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to get 1/7th share each in the Joint Hindu Family property is wholly illegal and the same is set aside and it is held that the male members of the coparcenary i.e. father and four sons are entitled to 1/5th share each in the Joint Hindu Family property.

(19) In view of the aforesaid discussion, the Regular Second Appeals No. 129 and 130 of 2000, filed by Dasa Singh and Gian Singh, are hereby dismissed and the Regular Second Appeals No. 174 and 1091 of 2000, filed by Ajmer Singh and Hardial Singh and by Jasmer Singh are allowed. The judgment of learned first appellate court is partly set aside and the suits of the plaintiffs Ajmer Singh and Hardial Singh and of Jasmer Singh are decreed. The consent decree dated 8th December, 1989 passed in civil suit No. 323 dated 14th September, 1989, titled as Gian Singh *versus* Dasa Singh regarding land measuring 41 kanals 11 marlas is held to be illegal, null and void. The suit land measuring 140 kanals 5 marlas is held to be the Joint Hindu Family property of the parties, in which all the coparceners, namely Dasa Singh, Ajmer Singh, Hardial Singh, Jasmer Singh and Gian Singh are in joint possession and are entitled to get 1/5th share each.

(20) No order as to costs.

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*J.S.T.*

*Before M.M. Kumar, J*

KARAM SINGH—*Petitioner*

*versus*

DANA SINGH—*Respondent*

*Civil Revision No. 4969 of 2002*

7th October, 2002

*Code of Civil Procedure, 1908—O. XVIII Rls. 4 & 5—Plaintiff filing affidavits by way of evidence in a suit for recovery—Challenge thereto—Whether recording of examination-in-chief by affidavit is confined only to cases which are not appealable—Held, no—Rule 4(i)*

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*provides that in every case examination-in-chief of a witness shall be on an affidavit—Rl. 5 requires that evidence of each witness has to be recorded in the language of the Court, in writing, either in the presence or under the personal direction & superintendence of the Judge—Interpretation—Evidence other than examination-in-chief may have to be recorded in accordance with the provisions of Rl. 5 but examination-in-chief is required to be recorded under the provisions of Rl.4—Petition liable to be dismissed.*

Held, that a perusal of sub-rule (1) and (2) of Rule 4 makes it evident that in every case examination-in-chief of witness shall be on an affidavit. Sub rule 2 provides that cross-examination and re-examination of such a witness who has furnished affidavit by way of examination-in-chief has to be either by the Court or by the Commissioner appointed by the Court. The use of word shall in sub rules (1) and (2) of Rule 4 shows the mandatory character of the provision. However, no amendment was carried in the provisions of Rule 5 which prescribed the procedure for recording the evidence in appealable cases. Rule 5 only requires that evidence of each witness has to be recorded in the language of the Court, in writing, either in the presence or under the personal direction and superintendence of the Judge etc. Rule 5 does not specify whether it applies to examination-in-chief or cross-examination and re-examination.

(Para 5)

Further held, that the expression “every case” used in sub rule (1) of Rule 4 would be rendered illusory and otiose if the recording of examination-in-chief by affidavit is confined to only those cases which are not appealable because no such intention is discernible from rules 4 and 5. The correct interpretation is that evidence other than examination-in-chief may have to be recorded in accordance with the provisions of Rule 5 but examination-in-chief is required to be recorded under the provisions of Rule 4.

(Para 7)

Tribhawan Singla, Advocate, for the petitioner.

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**JUDGMENT**

*M.M. Kumar, J*

(1) This revision petition filed under Section 115 of the Code of Civil Procedure, 1908 (for brevity, the Code) challenges order dated 22nd August, 2002 passed by the Additional Civil Judge (Sr. Division), Barnala dismissing the objections of the defendant-petitioner in permitting the affidavit of the plaintiff-respondent to be presented as evidence and to be treated as examination-in-chief. The Civil Judge has placed reliance on the provisions of Order XVIII Rule 4(1) and (2) of the Code.

(2) Facts in brief unfolded in the present petition are that the plaintiff-respondent has filed Civil Suit No. 176 of 2000 on 14th December, 2000 for recovery of Rs. 38,000 on the basis of a promissory note and receipt. Plaintiff-respondent by way of examination-in-chief filed affidavits which are Exs. P-A and P-B to which the defendant-respondent raised an objection arguing that the affidavits by way of evidence are not permissible to be filed in cases where the appeal is maintainable. Defendant-petitioner has relied upon the provisions of Order XVIII Rule 5 of the Code in this regard. The Civil Judge dismissed the application by rejecting the argument that the procedure for recording the evidence is to be governed by the provisions of Rule 4 of Order XVIII and the provisions of Rule 5 of Order XVIII of the Code would not be applicable.

(3) Mr. Tribhawan Singla, learned counsel for the defendant-petitioner has argued that under Rule 5 of Order XVIII of the Code, it is patent that in all the cases where the appeal is maintainable, the evidence of the whole case has to be recorded by the Judge himself in accordance with the provisions of Rule 5 of Order XVIII of the Code. According to the learned Counsel, it is only in cases of summary nature that the examination-in-chief in the form of affidavit could be tendered in accordance with the provisions of Rule 4 of Order XVIII of the Code. Therefore, the learned counsel has argued that the order passed by the Civil Judge is liable to be set aside.

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(4) After hearing learned counsel for the defendant-petitioner, I am of the considered view that the argument raised on behalf of the defendant-petitioner is liable to be rejected because the provisions of Rule of Order XVIII of the Code do not control the amended provisions made in Rule 5. Rule 4 and 5 of Order XVIII of the Code as amended are reproduced below for facility of reference:

“4. Recording of evidence.—(1) In every case, the examination—in chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed alongwith affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it :

Provided that the Court may, while appointing a commission under this sub rule, consider taking into account such relevant factors as it thinks fit :

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination :

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

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- (5) The report of the Commissioner shall be submitted to the Court appointing the Commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.
  - (6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.
  - (7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.
  - (8) The provisions of rules 16. 16A. 17 and 18 of Order XXVI. in so far as they are applicable, shall apply to the issue, execution and return of such commissions under this rule.
5. How evidence shall be taken in appealable cases.—In cases in which an appeal is allowed, the evidence of each witness shall be,—
- (a) taken down in the language of the Court,—
    - (i) in writing or, in the presence and under the personal direction and superintendence of, the Judge or
    - (ii) from the dictation of the Judge directly on a typewriter ; or
  - (b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge.”

(5) A perusal of sub rule (1) and (2) of Rule 4 makes it evident that in every case examination-in-chief of a witness shall be on an affidavit. It further requires that copies of examination in chief shall be supplied to the opposite party by the party who calls him for evidence. Sub rule 2 provides that cross examination and re-examination of such a witness who has furnished affidavit by way of examination-in-chief has to be either by the Court or by the Commissioner appointed by the Court. The use of word shall in sub

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rules 1 and 2 of Rule 4 shows the mandatory character of the provisions. However, no amendment was carried in the provisions of Rule 5 which prescribes the procedure for recording the evidence in appealable cases. Rule 5 only requires that evidence of each witness has to be recorded in the language of the Court, in writing, either in the presence or under the personal direction and superintendance of the Judge etc. Rule 5 does not specify whether it applies to examination-in-chief or cross examination and re-examination. In order to ascertain the object of introducing amendment in Rule 4 sub clause (e) of clause 3, a perusal of statement of objects and reasons appended to Bill No. L of 1997 for amending the provisions of the 'Code' becomes necessary which reads as under :

“3. Some of the more important changes proposed to be made are as follows :—

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(e) as the maximum time is consumed in recording oral evidence by the court which causes delay in disposal of cases, it is proposed to reduce such delay by making provisions for filing of examination-in-chief of every witness in the form of an affidavit. For the cross-examination and re-examination of witnesses it is proposed that it shall be recorded by a commissioner to be appointed by the Court and the evidence recorded by a commissioner shall become part of the record of the suit”

(6) A perusal of the afore-mentioned clause (e) of clause 3 would not leave any manner of doubt that the basic purpose of carrying the amendment in Rule 4 of Order 18 was to minimise the burden on the Civil Court by resorting to an alternative method of recording oral evidence either by way of filing affidavit or by appointing Commission expanding the scope of Section 75 of the Code. It is further clear that in appropriate cases, discretion has been given to the Civil Judge to record cross examination and re-examination in the manner prescribed in rule 5, However, rule 5 does not control the amendment made under Rule 5. Had the Legislature conceived such an intention then it could have easily made that provision.

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(7) Another reason for accepting the plea in all cases the examination-in-chief of a witness has to be on affidavit is that because before amendment procedure of recording evidence by affidavit used to be followed in summary cases. It is presumed to be known to the Legislature. However, it has yet prescribed the procedure of recording examination-in-chief by affidavit under rule 4. The expression every case used in sub rule 1 of rule 4 would be rendered illusory and otiose if the recording of examination in chief by affidavit is confined to only those cases which are not appealable because no such intention is discernible from rules 4 and 5. The examination-in-chief may have to be recorded in accordance with the provisions of Rule 5 but examination-in-chief is required to be recorded under the provisions of Rule 4.

(8) For the reasons recorded above, this revision petition fails and is dismissed.

(9) A copy of this order be given dasti on payment of usual charges. It is further directed that copy of this order be circulated to all the District and Sessions Judges for bringing it to the notice of the Subordinate Judges as there appears to be some ambiguity in Rules 4 and 5 of the Code.

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**R.N.R.**

*Before V.M. Jain, J.*

AVINASH KUMARI,—*Appellant/Plaintiff*

*versus*

PUNJAB STATE & OTHERS,—*Respondents/Defendants*

R.S.A. NO. 2673 OF 1999

22nd November, 2002

*Punjab Civil Services Rules, Vol.I, Part I—Rls. 4.11 & 7.5—Acceptance of resignation of a Govt. Employee—Request for withdrawal—Neither the post which was vacated by the plaintiff nor any other comparable post available with the department—Competent*