thus the stroke of luck and the benign kindness of His Almighty shall not be allowed to go a stray by the persons who were equally contributors for the creation. I am sure, that with the passage of time good sense shall prevail upon both the spouses to live under one roof and enjoy the remaining part of life. The contributors after having acquired happiness may give that in succession to the child. The words do give healing touch but act in personam, works wonders. Both the spouses are educated and have acquired perfect mannerism, which should be used for furtherance of the achievement of togetherness.

R.N.R.

Before M. M. Kumar, J

DALBIR KAUR—*Petitioner/Defendant*

versus

JAGIR KAUR & ANOTHER—*Respondents/Plaintiffs*

C.R. No. 5360 OF 1999

25th February, 2002

Code of Civil Procedure, 1908—O.XXIII, R1.1(3), O.XIV R1.2—Dismissal of the suit as withdrawn—Another suit claiming the same relief filed—Whether the suit barred by the principle of res judicata *& not maintainable—Preliminary issue—Dismissal of defendant's application for deciding the suit on preliminary issue—Formal defect in claiming the relief—Under O.XXIII R1.1(3) permission can be granted to institute a fresh suit to the satisfaction of the Court—No illegality or irregularity in allowing plaintiff's application for withdrawal of the suit and to file afresh on the same cause of action—Neither such orders causing any failure of justice nor any irreparable injury to the defendant as all objections remain open to him—Petition dismissed.*

Held, that under sub-rule (1) of Rule 1 of Order XXIII of the Code, the plaintiff has been given an absolute right to withdraw the suit at any time but under sub-rule (3) of Rule 1, such a right is tampered with the requirement that the Court must be satisfied that there is some formal defect or there are sufficient grounds for allowing the plaintiff to institute fresh suit on the same subject matter or a part

of the claim. The learned Civil Judge has committed an error by not keeping in mind the distinction between sub-rule (1) and sub-rule (3) of Rule 1. Therefore, the first ground on the basis of which the impugned order has been passed is not sustainable and the order to that extent is liable to be set aside.The reasoning followed in respect of point (b) deserves to be approved becuase a formal defect has been pointed out by the Civil Judge in claiming the relief which is clearly discernible from the plaint. The failure of the plaintiff to claim proper relief constitutes a formal defect with the meaning of sub-rule (3) of Rule 1 of order XXIII. Thus, it cannot be said that the impugned order is wholly illegal and there is such a material irregularity which would require setting aside the same. Even otherwise, the impugned orders do not cause any failure of justice to the defendant nor there is any jurisdictional error. In so far as the question of *res judicata* and deciding the suit on the basis of preliminary objection is concerned, those objections would still be available to the defendant if any fresh suit is filed.

(Paras 18, 19, 20 & 21)

B.R. Mahajan, Advocate for the petitioner.

R.K. Joshi, Advocate, for the respondent.

JUDGMENT

M.M. KUMAR, J

(1) This order shall dispose of two revision petitions, namely, Civil Revision Nos. 586 of 1999 and 6210 of 1999 because both the revisions have arisen from the orders dated 14th October, 1999 passed by the Additional Civil Judge (Senior Division), Ajnala in the civil suit No. 75 of 4th March, 1999. The subject matter of challenge in Civil Revision No. 5860 of 1999 is the order passed on an application filed by the plaintiff—respondents under order 23 rule 3(1) of the Code of Civil Procedure, 1908 (for brevity, 'the Code') seeking amendment of the plaint. The prayer of the plaintiff—respondents to withdraw the suit was allowed and permission has also been given to her to file a fresh suit on the same cause of action. The second order which is subject matter of challenge in the other revision has dismissed the application filed by the defendant—petitioner under order 14 rule 2 of the Code for deciding the issue concerning *res judicata.*

(2) The facts discernible from the record of this case are as follows :

(3) There was one Gurcharan Singh who was the original owner of the suit land. He died on 7th May, 1986. He was survived by his widow Dalbir Kaur and a daughter from her Rupinderjit Kaur. There were two children from the earlier wife, nemely, a daughter Raj Kaur and a son Sarabjit Singh. After the death of Gurbachan Singh, the widow Dalbir Kaur and the son Sarabjit Singh from the earlier wife were cultivating the suit land in equal shares. However, Sarabjit Singh also died on 14th December, 1996.

(4) On 26th February, 1997, plaintiff-respondents Jagir Kaur and Karamjit Kaur widow and daughter of Sarabjit Singh respectively instituted a civil suit bearing No. 65 of 1997 for declaration that they were owners in possession of the land measuring 73 kanals 3 marlas fully described in the plaint. The basis of their assertion was that the part of land was inherited by their husband and father from Gurbachan Singh on the basis of will dated 10th April, 1986 and the remaining land was self-acquired property of the deceased Sarabjit Singh. It was further asserted that the defendant-petitioner has no right to alienate or dispose of the land in any manner. On 25th March, 1998, during the pendency of the suit, parties entered into a compromise whereby it was agreed that out of 41 kanals 9 marlas of land inherited from Gurbachan Singh, Dalbir Kaur the widow of Gurbachan Singh would be owner of 20 kanals 14.5 marlas and remaining land would be owned by Jagir Kaur and Karamjit Kaur widow and daughter respectively of Sarabjit Singh. It was further agreed between the parties that the suits would be got decided in terms of the compromise and accordingly statement of Karamjit Kaur the daughter plaintiff-respondent No. 1 was recorded on 20th April, 1998 and she stated that the will allegedly executed by Gurbachan Singh was illegal and forged document and that she has compromised with the defendant-petitioner. The trial Court instead of deciding the suit on the basis of compromise dismissed the suit as well as the counter claim on merit vide its judgment and decree dated 20th April, 1998. Copy of the compromise dated 25th March, 1998, statement of Karamjit Kaur daughter plaintiff-respondent No. 2 dated 20th April, 1998 and judgment and decree dated 20th April, 1998 have also been placed on record.

(5) Another suit by the daughter of Gurbachan Singh from his earlier wife Raj Kaur and the daughter of the widowed wife Rupinder jit Kaur was filed claiming a share in the property. This was registered as civil suit No. 233 of 1997 and in view of the compromise dated 25th March, 1998 it was dimissed as withdrawn. The statement made by the parties have been placed on record as Annexure P. 5 and the order passed by the Court has been placed on record as Annexure P.6.

(6) Plaintiff-respondent No. 2 Karamjit Kaur daughter of Sarabjit Singh has again filed a civil suit No. 75 of 1999 claiming the same relief of declaration to the effect that they were owners in possession of land measuring 73 kanals 3 marlas and it was admitted by them in para No. 13 of the plaint that earlier suit for declaration was filed by them which was got withdrawn with *mala fide* intention of the counsel of the defendant-petitioner as he was the relative of the defendant-petitioner and deliberately failed to disclose true facts to the plaintiff-respondents. The defendant-petitioner contested the suit *inter-alia* raising the plea that the suit was barred by principle of *res judicata* and not legally maintainable. It was further alleged that the plaintiff-respondents were estopped by their own act and conduct from filing the suit. During the pendency of the proceedings, an application was filed by the plaintiff-respondents for withdrawal of the suit with the permission of the Court to file a fresh suit. The application was dismissed as withdrawn by them on 11th June, 1999. Thereafter, issues were framed by the Court. It was in these circumstances that two applications were filed.

(7) On 7th August, 1999 before adducing the evidence, the defendant-petitioner made an application for deciding the suit on the preliminary issue as to whether the suit is maintainable on account of the bar created by the principle of *res judicata*. The trial Court has already framed an issue as to whether the suit was barred by principle of *res judicata* and also an issue as to whether the suit is not maintainable.

(8) During the pendency of that application, another application was filed by the plaintiff-respondents under order 23 rule 3(1) of the Code for permission to amend the plaint and to withdraw the suit with permission to file the fresh one on the same cause of action.

(9) The first application filed by the defendant-petitioner under order 14 rule 2 of the Code was dismissed by recording the following order :

"After hearing learned counsel for the parties at length and after going through the pleadings of the parties as well as record of this case file, it is revealed that no doubt as per pleadings of the parties, while framing the issue with regard to maintainability of the suit as issue No. 5 and with regard to principle of res judicata vide issue No. 2 have been framed. But now the question arises whether issue No. 2 and 5 can be treated as preliminary issue and suit can be decided on this score. Particularly, in the light of the circumstances, when the defendant-applicant herself has admitted in her reply to the application moved by plaintiffs/applicants separately seeking the withdrawal of the suit and permission of the court to file a fresh suit to the same cause of action wherein the defendant herself has admitted that in counter claim filed by her in civil suit No. 65/97 has already been dismissed and no appeal has been preferred against the judgment dated 20th April, 1998 on account of dismissal of the counter claim and the same since has become final between the parties and issue No. 3. in the said judgment dated 20th April, 1998 has been returned and decided against the present defendant/applicant. while deciding civil suit No. 65 of 1997, which means the judgment dated 20th April 1998 operates as res judicata against the defentant/ applicant. Moreover, vide my separate order of even date, the plaintiff/applicants have been allowed to withdraw the present suit and permission has been granted to file a fresh suit on the same cause of action in respect of same subject matter by removing the errors, defects in the pleadings and making necessary amendments in the pleadings subject to cost of Rs. 1000 as a result of which the present application

has become infructuous and redundant and same is hereby dismissed.

Announced :

(Sd). . .,

Addl. Civil Judge (Sr. Div.)
Ajnala, 14th October, 1999

(10) The second application for withdrawal of the suit was allowed and permission was granted to file a suit afresh on the same cause of action. The Additional Civil Judge while allowing the application has observed as under :

"After hearing learned counsel for the parties at length and after going through the pleadings of the parties as well as record of this case file, it is revealed that the plaintiff/ applicants have sought the withdrawal of the suit by seeking permission to file a fresh suit on the same cause of action in respect of which learned counsel for respondent at the very out set during the course of arguments has strongly argued that as per application of applicants, the application has been moved u/o 23 Rule 3(1) CPC read with Order 6 Rule 17 CPC according to which neither the suit can be withdrawn nor the permission can be granted to file a fresh suit on the same cause of action as per the provisions which are mentioned in the application and as such, the application is liable to be rejected outrightly on this score being not maintainable and being not moved under the correct provisions of law. But on this score, I am not inclined to accept the arguments of learned counsel for respondent because the application cannot be invalid on the simple ground that it refers to a wrong provisions of law or that it combines two provisions of law one of which has no application and court has to look into the substance of the application. In this regard, I draw support from the rule of law laid dwon in *M/s S.K. Nagulu Coad Vs. Syndicate Bank, 1995 ISJ (Banking)*

504, Andra Pradesh High Court, M/s Sha Vinvinchand Hestimal & Co. Vs. Central Bank of India., 1995 (1) CCC Page 339 Karnataka, which is fully applicable on the facts of the present application. No doubt the application of the present applicants should have been moved as per the provisons of Order 23 Ruel 1 CPC instead of Order 23 Rule 3(1) CPC. But even if the applicants have moved the instant application under order 23 Rule 3(1) CPC, the court has to persue and consider the substance of the application as well as relief and prayer clause in the application which is apparently with regard to withdrawal of the suit seeking a permission to file a fresh one on same cause of action and by way of amendment in the pleadings, which the plaintiffs have not in the pleadings of the instant suit and as such, this objection raised by respondent to my mind is not sustainable and same is rejected.

The application has been opposed by learned counsel for respondent on another score that even if the present application is treated for the withdrawal of the suit by seeking the permission of the court even then the pleas and grounds mentioned in the application do not fulfil the requirements of the provisions of order 23 Rule 1 CPC for the purpose of withdrawal of suit, for the purpose of seeking the permission for seeking amendment of the pleadings because the applicants have miserably failed to point out the technical defects in the pleadings of the present case earlier taken or if at all any amendment is required, such defects cannot be cured by way of amendment and as such, according to counsel for respondent, the application deserves to be dismissed on this score also. The argument on behalf of respondent has been opposed by counsel for applicants by citing numerous authorities containing the rule of law, which entitles the plaintiffs/ applicants to withdraw the suit and for seeking the permission to file a fresh suit on the same cause of action and same subject matter and by taking the new pleas which the plaintiffs could not take in the earlier pleadings in the plaint, to

set up the claims of the plaintiffs. To substantiate its arguments, counsel for applicants has placed reliance upon *Mohinder Singh* v. *Babu Singh* (1985-2) 88 PLR page 609 *Municipal Committee Zind* v. *Suresh Kumar* 1989(1) RRR Page 165 (Punjab), wherein it has been held that civil procedure code, gives an unqualified rights to plaintiff to withdraw from suit and court cannot refuse permission and compel plaintiff to proceed with its because provisions of Order 23 Rule 1 CPC apply to the appeals in the same manner as they apply to suits. In an other authority cited on behalf of applicants, *Ghanaya Lal (deceased)* v. *Nathu,* 1990(1) RRR Page 10 (Punjab), wherein it has been held that error of not claiming proper relief is a formal defect and the error can be remedied either by way of amendment or by withdrawing the suit with permission to file a fresh suit. The contention that where a suit can be amended, permission to withdraw the suit cannot be granted is not tenable and such a contention would render the provisions of order 23 Rule 1 CPC obsolete. This rule of law also supports the contentions and claim of the applicants in the instant applications. Since the error in the pleadings have been mentioned in the application which the applicants have made in the pleadings of their suit the plaintiffs/ applicants can not be compelled to proceed with the present suit declining the permission because the permission if it is not granted, and the plaintiffs if are not allowed to withdraw the suit to file a fresh suit with same cause of action and relating to same subject matter by amending the errors in pleadings,it will render the provisions of Order 23 Rule 1 CPC and order 6 Rule 17 CPC obsolete. Since it is admitted case of the respondent in reply to the application that the counter claim of the respondent in the earlier suit no. 65/97 has been dismissed by the judgment of this court dated 20th April, 1998 in which the respondents challenged the will dated 10th October, 1986 through counter claim of the defendant by taking a categorical plea for

the purpose of will dated 10th April, 1986 which the plaintiffs could not take in the plaint of the instant suit and this error certainly constitute a technical defect in the pleadings of the plaintiffs which can be remedied by the plaintiffs by withdrawing the present suit and by granting the permission to the applicant to file a fresh suit by removing the errors defects in the pleadings as well as by making necessary amendments by taking the pleas so that the present suit of the plaintiff may not fail due to these technical defects.

As observed above, there is a technical defect in the pleadings of the plaintiffs and the plaintiffs/applicants want to remove the errors and to take certain pleas in support of the claims of the plaintiffs and there are sufficient grounds to allow the plaintiffs/applicants to withdraw the suit and to grant the permission to file a fresh suit. The rule of law as laid down in *Bhag Mal Vs. Master Khem Chand, AIR 1961, Punjab, page 421,* wherein it has been authoritatively held that if there are sufficient grounds to the satisfaction of the court for the withdrawal of the suit, the courts has jurisdiction to grant permission to withdraw the suit only for reasons falling within the ambit of Clasue (A) of Rule 1(2), or order 23 of Civil Procedure Code or for any grounds, which though may not be exactly ejusdem generis to the same but still the some what analogous to them. The grounds mentioned in the application certainly fall within the ambit of prcvisions of Order 23 rule 1(2)(a) CPC. Similarly, the defect in plaint is a sufficient ground for allowing plaintiffs to withdraw from suit with liberty to file a fresh suit. It has been so held in *(Joginder Singh Vs. Mohinder Singh) 1978 PLJ page 9 Punjab.*

In the light of above discussion and for the reasons recorded above, I am fully satisfied that there are technical defects not only in the pleadings of plaintiffs/applicants but also there are sufficient grounds to allow the application of applicants as the rule of law reproduced

in the above cited authorities on behalf of applicants and since counsel for respondent could not cite any authority contrary to the above cited authorities and as such, the applicants are entitled to withdraw the present suit and permission is granted to the applicants to file a fresh suit on the same cause of action in respect of same subject matter by removing the errors, defects in the pleadings. Accordingly, the application is allowed subject to costs of Rs. 1000 payable by the applicants to the respondent in case a fresh suit is filed by the plaintiffs/applicants, and the application in these terms stands disposed off."

(11) I have heard Shri B.R. Mahajan, learned counsel for the defendant/petitioner, Shri R.K. Joshi, learned counsel for the plaintiff-respondents and perused the record with their assistance.

(12) Shri Mahajan has argued that the Addition Civil Judge has committed grave error in law by granting permission to file a fresh suit to the plaintiff-respondents because even the present suit was barred by principle of res judicata. According to the learned counsel, the Additional Civil Judge has also gone wrong in dismissing the application of the defendant-petitioner for deciding the suit on the basis of preliminary issue that the suit was not maintainable because of the earlier litigation between the parties which ended in the passing of a decree by the Court of competent jurisdiction. According to the learned counsel, it would amount to abandonment of jurisdiction which vests in the Court. No permission to file the third suit could have been given because the suit itself was not maintainable.

(13) On the other hand, Shri R.K. Joshi, learned counsel for the plaintiff-respondents has argued that the present revision petitions are not maintainable as the defendant-petitioner has not suffered any failure of justice or it has not cause any irreparable injury to her within the meaning of proviso to sub Section (1) of Section 115 of the Code. He has further argued that there is no error of jurisdiction in passing the orders impugned in these revision petitions. The suit was at initial stages and the relief was not properly prayed.

(14) Having heard learned counsel for the the parties and perusing the record, I am of the considered view that these revision petitions deserve to be dismissed because merely the suit has been allowed to be withdrawn with liberty to file fresh suit by incorporating the necessary amendments which are of formal character. A perusal of the impugned order dated 14th October, 1999 passed by the Civil Judge shows that the application of the plaintiff-respondents has been allowed on the following grounds:—

> "(a) The Code of Civil Procedure confers unqualified rights on the plaintiff-respondents to withdraw from the suit and the Court cannot refuse permission and compel the plaintiff-respondents to proceed with it.
>
> (b) The failure of the plaintiff-respondents to claim proper relief in the plaint as it omitted to plead that the counter claim made by the defendant-petitioner in earlier Civil Suit No. 65/1997 has been dismissed by the judgment of the Civil Judge dated 20th April, 1998 in which the plaintiff-respondents has set up the will dated 10th April, 1986. This omission constitute a technical defect in the pleadings of the plaintiff-respondents which can be ratified either by permitting the amendment of the suit or by allowing the suit to be withdrawn with liberty to file fresh one after incorporating the necessary amendments.

(15) The process of reasoning followed by the Civil Judge in so far as point (a) is concerned is not acceptable in cases where the suit is required to be withdrawn with permission of the Court to enable the plaintiff-respondents to file a fresh suit on the same cause of action. Such an unquailfied right is available to the plaintiff-respondents where no permission for filing the fresh suit is required from the court. This distinction is clear on perusal of sub-rule(1) of Rule 1 and sub-rule (3) of Rule 1 of Order XXIII of the Code which reads as under :—

> "1. (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim :

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim."

(10) It is obvious that under sub-rule (1) of Rule 1 of order XXIII of the Code, the plaintiff has been given an absolute right to withdraw the suit at any time but under sub-rule (3) of Rule 1, such a right is tampered with the requirement that the Court must be satisfied that there is some formal defect or there are sufficient grounds for allowing the plaintiff to institute fresh suit on the same subject matter or a part of the claim. The Supreme Court in the case of ***M/s Hulas Rai Baij Nath*** versus ***Frim K.B. Bass and Co. (1)*** interpreted the provisions of sub-rule (1) of Rule 1 to mean that this rule is applicable to cases where permission to file fresh suit is not sought. The observations of their Lordships read as under :—

"The short question that, in these circumstances, falls for decision is whether the respondent was entitled to withdraw from the suit and have it dismissed by the application dated 5th May, 1953 at the stage when issues had been framed and some evidence had been

(1) AIR 1968 SC 111

recorded, but no preliminary decree for rendition of accounts had yet been passed. The language of order 23, rule 1, sub-Rule (1), C.P.C., gives an unqualified right to a plaintiff to withdraw from a suit and if no permission to file a fresh suit is sought under sub-rule (2) of that Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub-rule (3) of that Rule. There is no provision in the Code of Civil Procedure which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it....."

(17) Similarly in the case of ***Amalgamated Electricity Co. Ltd.*** versus ***Kutubuddin Rajeshaheb Chancha and others (2)*** this question came up for consideration before the Mysore High Court where this distinction has been made more explicit. The observations made by Mysore High Court in paragraphs 12 and 13 of the judgment which have significant bearing on the question under consideration read as under :—

"12. It appears to me that principles are to be derived or gathered from the fact that the absolute right of withdrawal and withdrawal with liberty to file a fresh suit on the same cause of action are treated as two distinct and different matters by Rule 1 of Order XXIII. The first one, while preserving, liberty to a plaintiff to withdraw his suit, visits him with certain consequences set out in the sub-rule (3). It is only if a plaintiff wishes to escape those consequences that he is required to comply with the terms of sub-rule (2). The said rule vests a power in the Court to decided whether, in the circumstances stated, the plaintiff should be relieved of adverse consequences following upon a formal defect or upon circumstances arising out of proceedings, and permitted to file a fresh suit. Whereas a choice made by the plaintiff under sub-rule (1) may be immune from any obstruction being placed in its

(2) AIR 1970 Mysore 155

exercise either by the opposing party or by the Court itself, an attempt to withdraw the suit with liberty to approach the Court again is expressly made subject to the Court being satisfied as to the particular set out in the sub-rule (2), On principle therefore, an application by a plaintiff under sub-rule (2) cannot be treated on a par with an application by him to exercise the absolute liberty given to him under sub-rule (1) : it is actually a prayer for a concession from the Court after satisfying the Court regarding the existence of circumstances justifying the grant of such concession. If so, it is, like any other application, a prayer which is capable of being withdrawn before it is granted or refused.

13. If an application under sub-rule (2) is heard on merits and at the conclusion the Court is not satisfied that circumstances exist justifying the grant of permission to withdraw with liberty to file a fresh suit, the Court could proceed to dismiss the application, in which case the suit remains on file. If such is the consequence of an actual adverse order made by the Court on an application, I do not think the plaintiff can be placed in a worse situation by stating that the application must be regarded as one under sub-rule (1) and therefore incapable of being withdrawn, or as having the immedate result of withdrawing the suit. It will be seen that in such an event, the plaintiff not only losses the right of filing a fresh suit but also loses even the possibility of getting such relief as he may be in a position to get existing suit. I do not think, an interpretation which leads to such a consequence should be readily accepted."

(18) The principles enunciated by the Supreme Court in the case of *M/s. Hulas Rai Baij Nath* (supra) and of Mysore High Court in *Amalgamated Electricity Co. Ltd.* (supra) do not leave any room for doubt that the learned Cicil Judge has committed an error by not keeping in mind the distinction between sub-rule (1) of Rule 1 and sub-rule (3) of Rule 1 of Order XXIII of the code. Therefore, the first ground on the basis of which the impugned order has been passed

is not sustainable and the order to that extent is liable to be set aside. The judgment in the case of *Mohinder Singh* (supra) relied upon in the order of the Civil Judge is in fact a judgment under sub-rule (3) of Rule 1 of Order XXIII of the Code. Therefore, it would not give absolute right to the plaintiff to withdraw the suit. However, the other judgment in the case of *Municipal Commitee, Jind* (supra) is not applicable to the facts of the present case as it is a judgment on sub-rule (1) of Rule 1 of Order XXIII of the code.

(19) Then the quistion for consideration is whether circumstances exist justifying the grant of permission to the plaintiff-respondents to withdraw the suit and allow them to file a fresh suit on the same cause of action within the meaning of Sub-rule (3) of Rule 1 of Order XXIII. In this regard, the reasoning followed in respect of point (b) deserves to be approved because a formal defect has been pointed out by the Civil Judge in claiming the relief which is clearly discernible from the plaint. The failure of the plaintiff-respondents to claim proper relief in so far as it has omitted to plead that the counter claim made by the defendant-petitioner in the earlier suit No. 65/1997 has been dismissed by the judgment of the Civil Judge dated 20.4.1998 in which the plaintiff-respondents has set up the will dated 10-4-1986. This omission constitutes a formal defect within the meaning of sub-rule (3) of Rule 1 of Order XXIII. For this proposition., reliance can be placed on a judgment of this court in the case of ***Chhindo*** versus ***Mela Singh, (3) Joginder Singh's*** case (supra); ***Bhag Mal's*** case (supra) and ***Gurcharan Singh*** versus ***Smt. Nihal Kaur etc., (4).*** Therefore, the reasoning adopted in respect of ground (b) merits acceptance.

(20) In view of the above discussion, it cannot be said that the impugned order is wholly illegal and there is such a material irregularity which would require setting aside the same under Section 115 of the Code.

(21) Even otherwise the impugned orders do not cause any failure of justice to the defendant-petitioner nor there is any jurisdictional error. In so far as the quistion of res-judicata and deciding the suit on the basis of preliminary objection is concerned, those objections would still be available to the defendant-petitioner if

(3) ILR (1967) Pb. & Hy. 6
(4) 1975 CLJ 719

any fresh suit is filed. Even otherwise, the Supreme Court in the Case of ***Prem Bakshi*** versus ***Dharam Dev (5)*** has interpreted Section 115 of the Code and has observed as under :—

> "The proviso to sub-sections (1) and (2) with explanation was added by the amending Act of 1976. By this amendment the power of the High Court was curtailed, the intention of the legislature being that High Court should not interfere with each and every interlocutory order passed by the trial Court so that the trial of a suit could proceed speedily and that only the interlocutory order coming under clause (a) or (b) of the proviso would be entertained by the High Court."

(22) Their Lordships also considered clause (a) and (b) of the proviso as well as explanation to sub-section (2) and observed as under :

> "In Major S.S. Khana v. Brig. F.J. Dhillon, AIR 1964 SC 497: 1964(4) SCR 409) this court considered the expression "any case which has been decided" in sub-secton (1) of Section 115 CPC and held that the expression case is a word of comprehensive import and includes civil proceedings other than suits and is not restricted by anything contained in the said section to the entirety of the proceeding in a civil court and to interpret the expression 'case' as an entire proceeding only and a part of the proceedings would impose as unwarranted restriction on the exercise of powers of superintendence by the High Court. This view of the High Court has now been legislatively adopted by the Parliament by introducing the explanation to sub-section (1) of Section 115 CPC and, therefore, an interlocutory order would be revisable. There is no doubt that present order being an interlocutory order is revisable under Section 115, but for exercising powers under this Section by the High Court, the order must satisfy one of the conditions mentioned in clause (a) and (b) of the proviso. The proviso to sub-section (1) of Section 115

(5) 2002 (1) RCR (Civil) 610

puts a restriction on the powers of the High Court inasmuch as the High Court shall not under this section vary or reverse any order made or any order deciding a issue, in course of a suit or other proceedings except where (1) the order made would have finally dispose of the suit or other proceedings or, (ii) the said order would occasion a failure of justice or cause irreparable injury to the party against whom it is made. Under caluse (a), the High Court would be justified in interfering with an order of a subordinate court if the said order finally disposes of the suit or other proceeding. By way of illustration we may say that if a trial court holds by an interlocutory order that it has no jurisdiction to proceed the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be revisable. The order in question by which the amendment was allowed could not be said to have finally disposed of the case and therefore, it would not come under clause (a).

Now the question is whether the order in question has caused failure of justice or irreparable injury to respondent No. 1. It is almost inconceivable how mere amendment of pleadings could possibily cause failure of justice or irreparable injury to any party. Perhaps the converse is possible i.e. refusal to permit the amendment sought for could in certain situations result in miscarriage of justice. Afterall amendments of the pleadings would not amount to decisions on the issue involved. They only would serve advance notice to the other side as to the plea, which a party might take up. Hence we cannot envisage a situation where amendment of pleadings, whatever be the nature of such amendment, would even remotely cause failure of justice or irreparable injury to any party."

(23) The basic object of amendment by adding proviso to sub-section (1) of Section 115 of the Code as explained by the Hon'ble Supreme Court is that the revisional jurisdiction of the High Court Shall not be available unless the order passed by the subordinate

Courts if allowed to stand would occassion a failure of justice or casue an irreparable injury.

(24) Applying the principle stated above to the facts of the present case no doubt is left that the defendant-petitioner would not suffer in any manner by the impugned orders in view of the fact that if the plaintiff-respondents ever file a fresh suit then all objections would remain open to them.

(25) For the reasons recorded above, the order dated 14th October, 1999 are upheld subject to the observations made in the foregoing paras. The revision petitioners fail and the same are dismissed without any order to cost.

R.N.R.

Before M.M. Kumar, J

JAGDISH CHAND GUPTA & ANOTHER—*Petitioners*

versus

DR. RAJINDER PARSHAD & OTHERS—*Respondents*

C.R. No. 2570 OF 2000

20th March, 2002

Code of Civil Procedure, 1908—Ss. 151, 152, 153, & 153-A—Preliminary decree of partition passed by the Trial Court affirmed by the 1st Appellate Court as well as the High Court—Executing Court ordering execution of the decree—Whether 1st Appellate Court can modify the decree by making an amendment in its judgment & decree—Held, no—Court has jurisdiction only to correct mistakes which are clerical in nature and not substantive in character.

Held, that the Addl. District Judge has allowed substantive amendment in the judgment and decree dated 15th May, 1999 and declared that the plaintiff-petitioner No. 1, defendant-respondent No. 1 and defendant-petitioner No. 2 would be entitled to 1/7th share in the suit property alongwith their sisters who have been impleaded as defendant-respondents No. 2 to 5. As a matter of fact, the Addl. District Judge on 15th May, 1999 had dismissed the appeal by affirming the finding on all the issues reached by the Trial Court. Under