of IAS for the years 1975 to 1977 in view of the service record as corrected or amended by orders Annexures P 1 and P 2.

(12) For the reasons recorded above, this writ petition is allowed, the order Annexure P 9 is hereby quashed and direction is issued to the official respondents to re-consider the case of the petitioner for inclusion in IAS select list for the years 1975 to 1977 in accordance with the regulations which were applicable at the relevant time keeping in view the annual confidential report for the year 1972-73 as corrected or amended and conveyed through Annexures P 1 and P 2 along with other relevant service record and the petitioner's appointment and absorption in the IAS cadre be regulated on the basis of such re-consideration. If the Selection Committee decides that he is not suitable for inclusion in the select list and should therefore be superseded, it shall record it reasons for the proposed supersession. If on the other hand, the Committee decides to include his name in the select list, he will be entitled to rank in that list in accordance with his seniority unless, in the opinion of the Committee, there is a junior officer of exceptional merit and suitability who may be assigned a higher Place. The Union Public Service Commission will thereafter be consulted in accordance with the regulations. The committee should decide the matter within 6 months from today. The petitioner would be entitled to costs from the official respondents.

D. S. Tewatia, J—I agree.

N.K.S.

Before J. V. Gupta, J.

PURAN SINGH,—*Appellant.*

versus

JAGTAR SINGH,—*Respondent.*

R.S.A. No. 296 of 1985.

September 6, 1985.

Code of Civil Procedure (V of 1908)—Order 41 Rules 1 and 3—Rules and Orders of Punjab High Court Volume IV—Chapter 17 Rule 12(2)—Memorandum of appeal presented alongwith certified

copy of the judgment of the trial Court—Certified copy of the decree sheet was not attached as the same had not till then been supplied by the copying agency—Note in this regard given in the memorandum of appeal—Appeal admitted and record of the trial Court was sent for—Such appeal—Whether could be dismissed subsequently for non-compliance of Rule 1 or Order 41.

Held, that the provisions of Order XLI Rule 1 of the Code of Civil Procedure are mandatory. But once an appeal is duly entertained without the production of a certified copy of the decree sheet with it, and neither the memorandum of appeal is rejected nor returned as provided under Order XLI Rule 3 of the Code, then subsequently, the appeal could not be dimissed on the ground that at the time of the presentation of the appeal, the same was not accompanied with a certified copy of the decree under appeal because by that time the stage for dismissing the appeal for non-compliance of the provisions of Order XLI Rule 1 of the Code had already passed. At that stage, the appellant could only be directed to file the certified copy of the decree under appeal after obtaining the same from the trial Court. (Para 5).

Regular Second Appeal from the order of the Court of Shri R. L. Anand, Additional District Judge, Ferozepur, dated 25th September, 1984, affirming that of Shri N. S. Saini, P.C.S. Additional Senior Sub-Judge, Ferozepore, dated 11th November, 1983, decreeing the suit of the plaintiff with costs because of which the defendant is permanently restrained from dispossessing the plaintiff from the suit property except in due course of law.

Ashwani Kumar Chopra, Advocate, *for the Appellant.*

K. S. Malka, Advocate, *for the Respondent.*

JUDGMENT

J. V. Gupta, J.

(1) This judgment will dispose of Regular Second Appeals Nos. 296 and 741 to 743 of 1985, as the question involved is common in all the cases.

2. The facts giving rise to Regular Second Appeal No. 296 of 1985, briefly, are that Jagtar Singh, plaintiff-respondent, got a decree for permanent injunction restraining the defendant-appellant from dispossessing him from the suit land otherwise then in due course of law, from the trial Court on November 11, 1983. The defendant filed the appeal on November 14, 1983. Along with the memorandum of appeal, a certified copy of the judgment of the trial

Court dated Nivember 11, 1983, was filed. Since a copy of the decree-sheet was not made available till then, a note was given on the memorandum of appeal that a copy of the decree-sheet was not filed therewith as the same had not been supplied till then. The appeal was duly entertained by the office and on November 15, 1983, the learned Additional District Judge passed the following order—

> "The appeal is fairly arguable. Admitted, It be registered. Notice to be issued to the respondent on PF and record of the lower Court be summoned for 16th December, 1983".

He was served for the next date, i.e., for December 16, 1983, when the case was adjourned to March 28, 1984. The case was being adjourned from time to time when ultimately it was heard on September 25, 1984. That day, a preliminary objection was raised on behalf of the plaintiff that since the certified copy of the decree was not filed along with the memorandum of appeal, there was non-compliance of rule 1 of Order XLI of the Code and, therefore, the appeal was liable to be dismissed on that ground alone. The said objection prevailed with the lower appellate Court and it consequently dismissed the appeal as not maintainable on the basis of this short ground alone. Dissatisfied with the same, the defendant has filed this second appeal in this Court.

3. The learned counsel for the appellant contended that once the appeal was duly admitted and registered by the lower appellate Court, then, subsequently, it could not be dismissed for non-compliance of Order XLI rule 1 of the Code; particularly when at the time of the filing of the appeal, it was brought to the notice of the Court by making an endorsement on the memorandum of appeal to the effect that a certified copy of the decree-sheet was not being filed with it as the same was not made available. The learned counsel further contended that at the time of the filing of the appeal, the same could be rejected or returned to the appellant as contemplated under Order XLI rule 3 of the Code. Once it was admitted to hearing, then, it could not be rejected on that score. In support of the contention, the learned counsel relied upon *Jagat Dhish* v. *Jawahar Lal*, (1). The learned counsel also referred to sub-rule (2) to rule 12 Chapter 17, Rules and Orders of the Punjab

(1) A.I.R. 1961 S.C. 832.

High Court, Volume IV (as corrected up to January, 1966) under which it was incumbent upon the Copying Agency to supply a copy of the decree-sheet along with the certified copy of the judgment, and to the Division Bench judgment of this Court in *Somnath Puri* v. *Smt. Sarda Puri,* (2). On the other hand, the learned counsel for the respondent submitted that rule 1 of Order XLI of the Code is mandatory and the non-compliance thereof was fatal and, thus, the appeal was rightly dismissed as not maintainable by the lower appellate Court.

4. I have heard the learned counsel for the parties and have also gone through the relevant provisions of the statute and the case law cited at the bar.

5. Sub-rule (2) to rule 12, Chapter 17, Rules and Orders of the Punjab High Court, Volume IV, referred to above reads,—

> "Whenever an application is made for a copy of a civil judgment for the purpose of appeal, the applicant shall be supplied with such copy, unless he declines to pay the necessary fees, in which case a certificate, under the signature of the officer-in-charge of the copying department, shall be endorsed on the copy of the judgment supplied to the applicant to the effect that he was duly informed that a copy of the decree was also necessary, and after being so informed, declined to pay fees for the same."

Admittedly, the appellant obtained a certified copy of the judgment on November 14, 1983, and also applied for a certified copy of the decree-sheet as well, but the same could not be made available because it was not drawn by that time. In any case, necessary note in that behalf was made on the memorandum of appeal. Once the appeal was admitted to hearing without the certified copy of the decree-sheet, then, subsequently, the appeal could not be dismissed on that short ground alone. At the most, the lower appellate Court could direct the appellant to file the certified copy of the decree-sheet within specified time or when made available. The observations of the Supreme Court in paragraph 14 of the judgment in *Jagat Dhish's case* (supra) are most relevant and are as follows :

> "Let us then consider the technical point raised by the appellant challenging the validity or the propriety of the order

(2) 1980 Hindu Law Reporter 98.

under appeal. The argument is that O. 41, R. 1 is mandatory, and as soon as it is shown that an appeal has been filed with a memorandum of appeal accompanied only with a certified copy of the judgment the appeal must be dismissed as being incompetent, the relevant provisions of O. 41 with regard to the filing of the decree being of a mandatory character. It would be difficult to accede to the proposition thus advanced in a broad and general form. If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact has not been drawn up by the trial Court; in such a case if an application has been made by the appellant for a certified copy of the decree, then, all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect, the appeal may be returned to the appellant for presentation with the certified copy of the decree after it is obtained. In the case like the present, if the appeal has passed through the stage of admission through oversight of the office, then, the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court, and we apprehend it would be its duty, to direct the subordinate Court to draw up the decree forthwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on merits. It is obvious that the complications in the present case have arisen as a result of

two factors; the failure of the trial Court to draw up the decree as required by the Code, and the failure of the office in the High Court to notice the defect and to take appropriate action at the initial stage before the appeal was placed for admission under O. 41 R. 11. It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under O. 41 R. 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects. Therefore, in our opinion, the appellant is not justified in challenging the propriety or the validity of the order passed by the High Court because in the circumstances to which we have already adverted the said order is obviously fair and just. The High Court realised that it would be very unfair to penalise the party for the mistake committed by the trial Court and its own office, and so it has given time to the respondents to apply for a certified copy of the decree and then proceed with the appeal."

It is not disputed that the provisions of Order XLI rule 1 of the Code, are mandatory. But once an appeal is duly entertained without the production of a certified copy of the decree-sheet with it and neither the memorandum of appeal is rejected, nor returned, as provided under Order XLI rule 3 of the Code, then, subsequently, the appeal could not be dismissed on the ground that at the time of the presentation of the appeal the same was not accompanied with a certified copy of the decree under appeal, because by that time the stage for dismissing the appeal for non-compliance of the provisions of Order XLI rule 1 of the Code had already passed. At that stage, the appellant could only be directed to file the certified copy of the decree under appeal after obtaining the same from the trial Court. Thus, the approach of the lower appellate Court in this behalf was wrong, illegal and misconceived.

6. Under the circumstances, all the appeals succeed and are allowed. The judgments and decrees of the lower appellate Court in all the appeals are set aside and the cases are remanded to the

District Judge, Ferozepur, for deciding the appeals on merits, in accordance with law, after directing the appellants to file the certified copies of the decrees under appeal by obtaining the same from the trial Court. The parties have been directed to appear before the District Judge, Ferozepur, on October 12, 1985.

N.K.S.

Before Pritpal Singh, J.

NACHATTAR SINGH,—*Petitioner.*

versus

HARCHARAN KAUR,—*Respondent.*

F.A.O. No. 110-*M of* 1985.

September 9, 1985.

Hindu Marriage Act (XXV of 1955)—Section 13-B—Petition for divorce by mutual consent presented by the two spouses—Subsequent withdrawal of consent by one party—Whether envisaged by Section 13-B.

Held, that a reading of sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 would show that the scheme of the section does not envisage withdrawal of consent by one party. The petition can be dismissed as withdrawn only if both the parties who had filed the petition together agree to withdraw the same. Six months after the date of presentation of the petition and not later than 18 months after the said date, if the petition is not withdrawn by both the parties, the Court has to satisfy itself after hearing the parties and after making such enquiries as it thinks fit, that the petition was in fact presented by both the parties to the marriage, that they have been living separately for a period of one year or more and that they have mutually agreed that the marriage should be dissolved. After both the parties have voluntarily consented to file the petition for dissolving the marriage by mutual consent and all the other conditions mentioned in sub-section (1) of Section 13-B of the Act are fulfilled, it will not be open to the party to withdraw the consent. (Para 2).

First Appeal from the order of the court of the Additional Senior Sub-Judge, Jagraon, with powers of District Judge under Hindu Marriage Act, dated 6th February, 1985, *dismissing the petition.*

G. S. Punia, Advocate, *for the Appellant.*

I. S. Vimal, Advocate, *for the Respondent.*