(10) In view of the forgoing discussion, the answer to this question is also in affirmative i.e. in favour of the revenue and against the assessee and it is held that the order passed by Shri I. C. Puri, Presiding Officer Sales Tax Tribunal Punjab dated 12th August, 1975 suffered from the vice of mistake of law apparent on the record needing rectification. Thus the questions referred to this Court are answered in favour of the revenue and against the assessee. No costs.

R.N.R.

Before : Ashok Bhan, J.

SUKHWANT RAI,—*Appellant.*

versus

M/S KALU RAM KHIALI RAM, PATIALA AND ANOTHER,
—*Respndoents.*

Regular First Appeal No. 1334 *of* 1978.

14th February, 1991.

Code of Civil Procedure, 1908—*O.* 13, *rl.* 4 *provisos* (*a*) to (*e*)—*Indian Stamp Act*, 1899—*Ss.* 35, 36—*Indian Evidence Act*, 1872—*Ss.* 45, 91—*Admissibility of evidence*—*Execution of documents by defendant*—*Challenge to*—*Expert witness giving evidence that signatures on documents are of same person who had signed written statement and power of attorney in the suit*—*Witness not an attesting witness to the documents*—*No inference of execution of documents by the defendant can be drawn from such evidence*—*Exhibit marks on documents put by the trial Court inadvertently*—*Execution thereof not proved*—*Such documents not admissible in evidence*—*Suit liable to be dismissed.*

Held, that the documents (i.e. Hundis) in dispute cannot be said to have been admitted in evidence. The evidence of Dewan K. S. Puri was only to the effect that the signatures on the documents were made by the person who signed the written statement and the power of attorney available in the present suit. From this evidence, it cannot be inferred that the execution of the documents by the defendant has been proved.

(Para 9)

Held further, that proviso added by the local amendment in O. 13 rl. 4 of the Code of Civil Procedure provides that where the Court is satisfied that the document has not been endorsed in the manner provided under O. 13 rl. 4 of the Code then the Court would treat the document as having been properly admitted in evidence unless non-compliance with this rule has resulted in miscarriage of justice. In this case, the trial Court itself came to the conclusion that exhibit marks had been put on the documents inadvertently while recording the evidence of the witness, and the documents had not been properly admitted in evidence only because the documents had been marked as exhibits inadvertently only for the purpose of identification in the evidence of a formal witness. Since the documents had not been in fact admitted into evidence, the proviso added by the local amendment is not attracted in this case.

(Para 9)

Regular First Appeal from the decree of the Court of Shri B. M. Modi, PCS, Sub Judge Ist Class, Samrala dated the 6th day of February 1978 dismissing the suit with no orders as to costs.

Claim : Suit for the recovery of Rs. 27,200 on the basis of two hundis drawn by the defendants in favour of the plaintiff detailed as under:—

(*i*) *A sum of Rs. 13.600 on the basis of one Hundi dated 13th August, 1973. Principal amount Rs. 10,000 and interest at the rate of Rs. 12 per cent per annum Rs. 3,600 from 13th November, 1973 to 10th November, 1976.*

(*ii*) *A sum of Rs. 13,600 on the basis of one hundi dated 22nd August, 1973 Principal amount of Rs. 10,000 and interest at the rate of Rs. 12 per cent Rs. 3,600 from 22nd November, 1973 to 10th November, 1976 be passed in favour of plaintiff and against the defendants with costs.*

Claim in Appeal : For reversal of the order of Lower Court. Dated the 14th February, 1991.

S. P. Gupta, Advocate, *for the Appellants.*

S. N. Chopra, Advocate, *for the Respondent.*

JUDGMENT

Ashok Bhan, J.

(1) Plaintiff-appellant filed the present suit on 10th November, 1976 against the defendant-respondents for recovery of Rs. 27,200 on the basis of two Hundis drawn by Lalita Parshad defendant No. 2

on behalf of defendant No. 1, firm. The relief claimed as given in para 9 of the plaint is as under :—

> "It is, therefore, prayed that a decree for Rs. 27,200 detailed as under :—
>
> "A sum of Rs. 13,600 on the basis of one Hundi dated 13th August, 1973 (Principal amount of Rs. 10,000 and interest at the rate of Rs. 12 per cent per annum Rs. 3,600 from 13th November, 1973 to 10th November, 1976).
>
> A sum of Rs. 13,600 on the basis of one Hundi dated 22nd August, 1973 (Principal amount of Rs. 10,000 and interest at the rate of Rs. 12 per cent Rs. 3,600 from 22nd November, 1973 to 10th November, 1976) be passed in favour of the plaintiff and against the defendants with costs."

(2) The suit was resisted by the defendant-respondents Written statement was filed and it was denied that Lalita Parshad defendant No. 2 had executed the Hundis and took any amount from the plaintiff on that basis. The averment made was that the defendant-respondent was a drunkard and was in the habit of signing blank papers and Hundis. The plaintiff might have obtained the signatures of defendant No. 2 on blank Hundis when he was under the influence of liquor.

(3) The parties went to trial on the following issues framed by the trial Court :—

(1) Whether the defendant executed the Hundi on 13th August, 1973 in favour of the plaintiff for consideration of Rs. 10,000 ? If so, its effect ? OPP

(2) Whether the defendant executed another Hundi on 22nd August, 1973 in favour of the plaintiff for consideration of Rs. 10,000 ? If so, its effect ? OPP

(3) Whether the plaintiff is entitled to any interest from the defendant ? If so, at what rate and how much ? OPP

(4) If issues No. 1 and 2 are proved, whether the Hundis referred to above, are without consideration ? OPP

(5) Whether defendant No. 1 is not bound by the acts of defendant No. 2 ? OPD

(6) Whether the Hundis were signed by defendant No. 2 on blank papers and under the influence of liquor and under undue influence ? OPD

(7) Whether there are any additions or alterations in the Hundis ? OPD

(8) Whether the plaint is not properly verified ? OPD

(9) Relief.

(4) Plaintiff produced Dewan K. S. Puri, Hand Writing and Finger Print Expert (hereinafter referred to as the Expert) as P.W. 1 on 14th September, 1977. This witness deposed that he compared the disputed signatures marked as Q1 on Hundi dated 13th August, 1973 and Q2 on Hundi dated 22nd August, 1973 which were marked as Exhibits P/1 and P/2 respectively with the specimen signatures marked as S1 and S2 on the written statement and S3 on the power of attorney available in this case. On comparison, in his opinion signatures on Q1 and Q2 and Hundis Exhibits P/1 and P/2 respectively were by one and the same person who had put his signatures as S1 and S2 on the written statement and S3 on the power of attorney available on the record. Exhibit P/3 was his report. Before any other witness could be examined, defendant-respondents put in an application stating that the Hundis produced by the plaintiff were under-stamped and were in admissible in evidence. It was alleged in the application that the Hundis had not yet been proved and admitted into evidence in terms of section 36 of the Indian Stamp Act, 1899 (hereinafter referred to as the Act). Another averment in the application was that endorsement which was to be made by the Court under order 13 rule 4 of the Code of Civil Procedure (hereinafter referred to as the Code) had not been made and in the absence of such an endorsement, the document could not be taken to have been admitted into evidence. According to this application the endorsement under order 13 rule 4 of the Code was a mandatory requirement of law and until and unless the same had been made, the document could not be deemed to have been admitted into evidence. It was averred the Dewan K. S. Puri, was not a witness to the execution of the Hundis nor was he scribe of the same and as such the execution of the Hundis could not be proved by him. Hundis which had been exhibited as P/1 and P/2 could not be stated to have been admitted in evidence on the basis of his statement. On the strength of these allegations. it was prayed that Hundis should be rejected

being under stamped and having not been admitted into evidence and the suit filed by the plaintiff be dismissed. Reply was filed to this application and it was denied by the plaintiff that the Hundis in question were under stamped. Plaintiff alleged that he had already started his evidence and Dewan K. S. Puri expert had proved the execution of the Hundis in question by establishing signatures of the executant on the same. Plaintiff pleaded that the Hundis stood admitted in evidence after the Court had applied its mind and no objection to their admissibility was raised at the time they were admitted into evidence; and that objection could not be raised at any later stage. The trial Court disposed of this application,—*vide* its order dated 6th February, 1978 and held that the Hundis in question were insufficiently stamped and were not admissible in evidence and that in fact they had not been admitted into evidence although exhibit marks P/1 and P/2 had been put on them at the time when the statement of Dewan K. S. Puri was being recorded. It was further held that no decree could be passed on the basis of these Hundis and the suit was ordered to be dismissed. Plaintiff-appellant has come up in appeal against the said order.

(5) Before I proceed to decide the controversy in issue, let me state the admitted facts on which there is no controversy between the parties at this stage :—

(i) Both the Hundis on the basis of which the present suit has been filed are under stamped.

(ii) Under section 35 of the Indian Stamp Act, no instrument chargeable with duty can be admitted in evidence unless such instrument is duly stamped. Provisos (a) to (e) to section 35 lay down various penalties on payment of which the instrument which is under stamped can be admitted in evidence, *but a bill of exchange and promissory notes are excluded.*

(iii) Section 36 of the Act provides that where an instrument has been admitted in evidence then the same cannot be called in question at any later stage of the suit or proceedings on the ground that the instrument has not been duly stamped except as provided under section 61 of the Evidence Act.

(iv) It is admitted between the parties that Section 61 of the Evidence Act is not applicable to the facts of the present case.

(6) The narrow controversy that arises for decision in this case, therefore, is whether the Hundis had been 'validly' "admitted into evidence" while recording the statement of Dewan K. S. Puri or not. If the answer to the question is in the affirmative then under section 36 of the Act, the instrument having been once 'admitted into evidence' could not be called in question. Trial Court came to the conclusion that Dewan K. S. Puri was not an attesting witness of the Hundis. Hundis were not prepared in his presence. Dewan K. S. Puri expert had not stated in evidence that the Hundis had been executed by Lalita Parshad defendant No. 2. His evidence was only to the effect that the signatures on these Hundis were of the same person who signed the written statement and the power of attorney. The trial Court concluded that from the evidence of Dewan K. S. Puri, it could not be inferred that the execution of the Hundis by defendant No. 2 had been proved.

(7) Further finding recorded by the trial Court was that no endorsement as required under order 13 rule 4 of the Code on the Hundis was made at the time of recording of the evidence of Dewan K. S. Puri. It was observed by the trial Court that after the defendants had put in an application on 28th October, 1977 pointing out that the Hundis were under stamped and inadmissible in evidence, the Reader of the Court put the stamps containing the particulars required under order 13 rule 4 of the Code on the back of the Hundis and produced the same before the trial Court for its signatures. Trial Court struck out these particulars and made a note that since the documents had not been proved, the same could not be exhibited. As the provisions of order 13 rule 4 of the Code, had not been complied with, it could not be said that the Hundis had been admitted into evidence without any objection from the defendant-respondents regarding their admissibility for want of stamp.

(8) Learned counsel appearing for the plaintiff-appellant has argued that there are different modes of proving a document. Execution of a document can either be proved by executant, scribe, attesting witness or in their absence by a person who is familiar and conversant with the signatures of the executant like Hand Writing and Finger Print Expert whose opinion is relevant and can be taken into consideration under section 45 of the Evidence Act. In this case, Dewan K. S. Puri, an expert appeared as a witness on 14th September, 1977 and proved the documents by comparison of the signatures on the Hundis and the admitted signatures of defendant No. 2 on the written statement and the power of

attorney. Hundis were exhibited marks P/1 and P/2 and referred to as such in the examination chief and cross-examination of the witness. Exhibit marks were put and the trial Court initialled the same which amounted to the documents being admitted and exhibited without objection and once a document is admitted without objection then the question of its admissibility could not be raised at any subsequent stage. Learned counsel for the plaintiff-appellant relied upon *Sib Narayan Mukherjee* v. *Janak Upadhya* (1), *J.M.A. Raju* v. *Krishnamurthy Bhatt* (2), and *P. C. Purushothama Reddiar* v. *S. Perumal* (3), for this proposition. The next submission of learned counsel appearing for the appellant is that the trial Court erred in dismissing the suit of the plaintiff only on the ground that the Hundis Exhibits P/1 and P/2 were held to be inadmissible. He argued that plaintiff could fall back on the original consideration having been made by some other evidence, that is books of account etc. and the trial Court should have only held that the Hundis were inadmissible but should not have dismissed the suit as a whole and permitted the parties to lead their evidence on other issues already framed and proceeded with the case.

(9) Learned counsel appearing for the respondents has rebutted the arguments of the learned counsel appearing for the appellant. He submitted that the documents in fact were never admitted in evidence. Since the documents were not admitted in evidence as contemplated under Section 36 of the Act, the defendant-respondents were well within their rights to take up the objection regarding admissibility of the documents at a later stage. He has further argued that since there was no endorsement made in the manner laid down under Order 13 rule 4 of the Code, it could not be deemed that the documents had been properly admitted that proved on the record. He has relied upon *Jagan Nath's* case (supra) and *Kolli Eranna and others* v. *Belalmkonda Thimmaiah and others* (4). *Jagan Nath's* case (supra) is the nearest authority to the facts of the present case. In that case, the claim was laid on the basis of bahi account. The original bahi entry was produced by an attesting witness and the evidence of an attesting witness was record with reference to it without any objection being raised on the opposite side. On the next day, some more evidence was recorded and then

(1) A.I.R. 1974 Calcutta 203.
(2) A.I.R. 1976 Gujrat 72.
(3) A.I.R. 1972 S.C. 608.
(4) A.I.R. 1966 A.P. 184.

an objection was raised by the learned counsel for the defendant that the entry was inadmissible in evidence as the stamp thereon had not been cancelled. The entry had already been marked as Ex. P/1 but had not been initialled or signed by the Judge as required under order 13 rule 4 of the Code. The trial Court upheld the objection raised by the learned counsel for the defendant and ruled out that the entry was inadmissible in evidence. The decision was upheld by the District Judge in appeal. High Court of Lahore upheld the decision of the Courts below and made the following observations :—

> "There was no judicial determination of the question of the admissibility of the document till the objection was raised and the words 'admitted in evidence' in Section 35, Stamp Act must be taken to mean letting in as a part of the evidence as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp."

It was further held that the document could not be regarded as admitted as soon as it was tendered and some evidence was led with regard to it without any objection. Considering the case in hand, in the light of the decision of the Lahore High Court (supra) the conclusion is irresistible that the Hundis in dispute have not been admitted in evidence. Dewan K. S. Puri was not an attesting witness of these Hundis. The Hundis had not been prepared in his presence; he has not stated that these Hundis were executed by Lalita Parshad defendant No. 2. His evidence is only to the effect that the signatures on the Hundis are of the same person who had signed the written statement and the power of attorney in the present suit. Execution of the Hundis does not stand proved. Learned trial Court has itself stated that Exhibits P/1 and P/2 had been put inadvertently and there was no conscious application of its mind while putting exhibit marks on these two documents. The view taken by the trial Court is correct. The evidence of Dewan K. S. Puri was not regarding the execution of the documents but was only to the effect that the signatures on the Hundis were made by the person who signed the written statement and the power of attorney available in the present suit. From this evidence, it cannot be inferred that the execution of the *Hundis* by defendant No. 2 Lalita Parshad has been proved. The Hundis cannot be said to have been admitted in evidence in this case in the statement of Dewan K. S. Puri PW1 within the meaning of the words 'admitted

in evidence' mentioned in Section 36 of the Act and as explained in *Jagan Nath's* case (supra). Order 13 rule 4 of the Code provides that every document which is admitted in evidence has to be endorsed with the particulars, namely; the number and title of the suit, the name of the person producing the document, the date on which it was produced, and a statement of its having been so admitted which is to be signed or initialled by the Judge. Admittedly, in this case, there was no endorsement on the document regarding its having been admitted in evidence. Learned counsel for the appellant relying upon a local amendment of Order 13 rule 4 made by High Court of Punjab and Haryana (Chandigarh) published in Haryana Gazette 11th June, 1974, Pt. III (I.S.) which is to the following effect :—

> "Provided that were the Court is satisfied that the document, not endorsed in the manner laid down in the above rule, *was in fact, admitted in evidence*, it shall treat the document as having been properly admitted in evidence unless non compliance with this rule has resulted in miscarriage of justice."

argued that although the trial Court had not endorsed the documents as laid down in Order 13 rule 4 of the Code which had in fact been admitted in evidence because it was so exhibited by the trial Court at the time of recording evidence of Dewan K. S. Puri and the mere non-compliance of order 13 rule 4 of the Code would not keep the two Hundis away from the purview of the Court as the non-compliance with the said rule has not resulted in any miscarriage of justice because the *Hundis* had been exhibited as P/1 and P/2 and initialled by the trial Court. He has relied upon *Surindra Sharma* v. *Ram Parkash* (5), and *Babu Ram* v. *Sadhu Singh and others* (6), wherein it has been held that the documents which have been duly proved but not endorsed in the manner laid down in Order 13 rule 4, Civil Procedure Code, shall be deemed to have been properly admitted in evidence unless non-compliance with this rule has resulted in miscarriage of justice. There is no proposition of law. I have already held that the documents Exhibits P/1 and P/2 had not been duly proved regarding its execution as the evidence of Dewan K. S. Puri was only to the effect that signatures on these

(5) 1979 P.L.J. 588.

(6) 1975 P.L.J. 476.

two Hundis were of one and the same person who had signed the written statement and the power of attorney available on the suit file. From his evidence, it cannot be inferred that execution of the Hundis by defendant No. 2 had been proved. Proviso added by the local amendment in Order 13 rule 4 of the Code provides that where the Court is satisfied that the document has not been endorsed in the manner provided under Order 13 rule 4 of the Code then the Court would treat the document as having been properly admitted in evidence unless non-compliance with this rule has resulted in miscarriage of justice. In this case, the trial Court itself came to the conclusion that exhibit marks P/1 and P/2 had been put on the Hundis inadvertently while recording the evidence of Dewan K. S. Puri, and the documents had not been properly admitted in evidence only because Hundis had been marked as exhibits inadvertently only for the purpose of identification in the evidence of a formal witness. Since the *Hundis* had not been in fact admitted into evidence, the proviso added by the local amendment (supra) is not attracted in this case. *Surindra Sharma's* case (supra) and *Babu Ram's* case (supra) have thus no applicability to the facts of the present case. No other evidence in the case had been recorded and these *Hundis*, therefore, were not referred to in the examination-in-chief and cross-examination of any of these witnesses examined by the parties. Since there was no application of mind regarding the admissibility of document, it could not be held that the documents had been admitted into evidence. In the case in hand, the documents were marked as exhibits merely on the evidence of a formal witness as Dewan K. S. Puri could not depose regarding the execution of the documents. Thus provisos (a) to (e) of Order 13 rule 4 of the Code and the Local Amendment made by Punjab and Haryana High Court (supra) cannot come to rescue of the plaintiff in the present case.

(10) I do not find any force in the submission of the learned counsel for the appellant that the trial Court could not decide regarding admissibility of the *Hundis* and determine the suit finally. Plaintiff did not have any independent cause of action in the suit apart from the two Hundis. It has been held by the Division Bench of Lahore High Court in *Sohan Lal Nihal Chand* v. *Raghu Nath Singh and others* (7), that Section 91, Evidence Act, is an absolute bar to the production of any oral evidence to prove the terms of a contract which has been reduced to writing and if the

(7) A.I.R. 1934 Lahore 606.

written contract is inadmissible in evidence a suit to enforce it. must fail. Relevant extract of the judgment is reproduced below:—

> "As for the contention that the suit lay on the factum of the loan, it is now well settled not only by a uniform course of decisions of this Court and the Punjab Chief Court but also by the latest pronouncement of various other High Courts that Section 91, Evidence Act, is an absolute bar to the production of any oral evidence to prove the terms of a contract which has been reduced to writing and if the written contract is inadmissible in evidence a suit to enforce it must fail.—*vide inter alia* Mt. Bhag Bhari *v.* Hujar Mal AIR 1917 Lah. 220, Chanda Singh *v.* Amritsar Banking Co. AIR 1922 Lah. 307, A.I.R. 1927 Lah. 89, Nazir Khan *v.* Ram Mohan Lal A.I.R. 1931 All 183 Chandrasekaram Pillai *v.* Srinivasa Pillai AIR 1983 Mad 71 and Sheikh Akbar *v.* Sheikh Khan (1881) 7 Cal. 256 (which is still regarded as the leading authority on the subject)."

I am in respectful agreement with the view taken in cases (Supra) and hold that the trial Court was right in dismissing the suit under the circumstances of the present case.

(11) For the foregoing discussion, this appeal fails and is dismissed with no order as to costs.

J.S.T.

Before : V. K. Bali, J.

RAM DASS AND OTHERS,—*Appellants.*

versus

PIARA SINGH AND OTHERS,—*Respondents.*

Regular Second Appeal No. 331 of 1979.

16th April, 1991.

Limitation Act (XXXVI of 1963)—S. 63(b)—Suit for possession by mortgagee who claims title due to non-redemption within limitation—Limitation for such suit.

Held, that clause (b) of S. 63 is not at all applicable. The stress on the aforesaid clause is on seeking for possession of immovable property which has been mortgaged. This necessarily would mean