. R. 24 All. 521 (P. C.).
(5) (1904) I. L. R. 27 All. 313.
(6) 2 P. R. 1890.

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interest the mortgagee should receive. His claim to Rs. 33-12-0 simple interest on Rs. 10 up to the date of application for redemption is, in our opinion, correct. For the rest he has refrained from claiming interest after the date on which he took possession but has claimed compound interest on what was in arrear on the date of his taking possession up to the date of the application for redemption. It seems to us, however, after a careful consideration of the terms of the mortgage deed that it was not the intention of the parties that compound interest should be charged after possession had been taken. Interest and compound interest both were to be paid in kind, and could only be paid so long as the mortgagors had the land which yielded the kind. When the land was taken from them they ceased to have the means of paying either interest or compound interest. Therefore in our opinion calculation of compound interest must cease on the 3rd April 1904, when the mortgagee got possession.

In any case we should not think it right to allow the plaintiff to value his interest in kind at the market rate of 1916, when he brought his suit. We proceed to indicate the lines on which the redemption money due to the mortgagee should be calculated, and it is necessary to remand the case to the lower Court for further evidence to be taken in order to enable us to pronounce a final order.

The quantity of grain outstanding for each year from 1953 to 1961 *Sambat* is accepted as stated in paragraph 3 of the plaint. The market rate for each year is to be ascertained and the balance of grain for each year reduced to money according to that market rate. On each of the sums so ascertained compound interest at 25 *per cent.* will be calculated from the date of default to the 3rd April 1904. To the resultant figures are to be added (1) Rs. 33, price of chaff on which no compound interest is claimed, and (2) Rs. 33-12-0, the interest on the additional charge of Rs. 10. The total will be declared to be the sum on payment of which together with the principal Rs. 570 the land can be redeemed by the mortgagor-defendants, and the plaintiff will receive his proportionate costs in both Courts.

We refer the appeal to the lower Court under Order XLI, rule 25, for trial of the following issues and return of evidence and findings thereon within three months :—

(1) What was the market rate for white wheat first quality on the date of each default from *Sambat* 1953 to *Sambat* 1961 ?

(2) What is the total value at those rates of the wheat due to the plaintiff on 3rd April 1904 calculated as directed by us above ?

A. N. C.

Appeal accepted, case remanded.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Zafar Ali.

Mussammat HAJRA BIBI AND ANOTHER (DEFENDANTS) Appellants,

versus

Mst. JANAT BIBI AND OTHERS (PLAINTIFFS) Respondents.

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Nov. 11.

Civil Appeal No. 3150 of 1918.

Custom—Succession—Qureshi Qazis *of Multan City—Family custom—whether daughters are excluded from succession to agricultural land in presence of sons though they take their share in urban immoveable property according to Muhammadan Law.*

Held, that the plaintiff-collaterals had failed to prove a special custom in the family of the Qureshis of Multan City to which the parties belonged, according to which daughters do not succeed to agricultural land in the presence of sons, though as regards urban immoveable property they take their share according to Muhammadan Law.