

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH.

CR 2468 of 2015

Date of Decision: April 29, 2015

Anil Chopra and another

.....Petitioners

Vs.

Ajay Kapoor and ors.

.....Respondents

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

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Present:- Mr.Sanjeev Gupta, Advocate  
Mr. P.K. Kukreja, Advocate  
for the petitioners.

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**M.M.S. BEDI, J.**

In the present revision petition, counsel for the petitioner has raised an interesting controversy regarding the permissibility of examination on oath by oral evidence before a Commissioner appointed under Order 26 Rule 4 CPC to record evidence as per Order 18 Rule 4 CPC and a statutory bar of recording oral evidence in examination-in-chief on oath.

The contention of learned counsel for the petitioner is that examination-in-chief can only be recorded on affidavit by a Commissioner

appointed under Order 26 Rule 4 CPC after the Code of Civil Procedure (Amendment) Act, 2002 (No.20 of 2002).

Brief facts in the present revision petition filed by the tenant are that the landlord/ respondents obtained an ex-parte ejectment order against the petitioners in proceedings under Section 13 of the East Punjab Urban Rent Restriction Act, for short 'the Act'. The tenant- petitioners filed application for setting aside the ex-parte ejectment order on the ground that they had not been served. The claim of the landlord- respondents appears to be that the petitioners had been served in accordance with law by process server. The tenant- petitioners have already led their evidence. The landlord- respondents summoned two witnesses i.e. Rajiv Kumar, Process Server, DHW1, an employee of the Court who had allegedly served the summons and prepared his report on the judgment debtor-petitioners- tenants and DHW2 Sat Pal Thakur, a witness in whose presence the petitioners had been served with the summons by Process Server, Rajiv Kumar. The said two witnesses were ordered to be examined through the Court Commissioner. They proved certain documents by making a statement on oath before the Court Commissioner. The tenant- petitioners filed an application before the Rent Controller raising objections that the Court had appointed Court Commissioner without any application and that the examination-in-chief was recorded by the Court Commissioner despite there being no provisions in the Act and that the evidence is to be recorded only through affidavit under Order 18 Rule 4 CPC, although only cross-

examination and re-examination can be recorded through Court Commissioner.

The respondents filed reply opposing the application, objecting to the maintainability of the application and clarified that statement of Rajiv Kumar, Process Server of the Court of Civil Judge (Senior Division) was recorded in examination-in-chief on the basis of the record available in the Court file regarding returning of the summons which were sent by the Court in the name of tenants and that he had made deposition on the basis of the register containing the entries of entrustment of summons and disposal thereof which is entered by the Process Server in the ordinary course of the duties. The statement was recorded in the open Court after the Court Commissioner was appointed by the Court. Sat Pal Thakur, other witness had also made statement on the basis of the original summons.

The Rent Controller dismissed the application observing that the recording of evidence by way of Court Commissioner is permissible and the evidence can be recorded in the Court by appointing Court Commissioner in presence of the Presiding Officer. The purpose behind it is to save the time and expedite the Court process. No separate application is required before the Court exercises such powers. The Rent Controller further observed that the summoned witnesses could be examined orally and in view of the powers conferred by High Court Rules and Orders enabling a Court to get the examination-in-chief recorded through Court Commissioner

in the Court itself. The Court observed that the witnesses were formal witnesses regarding procedure.

Learned counsel for the petitioners has vehemently contended that the order passed by the Rent Controller is illegal. He placed strong reliance on the following judgments:-

- i) **Laxman Das Vs. Deoji Mal and others**, 2003 (2) RCR (Civil) 348;
- ii) **Drakshayini Vs. Gangavva and others**, 2005 (2) RCR (Civil) 540;
- iii) **Karam Singh Vs. Dana Singh**, 2003 (2) RCR (Civil) 409;
- iv) **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India**, 2002 (4) RCR (Civil) 786;
- v) **Ameer Trading Corporation Ltd. Vs. Shapoorji Data Processing Ltd.**, 2004 (1) RCR (Civil) 259.

In **Laxman Dass** case (supra), the plaintiff had filed an ejectment petition under the Act. Examination-in-chief could not be completed due to paucity of time. The remaining examination-in-chief was recorded in the form of affidavit. The defendant objected for accepting the affidavit but request was rejected as such revision petition was filed by the defendant. Revision petition was allowed observing the principle in legal maxim “Expressio Unius est exclusion alterius”, meaning thereby, that if a statute provides for a thing to be done in a particular manner, then it has to be

done in that manner and in no other manner and following other course is not permissible. It was observed as follows:-

“Order 18, Rule 4 provides for recording of examination-in-chief by affidavit in every case, but R.5 thereof remains unchanged which provides for recording of evidence by the Court in case the ultimate judgment and decree to be passed by the Court is appealable. To provide the harmonious construction of these provisions, Order 18, Rule 4 is to be read with Order 18, Rule 13, but as there is no change in Order 18, R. 5, it is difficult to hold that even in cases where the ultimate order shall be appealable, the evidence can be recorded as provided either under Order 18, Rule 4 or Order 18, Rule 13. Giving any other interpretation would render R 5 thereof nugatory and such an interpretation is not permissible. What to talk of a provision, even a word in the Statute cannot be construed as a surplusage. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the Statute. By construction, a provision should not be reduced as a "dead letter" or

"useless lumber". An interpretation which renders a provision an exercise in futility, should be avoided, otherwise it would mean that enacting such a provision in subordinate legislation was "an exercise in futility" and the product came as a "purposeless piece" of legislation and provision had been enacted without any purpose and entire exercise to enact such a provision was "most unwarranted besides being uncharitable."

In **Drakshayini's** case (supra), it was observed as follows:-

- “2. The only point to be considered by this Court in this Writ Petition is whether the Commissioner who has been appointed by the Court to record the evidence of a witness is required to record the examination-in-chief by way of oral evidence or the party has to file an affidavit in lieu of examination-in-chief.
3. The learned Counsel appearing for the petitioner contends that the Commissioner was not appointed under Rule 4 (6) of Order 18 of Civil Procedure Code and that he was appointed under Order 26 Rule 4-A of Civil Procedure Code. If a Commissioner is appointed under Order 26 Rule 4-A of Civil Procedure Code, evidence has to be

recorded as per Rule 19 of Order 18 of Civil Procedure Code. Therefore, he requests this Court to set aside the order passed by the Trial Court.

4. After the amendment of C.P.C. as per Rule 4 of Order 18, the examination-in-chief of a witness shall be only on affidavit. As per sub-rule (2) of Rule 4 of Order 18, the cross-examination has to be taken either by the Court or by the Commissioner appointed by it. Therefore, it is clear, the examination-in-chief cannot be recorded even if a Court appoints a Commissioner.
5. According to the learned counsel for the petitioner, whenever a Court appoints a Commissioner under Order 26 Rule-4A, statement has to be recorded as per Rule 19, Order 18 of Civil Procedure Code which reads as hereunder:-

“Power to get statements recorded on commission Notwithstanding anything contained in these rules, the Court may, instead of examining witnesses in open Court, direct their statements to be recorded on commission under Rule 4-A of Order 26”.

From this it is clear that a Commissioner can be appointed under two provisions of law, one under Order 18 sub-rule (6) of Rule 4 Civil Procedure Code and a Commissioner can also be appointed under Order 26 Rule 4-A of Civil Procedure Code. Even if a Commissioner is appointed under Order 26 Rule-4A of Civil Procedure Code, recording of evidence as contemplated under Order 18 Rule 1 and 2 cannot be bye-passed. Order 18 Rule 4(1) of Civil Procedure Code is mandatory and it is not directory. Therefore, the Trial Court is justified in rejecting the application of the Commissioner.”

In **Karam Singh’s** case (supra), it was observed that in all the cases examination-in-chief of a witness has to be on affidavit after the amendment irrespective of the fact whether the evidence is being recorded in appealable cases or in summary cases.

In **Salem Advocate Bar Association’s** case (supra), it was observed that Under Order 18 Rule 4 (2) and (3) CPC (as amended) evidence may be recorded either in writing or mechanically and that it was discretionary for the Court to get examined any witness by Commissioner or by the Court itself.

In **Ameer Trading Corporation Ltd.** case (supra), it was held as follows:-

“In other words, in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness-box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under R.5. In non-appealable cases, however, the affidavit in relation to examination-in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to R.13 of O.18. The cross-examination of such deponent in case of appealable cases, will have to be recorded by complying the provisions of R.5, whereas in case of non-appealable cases the Court would be empowered to exercise its power under R.13”

In the above said judgments, the amended provisions under Order 18 Rules 4 and 5 CPC have been considered, observing that examination-in-chef of a witness can be on affidavit. As per provisions of

Order 26 Rule 4 A CPC, once a Court Commissioner is appointed for recording of evidence he is required to record evidence by way of examination-in-chief on affidavit as mandated by Rule 4 of Order 18 CPC but in none of the above said judgments, the definition of evidence as per Evidence Act has been considered. The ‘evidence’ as per Evidence Act, reads as follows:-

- “(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
- (2) all documents produced for the inspection of the Court; such documents are called documentary evidence.”

The oral evidence has not been prohibited to be produced after the amendment of Order 18 Rule 4 CPC and Order 26 Rule 4 (A) CPC. The observations of the Apex Court in **Salem Advocate Bar Association’s** case (supra) have been considered in Para 18 of the judgment, wherein it was observed as follows:-

“18. In cases where the summons have to be issued under Order 16, Rule 1, the stringent provision of Order 18, Rule 4 may not apply. When summons are issued, the Court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to

be present in Court for his examination. In appropriate cases, the Court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18, Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in Court for recording of his evidence is a matter to be decided by the Court in its discretion having regard to the facts of each case."

Following the judgment of the Apex Court in **Salem Advocate Bar Association's** case (supra) and the judgment of the Division Bench of Gwalior Bench of Madhya Pradesh High Court in **Roshan General Store Vs. Vivek Gupta**, AIR 2004 (MP) 42, , it is held that where the summons have to be issued under Order 16 Rule 1 CPC, the stringent provisions of Order 18 Rule 4 CPC may not apply and in the case where summons are issued the Court can give option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in the Court for examination. It is always open to the Court to waive the proposition incorporated under Order 18 Rule 4 CPC in regard to the summoned witnesses. While interpreting Order 8 Rule 4 (2) CPC in **Salem Advocate Bar Association's** case (supra), the Apex Court held that the discretion is conferred upon the Court to decide as to whether evidence of a witness shall be taken either by the Court or by the Commissioner. While considering the

apprehension of the counsel that the Court has no discretion and once it decides that the evidence shall be recorded by the Commissioner then evidence of the witnesses cannot be recorded in Court, this proposition was rejected by the Apex Court and it was held that the Court has the power to direct either all the evidence being recorded in Court or all the evidence being recorded by the Commissioner or the evidence being recorded partly by Commissioner and partly by the Court. Referring to Rule 4 (3) of Order 18 CPC where it is provided that the evidence may be recorded either in writing or mechanically in the presence of the Judge or the Commissioner, the word 'mechanically' has been explained which provides that the evidence can be recorded with the help of the electronic media, audio or audio-visual, and in fact whenever the evidence is recorded by the Commissioner it will be advisable that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage. Such observation has been followed by this Court in **Abnash Kaur and another Vs. Surinder Singh Sandhu and others**, 2012 (3) PLR 215 and a Full Bench judgment of Andhra Pradesh High Court in **Reeta Pandit Vs. Atul Pandit**, 2005 (2) RCR (Civil) 504, wherein it was held that though in all cases examination-in-chief has to be conducted by way of affidavit but in cases where the witness is not under the control of the party who wants to examine him as a witness, re-course can be taken to Order 16 Rule 1 CPC and after taking recourse to Order 16 Rule 1 CPC and after he is summoned

by the Court, **the witness can be asked either to file an affidavit or can be examined in the Court itself.**

In the present case DHW 1 Rajiv Kumar and DHW 2 Sat Pal Thakur had been summoned by the respondents-landlord. They were ordered to be examined by the Court Commissioner. No distinction can be made for the purpose of recording of examination-in-chief by oral evidence or by affidavit on the basis of examination by the Court or by the Court Commissioner. The Court Commissioner recording evidence is only a substitute for the Court under the supervision of the Court. The Rent Controller has rightly rejected the application of the petitioners objecting to the examination of the summoned witnesses by Court Commissioner by recording their oral evidence on oath under the Order of the Court. No ground is made out for interference.

Dismissed.

April 29, 2015  
sanjay

(M.M.S.BEDI)  
JUDGE