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before the Tribunal in any petition filed under section 10, and if an issue was framed upon the point and the Court decided that issue, their decision would be, in our opinion, within their jurisdiction. The jurisdiction of the Tribunal is not confined to a decision of the petitions received by it under section 14. That section is not exhaustive. Its jurisdiction is, under section 12, to decide all claims made in accordance with the provisions of the Sikh Gurdwaras Act.

For these reasons, therefore, we must dismiss this appeal with costs.

A. K. C.

*Appeal dismissed.*

**APPELLATE CIVIL.**

*Before Tek Chand and Abdul Rashid JJ.*

GHULAM MOHAMMAD (DEFENDANT) Appellant.,

*versus*

RAJESHWAR (PLAINTIFF) Respondent.

**Regular First Appeal No. 5 of 1939.**

*Mortgage — with possession — Mortgagor taking mortgaged property on rent and stipulating to make up deficiency in interest — Default in payment of rent — Whether mortgagor can plead limitation — Compound interest at 9 per cent per annum with six monthly rests — Whether excessive under Punjab Relief of Indebtedness Act (VII of 1934) — Interest payable at stipulated rate from date of suit to date of redemption.*

The mortgage in suit was with possession but on the date of the mortgage the mortgagor took the mortgaged property on lease from the mortgagee executing rent deeds in his favour. It was stipulated that the mortgagee was not responsible if property remained unoccupied or rent was not recovered. The mortgagor undertook, in all circumstances, to be liable to make good the deficiency in the interest. The deed further provided that compound interest was to be paid on the principal sum secured at 9 per cent..

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*per annum* at *six monthly* rests. In a suit by the mortgagee on foot of the mortgage-deed, it was contended on behalf of defendant, that in view of the rent deeds and leases, plaintiff could recover only rents, and not interest, under the mortgage-deed on the principle underlying s. 76 (b) of the Transfer of Property Act and that the plaintiff's suit for recovery of rent had become time barred and that the rate of interest was excessive under the provisions of the Usurious Loans Act as amended by the Punjab Relief of Indebtedness Act, VII of 1934.

*Held*, (i) that in view of the terms of the mortgage-deed the plaintiff was entitled to claim interest as the principal obligation of the mortgagor was to pay interest and the provision to pay rent was merely supplementary to, and not in substitution for, that obligation and the general rule laid down in s. 76 (b) of the Transfer of Property Act did not apply to the facts of this case.

*Chimman Lal v. Bahadur Singh* (1) and *Manjeshwar Naraina Rao v. S. Shivu Rao* (2), distinguished.

(ii) that the rate of interest was "excessive" as 9 *per cent per annum* compound interest should have been with *annual rests* and not with *six monthly* rests.

*Held further*, that where, as in the present case, the rate of interest and rests have been reduced, in the contract of mortgage, to what is permissible according to law, the plaintiff is legally entitled to the same rate and rests from the date of suit to the date of redemption.

*Jagannath Prosad Singh Chowdhury v. Surajmal Jalal* (3), relied upon.

*First appeal from the preliminary decree of Khwaja Ghulam Mohammad, Subordinate Judge, 1st Class, Lahore, dated 24th August, 1938, declaring that the amount due to the plaintiff on the mortgage mentioned in the plaint, calculated up to the 27th August, 1937, is the sum of Rs.1,40,000 for principal the sum of Rs.1,63,979-7-9 for interest on the said principal, etc., etc.*

(1) I. L. R. (1901) 23 All. 338. (2) I. L. R. (1918) 41 Mad. 1043.

(3) I. L. R. (1927) 54 Cal. 161 (P. C.).

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BARKAT ALI and BASHIR AHMAD, for Appellant.

MEHR CHAND, MAHAJAN, and TIRATH RAM, for  
Respondent.

TEK CHAND J.—This is a first appeal from the preliminary decree passed in a mortgage suit, declaring that the amount recoverable on foot of the mortgage in suit was Rs.3,03,979-7-9, and fixing the 24th of February, 1939, as the date for redemption. The decree, further, directed that if the aforesaid amount, together with the costs of the suit, was not paid on the date fixed, the mortgaged properties shall be sold and the sale-proceeds applied to the satisfaction of the decretal amount, and in case they were found insufficient the decree-holder shall be entitled to apply for a personal decree against the mortgagor for the balance. It was also provided that the mortgage money shall carry interest at 6 per cent per annum from the date of institution of the suit till realisation.

From this decree the defendant has appealed, urging that the decretal amount be reduced by Rs.1,63,979-7-9; and the plaintiff-respondent has filed cross-objections praying that the interest payable from the date of the institution of the suit till the date fixed for redemption should have been fixed at the rate stipulated in the mortgage-deed and not at 6 per cent per annum. He has paid court-fee on Rs.6,300 and, therefore, his prayer in cross-objections must be taken to be limited to this amount.

The mortgage in suit was effected on the 16th March, 1927. The consideration was Rs.1,40,000 made up of the following items:—

Rs.

25,000	left in trust with the mortgagee for payment to the National Bank of India, Limited, Lahore.
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Rs		
1,02,000	due on five pro-notes, executed by the mortgagor in favour of the mortgagee, on the 2nd April, 1925.	
13,000	arrears of interest on the afore-said pro-notes.	

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Total 1,40,000

The interest agreed to be paid on the principal sum secured was twelve annas per cent per mensem at *six-monthly* rests; in default compound interest at the same rate was to be charged. The mortgage was with possession, but on the date of the mortgage, the mortgagor took the mortgaged properties on lease from the mortgagee, and executed five rent-deeds in his favour (Exhibits P. 2 to P. 6). The stipulations in the mortgage-deed relating to the matter were as follows:—

- “(4) Possession of the property mortgaged has been delivered to the mortgagee afore-said. He shall remain in its possession till redemption. The income actually received by the mortgagee shall be given credit for. For the time being, I have taken the said property mortgaged, on lease and rent from the mortgagee afore-said by execution of separate deeds of rent and lease in his favour. If the property mortgaged, whole or in part remains unoccupied or the lease money and the rent are not recovered from sub-lessees and sub-tenants the mortgagee shall not be responsible therefor. I will,

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*under all circumstances, be liable to make good the deficiency in the interest."*

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"(6) If the mortgagee, aforesaid, is forced to recover the amount whole or in part, due to him, through Court, interest and compound interest at the said rate shall continue to run from the date of the institution of the suit till realisation of the entire amount".

The mortgagee, Keshwa Nand, died on the 23rd of November, 1932, leaving a minor son Rajeshwar, plaintiff. He instituted the present suit on the 27th of August, 1937, through his mother as next friend, for recovery of Rs.3,04,226-13-9, which he claimed was the amount due on foot of the mortgage after giving credit to the defendant for payments made by him.

The defendant pleaded that the account between the parties was an old one, that the transaction was "unfair" and the interest charged "excessive", within the meaning of the Usurious Loans Act and, therefore, the entire account between the parties should be reopened; that the plaintiff could not sue for interest in view of the rent-deeds and leases which had been executed in respect of the mortgaged properties; that certain re-payments had been made for which credit had not been given by the plaintiff; and that, in any case, the suit was barred by limitation. The trial Judge found against the defendant on all these issues, except that he corrected certain minor errors in calculation and granted the plaintiff a decree for Rs.3,03,979-7-9, as stated above.

The defendant has appealed with respect to the sum of Rs.1,63,979-7-9 only and on his behalf two points have been argued before us by Mr. Barkat Ali. Firstly, it has been contended that on the date of the mortgage the mortgagor having taken the properties on lease from the mortgagee, all that the latter was entitled to was to recover *rent* under the rent-deeds and not *interest* under the mortgage-deed and as the plaintiff, or his father, had not done so within the period prescribed by law, his claim for rent had become time-barred, and he cannot sue for interest now. In support of this contention, the learned counsel relied upon the principle underlying clause (b) of section 76 of the Transfer of Property Act, which lays down that when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property, he must use his best endeavours to collect the rents and profits thereof. After hearing counsel at length and examining the terms of the mortgage-deed I am of opinion that this contention is devoid of all force. As has been stated above, there was a distinct stipulation in the deed that the principal sum was to bear interest at the certain specified rate, and it was agreed that though the mortgagor had taken the mortgaged properties on rent, the income *actually* received by the mortgagee would be given credit for and that if the full amount was not received the mortgagor would be liable "to make good the deficiency in the interest". It will thus be seen, that the principal obligation of the mortgagor was to pay interest and the provision to pay rent was merely supplementary to, and not in substitution for, that obligation. The general rule laid down in clause (b) of section 76 of the Transfer of Property Act, therefore is not applicable to the facts of this case. Further, the default was

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primarily of the defendant himself. It was he who was to pay rent at the stipulated rate at specified intervals. Admittedly, he has failed to do so. He cannot, therefore, be allowed to take advantage of his own default and urge that the mortgagee, who did not sue him, has lost his primary right to recover interest. Mr. Barkat Ali referred us to two rulings, but the facts in both were peculiar and they are clearly distinguishable. In *Chimman Lal v. Bahadur Singh* (1), there was no stipulation in the deed to pay interest. All that was stated was that the mortgagor had taken the mortgaged property on rent and that he would pay it regularly. No rent was actually paid and the mortgagee allowed the claim for recovery thereof to become time-barred. Subsequently, he sued for the principal sum secured on the mortgage-deed and also for interest at the rate mentioned in the rent-deeds. On these facts it was held that he could not do so, there being no agreement to pay interest and the claim to recover rent having long since become barred. In the other case, *Manjeshwar Naraina Rao v. S. Shiru Rai* (2), the claim was based on a mortgage by way of conditional sale, in which, also, there was no agreement to pay interest and the mortgagor had been allowed to continue in possession on payment of rent, and the mortgagee, as landlord, had actually obtained a decree for arrears of rent, but had failed to execute it within the period prescribed by law. After some years, the mortgagor brought a suit for redemption, and in that suit the mortgagee claimed that he was entitled to be paid the principal sum as well as arrears of rent. The learned Judges repelled the claim as to rent, holding that the mortgagee having obtained a

(1) I. L. R. (1901) 123 All. 338

(2) I. L. R. (1918) 41 Mad. 1043.

decree for rent, his rights with regard to it were regulated thereafter entirely by the terms of that decree. "The claim for rent" they observed "had been taken out of the operation of the contract between the parties and passed into domain of judgment, and it was not open, afterwards, to either party to ignore the decree and fall back on their antecedent rights and obligations". The facts of the present case are entirely different. Here, the stipulation in the deed to pay interest is clear and explicit, and it was clearly provided that the rent to the extent *actually* paid, was to be credited towards interest, and the balance of the interest was recoverable as such. Further, the default in payment of rent was of the defendant himself and he cannot take advantage of his own default to defeat the rights of the plaintiff. It must, therefore, be held that the plaintiff is not disentitled to claim interest, merely because the mortgaged properties had been let out to the mortgagor and he had executed rent-deeds in his favour, but had not paid the amount of rent within three years from the date when it fell due.

The second question for consideration is whether the provisions of the Usurious Loans Act, as amended by the (Punjab) Relief of Indebtedness Act, VII of 1934, are applicable. To determine this, we have to see if the rate of interest, payable under the deed, is "excessive", or the transaction is "otherwise unfair". In the amended Act, it is provided that the Court shall deem interest to be "excessive" if on secured loans it exceeds 12 per centum per annum simple interest or 9 per centum per annum compound interest with *annual* rests. In the present case, as has been stated above, compound interest was payable at 9 per cent per annum but at *six-monthly* rests. It

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must therefore be held to be "excessive" and the defendant is, entitled to relief in respect thereof. This was frankly admitted by the learned counsel for the plaintiff-respondent. I hold, therefore, that compound interest must be charged at *yearly*, and not *six-monthly*, rests.

Mr. Barkat Ali conceded that the transaction was not "otherwise unfair"; but he urged that the dealings between the parties must be re-opened from the very beginning. We have examined the materials on the record bearing on the matter, but do not find anything usurious or unconscionable in these dealings. Out of the consideration for the mortgage in suit, Rs.25,000 was admittedly paid by the mortgagee in cash to the National Bank of India and the balance was due on prior pro-notes (Exhibits P. 9 to P. 13), dated the 2nd of April, 1925, three of which carried simple interest at 9 per cent per annum and the other two at 12 per cent per annum. It appears from the letter written by the defendant to the plaintiff on the 22nd April, 1923 (Exhibit P. 16), that these pro-notes had been executed in lieu of certain *hundis* for Rs.70,000, which had been drawn by the defendant in favour of the plaintiff on the 1st August, 1922, and for a sum of Rs.12,000 which had been paid to him by cheque on the Punjab National Bank, Limited. The earlier *hundis* have not been placed on the record but the defendant, who was present in person before us, stated that they had been executed for the balance due on earlier promissory notes, on which *simple* interest at 9 per cent per annum had been charged. He frankly stated, that from the commencement of his dealings with the plaintiff's father in 1915 till the execution of the mortgage-deed in suit, interest agreed

to be paid or actually charged never exceeded 12 per cent per annum (simple), which is much below the maximum limit prescribed in the Act. On these facts, the only relief to which the defendant is entitled is that compound interest on the principal sum secured by the mortgage must be allowed at 9 per cent per annum at *yearly*, and not *six-monthly*, rests as stated in the deed and claimed by the plaintiff. The amount due on this basis, on the 22nd August, 1937, has been calculated by the local commissioner appointed by the lower Court (as per statement B printed at pages 36—39 of the paper-book) as Rs.2,97,296-2-2. Both counsel have accepted the calculations to be correct. It must, therefore, be declared that the amount payable on that date was Rs.2,97,296-2-2 and not Rs. 3,03,979-7-9, as found and decreed by the lower Court.

The cross-objections relate to the amount of interest payable on the principal, Rs.1,40,000 from the date of suit till the date for redemption fixed by the lower Court (24th February, 1939). The lower Court has allowed simple interest at 3 per cent per annum for this period. This, however, is contrary to the express stipulation in paragraph 6 of the mortgage-deed. But apart from the stipulation, the plaintiff is legally entitled to claim interest for this period at the fixed rate. As held by their Lordships of the Privy Council in *Jagannath Prosad Singh Chowdhury v. Surajmal Jalal* (1), "till the period for redemption has expired the matter remains in contract, and the interest has to be paid at the rate, and with the rests, specified in the contract of mortgage". In view of this ruling, Mr. Barkat Ali did not contest

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the cross-objections. He, however, urged that as the date fixed for redemption by the lower Court (24th of February, 1939), has long since expired another date may now be fixed. Counsel for the respondent raises no objection, and we fix the date for redemption as 23rd July, 1940.

The result is that the appeal and the cross-objections must be accepted in part and, in lieu of the decree of the lower Court, a preliminary decree passed in terms of order XXXIV, rule 4, Civil Procedure Code, declaring that the amount due to the plaintiff on the mortgage in suit, calculated up to the 27th August, 1937, is Rs.1,40,000 principal *plus* Rs.1,57,296-2-2 interest *plus* Rs.4,202 costs and that if the defendant pays the aforesaid amount on or before the 23rd of July, 1940, with interest on Rs.1,40,000 from the date of the suit till that date at 9 per cent per annum with yearly rests the mortgage shall stand redeemed and the plaintiff shall deliver over to the defendant all documents in his possession or power relating to the mortgaged property but that if he fails to do so, simple interest at 6 per cent per annum shall be payable on the aggregate amount of principal, interest and costs from the 23rd of July, 1940, and the plaintiff shall be entitled to have the mortgaged properties sold and the sale proceeds applied for the satisfaction of the decree. We further order that if such payment is found insufficient the plaintiff shall be at liberty to apply for a decree for the balance being passed against the person and other property of the defendant.

As the appeal has substantially failed the appellant shall pay to the respondent the costs of the appeal

in this Court. No order as to costs of the cross-objections.

The order passed by the lower Court appointing a receiver shall continue.

ABDUL RASHID J.—I agree.

A. K. C.

*Appeal and cross-objections  
partly accepted.*

**APPELLATE CRIMINAL.**

*Before Young C. J. and Sale J.*

MOHAMMAD TAHIR—Appellant.

*versus*

THE CROWN, THROUGH SPECIAL OFFICIAL  
RECEIVER, LAHORE,—Respondent.

**Criminal Appeal No. 725 of 1940.**

*Criminal Procedure Code (Act V of 1898), S. 476 — Prosecution ordered by Court under S. 476 — Without preliminary enquiry — Legality of.*

*Held*, that according to s. 476 of the Code of Criminal Procedure, a preliminary enquiry is not essential in law and the proceedings under that section without such enquiry are not illegal.

*Imam Ali v. Emperor* (1), referred to.

*Appeal from the order of Mr. Justice Monroe, Liquidation Judge, High Court, Lahore, dated 10th May, 1940, sanctioning prosecution under section 476, Criminal Procedure Code.*

JOWALA PARSHAD, for Appellant.

NAZIR AHMAD, Special Official Receiver and  
R. L. ANAND, for Respondent.

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