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

that the mortgage is subsisting. Thus, it is the right of a mortgagee to seek possession in cases where possession has not been handed over to him and he is to seek such possession within twelve years when he becomes entitled to possession. In the present case, the relief was for possession on account of fact that the mortgage had come to an end and the right of mortgagee had nurtured into ownership. S. 63(b) of the Limitation Act would not be attracted when the mortgagee sheds his limited right of seeking possession as a mortgagee and attains a larger interest i.e. when he becomes an owner by prescription of time.

(Para 8)

Regular Second Appeal from the decree of the Court of Shri R. K. Synghal, Addl. Distt. Judge, Jullundur dated 15th November, 1978 reversing that of Shri Baldev Singh, Sub Judge, Ist Class, Jalandhar, dated the 15th day of January, 1975 (an appeal filed by Harnam Singh, defendant) and dismissing the suit filed by the Plaintiff with costs throughout.

Claim : Suit for possession of land 4 Kls. 2 Mls. Khewat Khataoni No. 178/341 Khasra No. 16/11/4 as entered in Jamabandi for the year 1968-69 situated in Village Dhafiwal Teh. Jalandhar on the basis of right and title of ownership.

Claim in Appeal : For reversal of the order of Lower Appellate Court.

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

H. L. Sarin, Sr. Advocate with Mr. Ashish Handa, Advocate, *for the Respondents.*

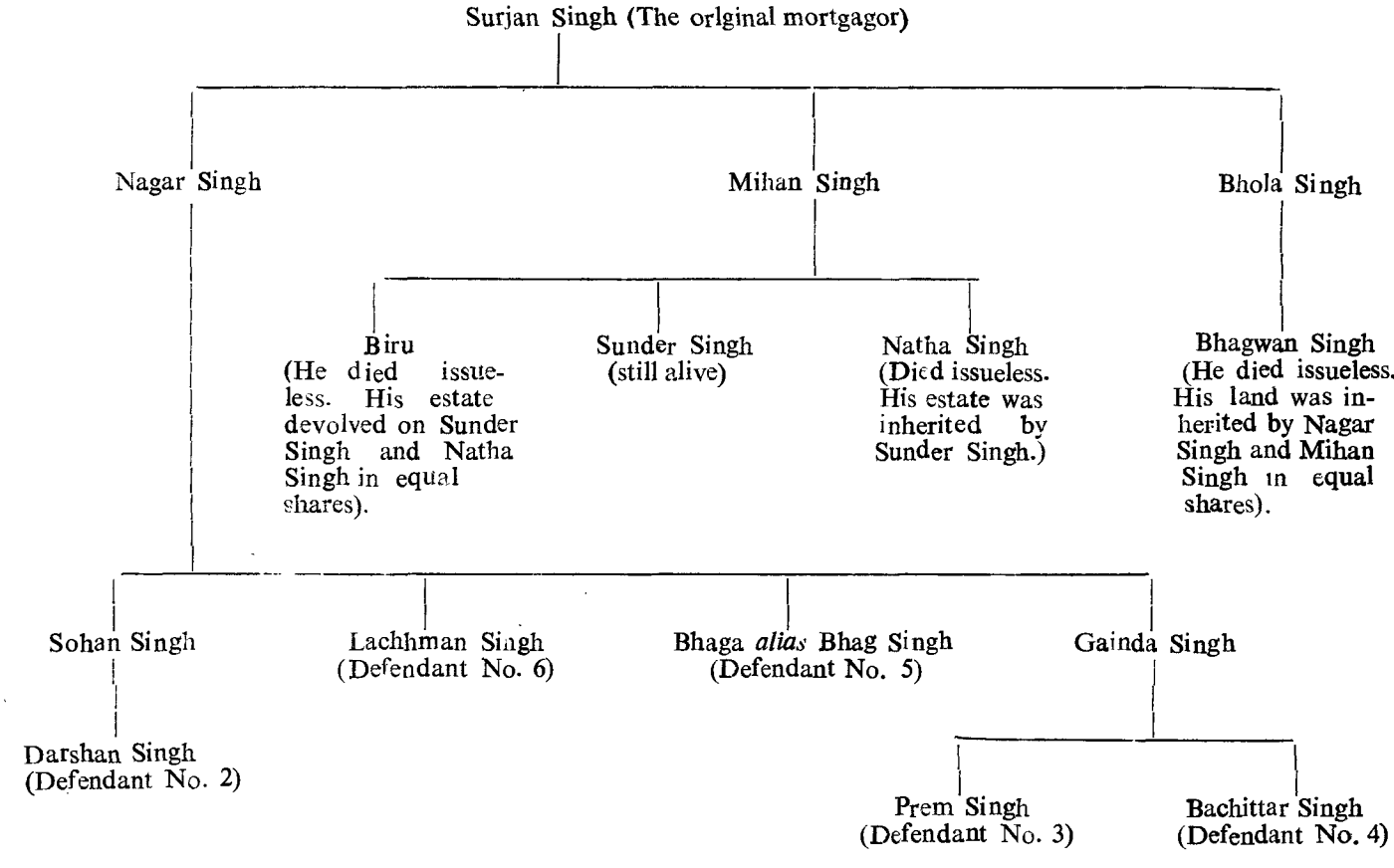
JUDGMENT

V. K. Bali, J.

(1) The suit of the plaintiffs met with partial success before the trial Court but whatever relief was granted in appeal preferred by the respondents, the same too was declined. This is second appeal on behalf of unsuccessful plaintiffs. Before, however, the points raised by the plaintiffs are mentioned, it shall be useful to give short resume' of the facts of the present case.

(2) Admittedly, one Surjan Singh was owner of the property in dispute which according to the plaint was a parcel of 4 kanals 2 marlas situated in village Dhariwal, Tehsil and District Jullundur. Surjan Singh aforesaid had three sons, namely, Nagar Singh, Mihan Singh and Bhola Singh. It shall be useful to reproduce the pedigree table which is extracted from Excerpt Exhibit P-1 and that would illustrate the relationship of Surjan Singh, the original owner with

the defendant-respondents who are his successors-in-interest :—



(3) Surjan Singh aforesaid had mortgaged his land, reference of which has been given above, to S/Shri Kanshi Ram, father of plaintiff Ram Dass, Surjan Mal, grand-father of plaintiff Nos. 2 to 4 and defendant No. 8 as also to Kedar Nath, father of plaintiff No. 5. According to the case of the plaintiffs as stated in the plaint and sought to be established before the Courts below, the aforesaid mortgage came into being sometime before 1902. The land, subject matter of the mortgage was comprised in Khewat/Khatauni No. 178/341, Khasra Nos. 16/11/4 (4 kanals 2 marlas) and the same was carved out in lieu of land measuring 4 Kanals 17 Marlas comprised in Khasra Nos. 514, 515, 590 and 441. After death of Surjan Singh, mortgagor, Bhola Singh one of his sons executed a Kabuliatnama on 9th of July, 1923. It is stated that in the Kabuliatnama aforesaid, the factum of mortgage was adequately recited. Even though, as per the case of the plaintiffs, the mortgaged had come into being in the way and manner, referred to above, the Revenue Authorities refused to sanction mutation and, therefore, they were constrained to rake up the said matter which came for ultimate decision before the Collector who,—*vide* his orders dated 6th of October, 1936, directed the mutation to be sanctioned in favour of the plaintiff mortgagees. In consequence thereof, mutation No. 562 was sanctioned. Inasmuch as the mortgagor had inducted a tenant, the plaintiff-mortgagees were constrained to seek their rights of receiving the rent from the tenant, namely, Harnam Singh who in the present litigation is defendant No. 1, but the said suit was given up for the reason that the claim of the plaintiffs had been satisfied out of Court. By the present litigation, the plaintiffs sought possession by claiming title to the suit land on account of the fact that mortgage in question was over 60 years and right of redemption had been extinguished by lapse of time. It is further contended by the plaintiff-appellants that before the present suit was filed, they had to go for another litigation against the tenant by way of seeking his eviction but the same was declined,—*vide* order dated 29th of March, 1972 for the sole reason that Harnam Singh, the contesting respondent in this appeal, had denied the relationship of landlord and tenant. In this view of the matter, the plaintiff-appellants who by the time the present suit was filed, had also acquired the right of ownership by prescription of time, were advised to straightway seek the decree for possession against the mortgagees and also against tenant Harnam Singh.

(4) The present litigation was contested by defendant No. 1, i.e. Harnam Singh (tenant) alone. The other defendants remained

ex parte throughout the litigation inclusive of the appeal before this Court. The controversy in the litigation reflected through the pleading of the parties gave rise to the following issues :—

(1) Whether the land mentioned in para No. 1 of the plaint was mortgaged by Surjan Singh in favour of the predecessor-in-interest of the plaintiffs and defendant No. 8? OPP

(2) Whether the land in suit was allotted in lieu of land described in para No. 1 of the plaint ? OPP

(3) Whether the plaintiffs and defendant No. 3 had been in possession of the mortgaged land, as mortgagees? OPP

(4) Whether the suit is maintainable ? OPP

(5) Whether the suit is barred by principles of res judicata and section 25 of the Punjab Security of Land Tenures Act? OPD

(6) Whether the alleged mortgage is hit by the Punjab Alienation of Land Act, 1900 ? OPD

(7) Whether the suit in the present form is not maintainable ? OPD (Onus objected).

(8) Whether the sale deed dated 1st October, 1964 as alleged in para No. 7 of the plaint is binding on the plaintiffs ? OPD

(9) Relief.

(5) Issue No. 1 was decided in favour of the plaintiffs. Under issue No. 2, it was held that only 2 Kanals 17 Marlas of land out of the land in dispute was allotted in lieu of the mortgage land. So far as issue No. 3 is concerned, the same was decided in favour of the plaintiffs. Issue Nos. 4 and 7 were determined in favour of the plaintiffs whereas findings on issue Nos. 5, 6 and 8 went against the defendant-respondents. In the manner aforesaid, the learned trial Court decreed the suit of the plaintiffs to the extent of 2 Kanals 12 Marlas. In the appeal carried before the learned first appellate Court, as indicated above, even the limited relief of 2 Kanals 12 Marlas was declined to the plaintiff-appellants. It may be mentioned that inasmuch as both plaintiffs and defendants No. 1 were aggrieved, two appeals were carried before the District Judge and whereas the appeal of the plaintiffs was dismissed, the appeal preferred by defendant No. 1 was allowed.

(6) It is interesting to note that the learned first appellate Court has not dealt with the case by taking up issues separately and the matter was determined on the sole issue of limitation by assuming that even if the findings on the other issues were to be returned in favour of the plaintiffs, the findings with regard to limitation were to go against them and, therefore, no useful purpose was to be served by examining and consequently deciding the other issues. In a given case, this may be a correct approach but the real difficulty is faced by the appellate Courts when the findings on the only issue determined by the Court below are to be reversed. It is for this precise reason that the recording of findings on all the issues has been commended from time to time. In the present case this Court is confronted with the situation where findings of the first appellate Court deserve to be set aside and as a necessary corollary, therefore, it becomes necessary to give findings on the other issues although not commented and decided by the first appellate Court. Had the matter not been pending for a long time in this Court, the only course, perhaps, would have been to remand the case to the first appellate Court by simply setting aside the findings recorded by the said Court on the question of limitation. However, such a course did not commend to me and is rightly suggested by the learned counsel for the parties not to be followed at this late stage. In the circumstances, I will take up the other issues for determination even though the same have not been decided by the first appellate Court. However, before that is done, it shall be first necessary to deal with the question of limitation and set aside the findings on the said issue recorded by the first appellate Court.

(7) The findings of the learned first appellate Court on the question of limitation basically stems from reading of Section 63 of the Limitation Act. It shall thus be useful at this stage to re-produce Section 63 and the same runs as under:—

"Description of suit	Period of Limitation	Time from which period begins to run
63. By a mortgagee—		
(a) for foreclosure;	Thirty years	When the money secured by the mortgage becomes due.
(b) For possession of immovable property mortgaged	Twelve years	When the mortgagee becomes entitled to possession."

(8) The reading of Section 63 (supra) would leave no manner of doubt that the mortgagees can ask for foreclosure after thrity years when the money secured by the mortgage becomes due. In other words, he can sue for attaining the property after thirty years if the mortgage still subsists and this was what precisely sought to be achieved by the plaintiffs in the present case. In so far as the clause (b) is concerned, the same talks of limitation of twelve years so as to obtain possession of immovable property which is the subject matter of mortgage when the mortgagee becomes entitled to possession. It is clause (b) of Section 63 which has been applied by the learned first appellate Court so as to knock out the plaintiffs on the grounds of limitation. In my considered view, the learned appellate Court clearly erred while applying clause (b) of Section 63 which is not at all applicable. The stress on the aforesaid clause i.e. clause (b) of Section 63 is on seeking for possession of immvoable property which has been mortgaged. This necessarily would mean that the mortgage is subsisting. Thus, it is the right of a mortgagee to seek possession in cases where possession has not been handed over to him and he is to seek such possession within twelve years when he becomes entitled to possession. In the present case the relief was for possession on account of fact that the mortgage had come to an end and the right of mortgagee had nurtured into ownership. Section 63(b) of the Limitation Act would not be attracted when the mortgagee sheds his limited right of seeking possession as a mortgagee and attains a larger interest i.e. when he becomes an owner by prescription of time. The learned counsel for tenant Harnam Singh despite his best efforts to persuade me to take a different view and fall in line with the reasonings adopted by the first appellate Court has not been able to do so. Nothing at all from the Limitation Act has been pointed out to show the period of limitation that may govern the suit of the kind that was filed by the plaintiffs in the present case. Confronted with the situation of the kind as is obtainable in the present case, the learned counsel for respondent Harnam Singh then endeavoured for up-holding the judgment of the first appellate Court on the basis of Section 58 of the Transfer of Property Act. The stress was on definition of simple mortgage contained in clause (b) of Section 58 and before the contention of Mr. Sarin, learned Senior Advocate is noticed, it will be useful to reproduce the same which runs as follows:—

> 58(b) Simple mortgage.—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees,

expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

On the basis of definition of simple mortgage as reproduced above, it is contended that in a case of mortgage which is simple, the only right of mortgagee is to cause the mortgaged property to be sold and the proceeds of sale to be applied, so, far as necessary, in payment of the mortgage amount. It is, thus, strenuously urged that in the present case, it was a case of simple mortgage and the plaintiffs could at best recover the mortgage money. Although subsequent discussion would show that in the present case mortgage was with possession, though possession was not parted by mortgagee yet even if it was a case of simple mortgage, In my view, the aforesaid contention cannot be upheld. Section 58(b) of the Transfer of Property Act only defines simple mortgage. The rights of mortgagee in the case of simple mortgage or otherwise are not spelled out from the definition of simple mortgage. As noted above, the right to seek possession of the property which is subject matter of mortgage would accrue to a mortgagee immediately when the mortgagor has not been able to redeem it in the period prescribed for the same. Section 60 of the Transfer of Property Act envisages that the mortgagor can redeem the mortgage any time after the principal money has become due and has been paid or tendered but he can do so only upto the time mortgage is in existence and has not been extinguished. However, when once the right of redemption is extinguished by lapse of time, the mortgagee would always be within his rights to seek possession by prescription of time. For the reasons aforesaid, findings of the learned appellate Court on the crucial question of limitation are set aside and one recorded by the learned trial Court on the said issue are affirmed.

(9) Under issue No. 1, the learned trial Court returned a firm finding of fact that the land mentioned in para No. 1 of the plaint was mortgaged by Surjan Singh in favour of predecessors-in-interest of the plaintiffs and defendant No. 8. In order to establish the factum of mortgage, the plaintiffs brought on record except Exhibit P1, copy of *Kabuliatnama* Exhibit P5 and copy of mutation No. 562. Exhibit P10. From the documents aforesaid, it is proved that the exact date

of mortgage cannot be made out but it is absolutely clear that Surjan Singh was the original mortgagor, Kanshi Ram Surjan Mal and Kidar Nath were the original mortgagees, the mortgage amount was Rs. 90, the mortgage was effected orally, it was in respect of 4 Kanals 10 Marlas of land comprised in Khasra Nos. 441, 514 and 590 situated at village Dhariwal, District Jalandhar and the same was with possession. It was created certainly sometimes before the year 1923 and mutation No. 562, dated October 6, 1936 was also sanctioned in respect of this mortgage. In para Nos. 1 and 9 of the except Exhibit P1, it is mentioned that the mortgage was for Rs. 90, it was in respect of 4 Kanals 10 Marlas of land comprised in Khasra Nos. 441(1K-13M), 514 (OK-14) and 590 (2K-3M), the mortgage was with possession by Bhagwan Singh son of Bhola Singh with Ram Dass son of Kanshi Ram, Kharati Ram son of Surjan Mal and mutation No. 562 was sanctioned in respect of this mortgage on October 6, 1936,—*vide* para No. 2 of the excerpt. Besides, in the written statement copy whereof is placed on record as Exhibit P2 and which written statement was filed by Bhagwan Singh son of Bhola Singh, the factum of mortgage in question was admitted. It may be mentioned here that Bhagwan Singh is none other than the grandson of the original mortgagor Shri Surjan Singh. The aforesaid written statement came into being in consequence of a suit filed by Biru Ram one of the original mortgagees wherein he made out that he was mortgagee to the extent of 1/3rd share. It is pertinent to mention here that the said suit was decreed. Exhibit P5, as referred to above, is *Kabuliatnama*, dated July 9, 1923. It is clearly made out from the aforesaid document that Bhola Singh who was the son of the original motgagor had executed this document and admittedly Bhola Singh after the death of Surjan Singh was owner-mortgagor to the extent of his share. From this document, the factum of mortgage from atleast 1923 is conclusively established and even calculated from 1923 more than 30 years had already elapsed when the suit giving rise to this appeal was filed by which time period of limitation for redemption was reduced from sixty to thirty years.

(10) The defendant-tenant under the stress of voluminous documentry evidence, reference of which has been given above, was totally unable to controvert the factum of mortgage. So much so even the witnesses produced on his behalf also could not deny that the land subject matter of dispute was mortgaged with the predecessors-in-interest of the plaintiffs. The findings on issue No. 1 recorded by the learned trial Court could not be successfully assailed by Mr. Sarin, learned counsel for the respondents. As stated above,

it was only contended that the date of mortgage is not proved and in any case it was also not proved that the mortgage was with possession. I am afraid the contention of Mr. Sarin in view of firm finding of fact recorded by the learned trial Court which is based upon over-whelming evidence has only to be rejected.

(11) Under issue No. 2, the learned trial Court held that only 2 Kanals 12 Marlas of land comprised in the present Khasra No. 16/11/4 was allotted in lieu of 2 Kanals 17 Marlas of land which was comprised in old Khasra Nos. 514 and 590. Mr. Jain, learned counsel for the appellants vehemently contends that in except Exhibit P1, there is mention of Khasra No. 441 and not of 444 as has been wrongly mentioned by the learned trial Court. The contention seems to be correct, inasmuch as under issue No. 2, the learned trial Court has correctly mentioned that excerpt P1 shows that pre-consolidation land measuring 4 Kanals 10 Marlas was comprised in Khasra Nos. 441, 514 and 590. If that be so, the finding of the learned trial Court to the effect that no land in lieu of old Khasra No. 444 was allotted during consolidation in apparently incorrect. It was substituted for Khasra No. 441 which alone had to be traced and not Khasra No. 444. Examination of excerpt Exhibit P1, on the other hand, clearly shows that the land subject matter of dispute in the present case was allotted in lieu of the land which was earlier comprised in Khasra Nos. 441, 514 and 590 and in lieu of 4 Kanals 17 Marlas, land measuring 4 Kanals 2 Marlas was carved out. The mention of Khasra No. 444 in the earlier part of judgment of trial Court appears to be a typographical mistake. In the circumstances referred to above, issue No. 2 shall be determined in favour of the plaintiffs and against the defendants. It would be held that land measuring 4 Kanals 2 Marlas was carved out in lieu of land measuring 4 Kanals 17 Marlas which was earlier comprised in Khasra Nos. 514, 515, 590 and 441. The present description of the land would be *Khewat/Khatauni* No. 178/341, *Khasra* No. 16/11/4 measuring 4 Kanals 2 Marlas.

(12) Findings on the other issues have not been assailed by either of the parties nor any other point has been raised.

(13) In view of the findings recorded above, normally a decree for possession should have ensued but the plaintiffs for the said relief are still confronted with the factum of mortgagor inducting a tenant during the currency of mortgage. Mr. Jain, is unable to make out a case for possession in the present litigation. Tenancy

does not come to an end on account of change of ownership and nothing has been stated to make out that a tenant inducted by the mortgagor with-regard to agricultural land shall have to vacate when the mortgage is extinguished by lapse of time. In the circumstances the counsel for the plaintiffs contends that a decree for symbolic possession be granted and the plaintiffs be left to seek their right of evicting the tenants under the provisions of Punjab Security of Land Tenures Act 1953. No exception can be had to this and, therefore, in the facts and circumstances aforesaid, the suit of the plaintiffs shall be allowed only to the extent that they would be declared owners and would have right to seek only symbolic possession. For seeking actual possession, they would be left to seek the remedy provided to them under the provisions of Punjab Security of Land Tenures Act. The appeal shall be allowed in the manner indicated above. The judgment and decree of the first appellate Court is set aside and there shall be no order as to costs.

S.C.K.

Before : G. R. Majithia, J.

S. K. SAYAL, D.A.G., PUNJAB, CHANDIGARH,—*Appellant.*

versus

STATE OF PUNJAB,—*Respondent.*

28th May, 1991.

Interest Act (14 of 1978)—*S.* 3—*Code of Civil Procedure,* 1908—*S.* 34—*Six percent interest allowed by first appellate Court on amounts due under decree—Appellant claiming higher interest in second appeal—Where suit is not for payment of money, S.* 34 *is inapplicable—Interest under S.* 3 *of the Interest Act can be awarded even by way of damages—High Court allowing interest at the rate of* 12 *per cent instead of* 6 *per cent.*

Held, that S. 34 of the Code of Civil Procedure applies only where the decree is for payment of money. The interest can only be awarded on the principal sum and not on the principal and interest as on the decree. However, the instant suit is not a suit for payment of money. S. 34 of the C.P.C. is not applicable in the instant case. Interest will be payable under the provisions of the Interest Act, 1978. Indisputably, the Act applies to the State of Punjab. Under S. 3 of the Act, interest can be awarded even by way of damages. The respondent withheld the payment of salary to the