

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. : 10 of 2025
Reserved on 20.03.2026
Decided on : 06.04.2026

Sugham BhagatAppellant.

Versus

Reena Sharma & another ...Respondents

Coram:

The Hon'ble Mr. Justice Romesh Verma. Judge.

*Whether approved for reporting?*¹

For the appellant Mr.Sushant Vir Singh, Advocate.

For the respondents Mr.Vishal Mohan, Sr. Advocate,
with Mr. Praveen Sharma,
Advocate for respondent No.1.

Romesh Verma, Judge

The present Regular Second Appeal arises out of the judgment and decree as passed by the Additional District Judge, Palampur, District Kangra, H.P.dated 28.09.2024, whereby the appeal and application under the provisions of Order 23 Rule 1 of C.P.C filed by the present respondent were allowed and the judgment and decree as passed by the learned Civil Judge , Palampur, Distt. Kangra was set-aside.

2. The brief facts of the case are that the respondent/plaintiff filed a suit for possession by way of

¹ Whether reporters of Local Papers may be allowed to see the judgment?

ejection against the present appellant in the Court of learned Civil Judge, Palampur, District Kangra, H.P. on 20.06.2011.

3. The facts of the case are that the plaintiff is the owner of the house of single story, slate covered comprising of 6 rooms kitchen veranda, bath room and store which is bounded by house of Anu Sharma on north side link road to residence of MM Bhagat on the southern side residence of M M Bhagat on eastern side and on western side Nala road Ghuggar, situated at Mohal and Mouza Ghuggar, Tehsil Palampur, District Kangra, H.P. It was averred that house, as detailed, is exclusively owned by the plaintiff after the death of her father Rajinder Mohan and defendant No.2 has got no right, title and interest on the same. It is further averred that defendant No.1 was inducted as tenant on monthly rent of Rs.800/- of two rooms and kitchen marked as R1, R2 and K1 in the above said house by the father of plaintiff and after the death of the father of plaintiff, defendant No.2 is tenant under the plaintiff on monthly rent of Rs.800/- per month. It is further averred that she is residing in a rented residential accommodation, and now requires the aforesaid suit

property for her own residence. Further it is averred that she requested the defendant No.1 to vacate her room but he prolonged the matter on one pretext or other. Thereafter vide legal notice dated 17.06.2010, she terminated the tenancy of defendant No.1 and despite that defendant No.1 did not vacate the house and sent a false reply. It is further averred that defendant No.2 has forcibly taken the possession of four rooms in the last week of December, 2010. It is further averred that defendant No.2 is residing with her family at Jalandhar (Punjab) for the last 5 years and at present the plaintiff has apprehension that defendant No.2 may dismantle the existing structure and will also alter the nature of the same . Further it is averred that defendant No.2 may despite having no right title or interest has taken forcible possession of the house.

4. The suit was contested by the defendants by raising various preliminary objections with regard to valuation, maintainability and estoppel etc. It was averred that defendant No.2 became the owner in possession of the suit property after the death of her father Rajinder Mohan Bhagat on 25.2.2006 on the basis of a Will which was executed and registered on 26.09.2002 .It is averred that she

got married on 29.10.2007 and after the death of her father, she became full owner of the same. She stated that defendant No.1 was inducted by her and she was receiving the rent from defendant No.1 and there is no dispute between her and defendant No.1 regarding the rent. Further it is averred that defendant No.1 is in possession of two rooms and she has claimed that in the last days of her father, she was residing with him. All the averments as made in the plaint were refuted and it was prayed that suit filed by the plaintiff may be ordered to be dismissed.

5. The plaintiff filed replication, wherein the averments as made in the plaint were reiterated.

6. The learned trial Court framed the issues on 19.02.2014 in the following manner:

1. Whether the plaintiff is entitled to the relief of possession of room R3, R2 and K1, as prayed for? OPP

2. Whether the plaintiff is entitled for the relief of possession of room R3 to R6 illegally and forcibly occupied by defendant No.2, as prayed for? OPP

3. Whether the suit is not maintainable in present form? OPD.

4. Whether the suit is improperly valued for the purpose of court fee and jurisdiction? OPD.

5. Whether the plaintiff is estopped by her and conduct from filing the present suit?OPD.

6. Whether deceased Rajinder Mohan Bhagat has executed legal and valid Will dated 26.9.2002 in favour of defendant No.2, if so, its effect?OPD

7. Whether defendant No.2 has become absolute owner of the suit property?OPD.

8. Whether defendant No.1 is entitled to possession of the suit land as tenant being inducted by defendant No.2 on payment of rent, as alleged?OPD.

9. Relief.

7. Learned Trial Court directed the respective parties to adduce evidence in support of their contention and finally vide its judgment and decree dated 15.07.2017, dismissed the suit as filed by the plaintiff/respondent.

8. Feeling dissatisfied the plaintiff/respondent preferred an appeal under Section 96 of Civil Procedure Code in the Court of learned Additional District Judge, Palampur, District Kangra, H.P. on 09.10.2017.

9. During the pendency of the appeal before the First Appellate Court, the appellant filed an application under Order 23 Rule 1 read with Section 151 C.P.C for withdrawal of the suit. The learned First Appellate Court

vide its judgment dated 28.09.2024 allowed the appeal as well as application under Order 23 Rule 1 of C.P.C and consequently, the judgment and decree dated 15.07.2017 passed by the learned Civil Judge Palampur, District Kangra in Civil Suit No. 140/2011, titled as Reena Sharma vs. Shyam Singh Parmar and another was ordered to be set-aside and the suit of the plaintiff was permitted to be withdrawn.

10. Feeling dissatisfied, the defendant has approached this Court by filing Regular Second Appeal. It is contended by the learned counsel for the appellant Mr. Sushant Vir Singh Thakur that the First Appellate Court has erred by allowing the appeal and application under Order 23 Rule 1 C.P.C in contrast to the various judgments as passed by the Hon'ble Apex Court, whereby the withdrawal of the suit that too at the appellate stage is not permissible, more so when right has accrued to the opposite party after the passing of the decree. He has further submitted that the learned First appellate Court without assigning any reasons and without adhering to the principles of Order 23 Rule 1 C.P.C allowed the application for the withdrawal of the suit. He has submitted that though the present respondent could have withdrawn the appeal, however, the suit which was

finally decided/adjudicated by the competent court of law on merits could not have been permitted to be withdrawn.

11. On the other hand, Mr. Vishal Mohan, learned Senior Advocate, assisted by Mr. Praveen Sharma, Advocate appearing for respondent No.1 has defended the judgment as passed by First Appellate Court and has submitted that on account of the subsequent events, during the pendency of the appeal, suit land/property stands partitioned and by way of partition, the land comprised in Khasra No. 820/1 measuring 0-01-92 hectares has been allotted to her vide order dated 25.06.2019, passed in partition case No. 4/2019 by the Assistant Collector First Grade Palampur. Earlier the suit land/property was joint between her and the defendant and since now, the suit land stands partitioned and the suit filed by her may fail on account of the formal defect. Therefore, the First Appellate Court has rightly exercised the jurisdiction.

12. I have heard the learned counsel for the parties and have gone through the record of the case file carefully.

13. With the consent of the parties, the present appeal is finally heard at the admission stage.

14. The respondent/plaintiff filed a suit for possession by way of ejectment against the defendants Shyam Singh Parmar and Sugham Bhagat in the Court of Civil Judge, Palampur, District Kangra. In the present appeal, only defendant No.2 Sugham Bhagat has approached this Court and defendant No.1 Shyam Singh has chosen not to file any appeal against the judgment as passed by the First Appellate Court. After framing of the issues by the learned trial Court, the respective parties led their evidence and finally the learned trial Court came to the conclusion that the plaintiff is not entitled for the relief of possession of the suit property. The learned Civil Judge, Palampur vide deciding issues No. 6 and 7 with respect to the execution of the Will dated 26.9.2002, in favour of defendant No.2 that whether defendant No.2 has become absolute owner of the property, came to the conclusion that there was a valid will executed by Rajinder Mohan in favour of defendant No.2 vide Will dated 26.09.2002 and on the basis of the same, defendant No.2 namely Sugham Bhagat has become absolute owner of the suit property. The judgment as passed by the learned Civil Judge clearly reveals that there is a categorical finding by the learned trial Court

that though the plaintiff is not entitled for decree of possession, however, defendant No.2 was able to establish that a valid will was executed by deceased Rajinder Mohan in her favour and on the basis of same she became absolute owner of the suit property.

15. As rightly pointed out by Sh. Sushant Vir Singh Thakur, Advocate, for the appellant that the rights of defendant No.2 were crystallized while deciding issues No. 6 and 7 by learned Civil Judge, Palampur, District Kangra. Though, ultimately suit filed by the plaintiff was dismissed, however, the rights of defendant No.2 was decided on the strength of the Will dated 26.9.2002.

16. It is contended by the learned counsel for the appellant that once the learned trial Court adjudicated and determined the rights of the respective parties, especially of defendant No.2/appellant by holding that there is a valid Will in her favour on behalf of deceased Rajinder Mohan dated 26.09.2002 she has become absolute owner of the suit property, therefore, The impugned judgment as passed by the learned First Appellate Court is not sustainable.

17. Learned counsel for the appellant has submitted that as per provisions of Order 23 Rule 1 (3),

withdrawal of the suit can be allowed where the court is satisfied that suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim. However, in the case at hand, the plaintiff/respondent has failed to make out a case that what is formal defect in the suit on the basis of which the application under Order 23 Rule 1 C.P.C was filed. He has further submitted that the learned First Appellate Court has failed to assign and give plausible reason for allowing the application for the withdrawal of the suit. He has urged that there is no specific reason assigned by the learned First Appellate Court and merely on the basis of averments as made in the application that the partition has taken place, plaintiff was permitted to withdraw the suit.

18. Mr. Sushant Vir Singh, learned counsel for the appellant has submitted that once the rights of the parties were crystallized by the judgment and decree, as passed by the learned Civil Judge, Palampur, then the appellate Court has erred by allowing the application of the plaintiff/respondent to withdraw the suit. He has contended that at the most, the present respondent could

have withdrawn the appeal, which was filed before the First Appellate Court, however, after final adjudication of the suit that too at the appellate stage, the suit could not have been withdrawn. In order to substantiate his contentions, the learned counsel for the appellant has relied upon the judgment of the Hon'ble Supreme Court held in **Executive Officer, Arthanareswarar Temple Vs. R. Sathyamoorthy and Others (1999)3 SCC 115**, which reads as under:-

14. It is true that in a large number of cases decided by the High Courts, it was held while dealing with applications under Order 23, Rule 1, CPC, that if an appeal was preferred by an unsuccessful plaintiff against the judgment of the trial Court dismissing the suit and if the appellant-plaintiff wanted to withdraw not only the appeal but also the suit unconditionally, then such a permission so far as the withdrawal of the suit was concerned, can be granted if there was no question of any adjudication on merits in favour of the defendants by the trial being nullified by such withdrawal. On the other hand, if any such findings by the trial court in favour of the defendant would set nullified, such permission for withdrawal of the suit should not be granted, (See Thakur Singh v. A. Achuta Rao, Kedar Nath v. Chandra Kiran Vidyadhar Dube v. Harcharan Charles Sanuel Vs. Board of Trustees; Lala Chetram v. Krishnamoni, Jubedan Begum v. Sekhawat Ali Khan; Ram Dhan v. Jagat Prasad Sethi). In the present case, the learned Judge felt that no such finding in favour of the Commissioner was being nullified by the withdrawal of the OP at the stage of

revision and therefore the withdrawal of OP was permissible.

19 The Hon'ble Supreme Court has held in **R. Rathinavel Chettiar and another Vs. V. Sivaraman and others (1999) 4 SCC 89**

8.The question in the present case is, however, a little different. If the suit has already been decreed or, for that matter, dismissed and a decree has been passed determining the rights of the parties to the suit, which is under challenge in an appeal, can the decree be destroyed by making an application for dismissing the suit as not pressed or unconditionally withdrawing the suit at the appellate stage. It is this question which is to be decided in this appeal.

9.Every suit, if it is not withdrawn or abandoned, ultimately results in a decree as defined in [Section 2\(2\)](#) of the Code of Civil Procedure. This definition, so far as it is relevant, is reproduced below:-

"2(2). "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [Section 144](#), but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

10.Thus a "decree" has to have the following essential elements, namely,

(i) There must have been an adjudication in a suit.

(ii) The adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy.

(iii) Such determination must be a conclusive determination resulting in a formal expression of the adjudication.

11.Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant.

12.What is essential is that the matter must have been finally decided so that it becomes conclusive as between the parties to the suit in respect of the subject matter of the suit with reference to which relief is sought. It is at this stage that the rights of the parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree. Now, the decree can be recalled, reversed or set aside either by the Court which had passed it as in review, or by the Appellate or Revisional Court. Since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which

came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. It is for this reason that the proceedings either in appeal or in revision have to be allowed to have a full trial on merits.

16.This decision was considered by the Division Bench of the same High Court in [Vidhydhar Dube and others vs. Har Charan and others](#), AIR 1971 Allahabad 41 and was approved. It was held that the right of the plaintiff to withdraw the suit at the appellate stage is not an absolute right but is subject to rights acquired by defendant under the decree. It was also observed that withdrawal may be permitted if no vested or substantive right of any party to the litigation is adversely affected.

17.[Kedar Nath's](#) case (supra) was followed in [Kanhaiya and others vs. Mst. Dhaneshwari](#) and another, AIR 1973 Allahabad 212, in which it was again laid down that the plaintiff does not have an unqualified or unfettered right under Order 23 Rule 1(1)C.P.C. to withdraw the suit at the appellate stage when rights have accrued to the respondents under the decree.

18.Both these decisions, namely, the decision of the Allahabad High Court in [Kedar Nath's](#) case and [Kanhaiya's](#) case were followed by the Andhra Pradesh High Court in [Thakur Balaram Singh vs. K. Achuta Rao and others](#), 1977 (2) A.P.L.J. 111, and it was held that though the plaintiff has an absolute right to withdraw his suit before the passing of a decree under Order 23 Rule 1(1)C.P.C. but permission to withdraw the suit at the appellate stage would be refused if it would have the effect of prejudicing or depriving any right which became vested in the respondents or had accrued to them by reason of the findings recorded by the trial court.

22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in parties to the suit under the decree cannot be taken away by withdrawal of suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.

20. Similarly, the Hon'ble Supreme Court has held in **Sneh Gupta Vs. Devi Sarup and Others (2009)6, SCC 194**

33. It is also well known that a suit cannot be withdrawn by a party after it acquires a privilege. In [R. Ramamurthy Iyer v. Raja V. Rajeswara Rao](#) this Court held :(SCC pp.729-30,para 12)

"12. Coming back to the question of withdrawal of a suit in which the provisions of [Sections 2](#) and [3](#) of the Partition Act have been invoked we find it difficult to accede to the contention of the appellant that the suit can be withdrawn by the plaintiff after he has himself requested for a sale under [Section 2](#) of the Partition Act and the defendant has applied to the court for leave to buy at a valuation the share of the plaintiff under [Section 3](#). In England the position about withdrawal has been stated thus, in the Supreme Court Practice, 1970 at p. 334:

"Before Judgment.-- Leave may be refused to a plaintiff to discontinue the action if the plaintiff is not wholly dominus litis or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him."

As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale under [Section 3](#) of the Partition Act he obtains an advantage in that the court is bound thereafter to order a valuation and after getting the same done to offer to sell the same to such shareholder at the valuation so made. This advantage, which may or may not fulfill the juridical meaning of a right, is nevertheless a privilege or a benefit which the law confers on the shareholder. If the plaintiff is allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with the provisions of [Section 3\(1\)](#) it would only enable the plaintiff to defeat the purpose of [Section 3\(1\)](#) and also to deprive the defendant of the above option or privilege which he has obtained by the plaintiff initially requesting the court to sell the property under [Section 2](#) instead of partitioning it. Apart from these considerations it would also enable the plaintiff in a partition suit to withdraw that suit and defeat the defendant's claim which, according to Crump J., cannot be done even in a suit where the provisions of the [Partition Act](#) have not been invoked."

34. Yet again in [R. Rathinavel Chettiar v. V. Sivaraman](#) [(1999) 4 SCC 89], this Court, stated the law, thus : (SCC pp.96-97, para 22)

"22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in

which a contrary view has been expressed cannot be sustained."

35. A right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party. [See [Bijayananda Patnaik v. Satrughna Sabu and Hulas Rai Baij Nath v. Firm K.B. Bass & Co.](#)]

21. The Hon'ble Supreme Court has held in **Avenue Supermarts Private Limited Vs. Nischint Bhalla and Others** (2016)15 SCC 411 which reads as under:

19. In R. Rathnival, this Court has considered the question as to whether at a stage where the rights of the parties are crystallized can be divested of the rights under the decree simply because of withdrawal of the suit at the appellate stage or not. This Court has held as follows:-

"12. What is essential is that the matter must have been finally decided so that it becomes conclusive as between the parties to the suit in respect of the subject-matter of the suit with reference to which relief is sought. It is at this stage that the rights of the parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree. Now, the decree can be recalled, reversed or set aside either by the court which had passed it as in review, or by the appellate or revisional court. Since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. It is for this reason that the proceedings

either in appeal or in revision have to be allowed to have a full trial on merits.”

This Court after referring to the various decisions of the High Courts have come to the conclusion that where a decree passed by the trial Court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. In para 12 Page13 22, this court held as under:-

“22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody’s vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.”

21) In Sneh Gupta, this Court has held that a right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party.

22. The Hon’ble Apex Court in the aforesaid judgments has held that when the rights of the parties are crystallized and unless the decree is reversed, the parties cannot be divested of their rights and of the decree. Since the withdrawal of the suit at the appellate stage, if allowed would have the effect of destroying or nullifying the decree affecting the rights of the parties, which came to be vested

under the decree, it cannot be allowed as a matter of course, but has to be allowed rarely only when a strong case is made out.

23 The Hon'ble Apex Court has specifically held that where the decree passed by the learned Court is challenged in appeal, it would not be open to the plaintiff at that stage to seek withdrawal of the suit so as to destroy the decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by the withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody vested rights. Right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party.

24. In the present case, the issues with respect to Will and ownership were framed, as issue Nos.6 and 7 and there is a categorical finding in favour of defendant No.2/appellant, therefore, the appellant is well within his right to contend that once the rights of defendant No.2 were crystallized by passing a decree in her favour that cannot be defeated that too in an appeal by filing an application under Order 23 Rule 1 and 2 C.P.C . The judgment

as passed by the First Appellate Court is in contravention to the judgments as cited (supra) passed by the Apex Court, no reasons has been assigned by the First Appellate Court for coming to the conclusion and allowing the application filed by the plaintiff under the provisions of Order 23 Rule 1 C.P.C. The First Appellate Court while dealing with the application in para 15 in a routine manner allowed the application without assigning any specific and cogent reasons for the withdrawal of the suit at the appellate stage. In the opinion of this Court, the method as adopted by the First Appellate Court is not in consonance with the law laid down by the Hon'ble Apex Court.

25. It is contended by the learned Senior counsel for respondent No.1 that the application which was filed by the plaintiff/present respondent before the First Appellate Court for the withdrawal of the suit was not contested by the defendant/present appellant rather a statement was given by the learned counsel for the defendant that he does not want to file reply to the application under Order 23 Rule 1 read with Section 151 C.P.C. He has submitted that since there was no opposition on behalf of the defendant to the

said application, therefore, the application ought to have been allowed.

26. To his submissions, learned counsel for the appellant submits that by merely non filing of the reply to the application will not give any right to the respondent. Non filing of the reply or statement as made by the learned counsel cannot prejudice the rights of the present appellant. He has submitted that the statement as made by the learned counsel cannot bind the present appellant since vested rights of the defendant/appellant were involved in the said proceedings.

27. In order to strengthen his case with respect to the submissions, the learned counsel for the appellant has relied upon the judgment of the Apex Court in **Union of India and others vs. Mohan Lal Likumal Punjabi and others (2004)3 Supreme Court Cases 628**, wherein it was held as under:

8 We shall first deal with the effect of concession, if any, made by learned counsel appearing for the present appellants before the High Court. Closer reading of the High Court's order shows that the High Court took the view that in view of the revocation of the order on 19th December, 1994 and the order passed by the High Court on 11th January, 1995, no further order could have been passed under [Section 7](#) of SAFEMA. After having

expressed this view, the so-called concession is recorded. In our view the concession, if any, is really of no consequence, because the wrong concession made by a counsel cannot bind the parties when statutory provisions clearly provided otherwise. It was observed by Constitution Bench of this Court Sanjeev Coke Manufacturing Company v. M/s Bharat Coking Coal Limited that courts are not to act on the basis of concession but with reference to the applicable provisions. The view has been reiterated in Uptron India Ltd. vs. Shammi Bhan and Central Council for Research in [Ayurveda & Siddha and Another v. Dr. K. Santhakumari](#). In para 12 of Central Council's case it was observed as follows:

12. "In the instant case, the selection was made by the Departmental Promotion Committee. The Committee must have considered all relevant facts including the inter se merit and ability of the candidates and prepared the select list on that basis. The respondent, though senior in comparison to other candidates, secured a lower place in the select list, evidently because the principle of "merit-cum-seniority" had been applied by the Departmental Promotion Committee. The respondent has no grievance that there were any mala fides on the part of the Departmental Promotion Committee. The only contention urged by the respondent is that the Departmental Promotion Committee did not follow the principle of "seniority- cum-fitness". In the High Court, the appellants herein failed to point out that the promotion is in respect of a "selection post" and the principle to be applied is "merit-cum-seniority". Had the appellants pointed out the true position, the learned Single Judge would not have granted relief in favour of the respondent. If the learned counsel has made an

admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot enure to the benefit of any party."

9 In [Uptron \(India\) Ltd. V. Shammi Bhan and Anr.](#)(1998 (6) SCC 538), it was held that a case decided on the basis of wrong concession of a counsel has no precedent value. That apart, the applicability of the statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law would invariably depend upon the scope and meaning of the provisions concerned and has got to be adjudged not on any concession made. Any such concessions would have no acceptability or relevance while determining rights and liabilities incurred or acquired in view of the axiomatic principle, without exception, that there can be no estoppel against statute.

28. **The Hon'ble Supreme Court in *Asma Lateef and another Vs. Shabbir Ahmad and others* (2024) 4 SCC 696**
has held as under:

27. At this stage, we consider it apposite to take a quick look at Balraj Taneja to examine the scope of Order 8 Rule 10. Therein, this Court ruled that a court is not supposed to pass a mechanical judgment invoking Order 8 Rule 10 CPC merely on the basis of the plaint, upon the failure of a defendant to file a written statement. The relevant paragraphs of the judgment are reproduced below for convenience: (SCC p. 410, para 29)

"29. As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the

plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 Order 8."

No doubt this decision was rendered considering that the verb used in the provision is "may", but nothing substantial turns on it.

29. If indeed, in a given case, the defendant defaults in filing written statement and the first alternative were the only course to be adopted, it would tantamount to a plaintiff being altogether relieved of its obligation to prove his case to the satisfaction of the court. Generally, in order to be entitled to a judgment in his favour, what is required of a plaintiff is to prove his pleaded case by adducing evidence. Rule 10, in fact, has to be read together with Order 8 Rule 5 and the position seems to be clear that a trial court, at its discretion, may require any fact, treated as

admitted, to be so proved otherwise than by such admission. Similar is the position with Section 58 of the Evidence Act, 1872. It must be remembered that a plaint in a suit is not akin to a writ petition where not only the facts are to be pleaded but also the evidence in support of the pleaded facts is to be annexed, whereafter, upon exchange of affidavits, such petition can be decided on affidavit evidence. Since facts are required to be pleaded in a plaint and not the evidence, which can be adduced in course of examination of witnesses, mere failure or neglect of a defendant to file a written statement controverting the pleaded facts in the plaint, in all cases, may not entitle him to a judgment in his favour unless by adducing evidence he proves his case/claim.

29. The Hon'ble Supreme Court in **Balraj Taneja & another vs. Sunil Madan and another (1999)8 SCC 396** has held as under:

36 This suit has been decreed by the Delhi High Court by the following judgment:- "SUIT NO. 1124/96 & I.A. No. 4303/96. On the 20th of September, 1996, Mr. Lalit Kumar, learned counsel for defendant 1 to 3 sought time to file written statement and reply. Time was granted but the written statement and reply have not been filed. On the 22nd of January, 1997, Mr. Aseem Mohar for counsel for defendant appeared and sought time to file vakalatnama and written statement/reply and the matter had been adjourned to this date. Today Mr. Kamal Mehta putting in appearance on behalf of defendant No.2 and 3 and Balraj Taneja & Anr vs Sunil Madan & Anr on 8 September, 1999 Indian Kanoon -
<http://indiankanoon.org/doc/182831/> 10
 represents that Mr. Rajiv Nayar has been engaged by the second and third defendants this morning and he seeks time to file written statement/reply. The defendants are adopting this tactic only to protract the proceedings and

have not filed the written statement and reply to the application inspite of sufficient opportunity having been given. Accordingly, the suit is decreed for specific performance in favour of the plaintiff and against the defendants with the directions to the plaintiff to deposit the balance amount of Rs.3,00,000/- (Rupees Three Lakhs) in this court within six weeks from today. If the amount is deposited within six weeks, it will be open for the plaintiff to apply for the appointment of a Commissioner for the execution of the sale deed. The defendants are also directed to pay the cost of the suit. February 10, 1997. Sd/- JUDGE."

37 A perusal of the above judgment will indicate that the suit had been decreed only because of the failure of the defendants in filing the written statement. This exhibits the annoyance of the Court which is natural as no Court would allow the proceedings to be delayed or procrastinated. But this should not disturb the judicial composure which unfortunately is apparent in the instant case as the judgment neither sets out the facts of the case nor does it record the process of reasoning by which the Court felt that the case of the plaintiff was true and stood proved.

38 As will be evident from the facts set out above, the plaint itself showed a serious disputed question of fact involved between the parties with regard to the obtaining of Certificate (permission) from the Income Tax Department and its communication by the defendants to the plaintiff (Respondent No. 1). Since this question of fact was reflective of the attitude of the plaintiff, whether he was ready and willing to perform his part of the contract, it had to be proved as a fact that the Certificate (permission) from the Income Tax Department had not been obtained by the defendants and, therefore, there was no occasion of sending it to him. If the pleadings of respondent No. 1 were limited in character that he had pleaded only this much that the defendants had not obtained the Certificate (permission) from the Income Tax Department and had not sent it to

him, this fact would have stood admitted on account of non-filing of the Written Statement by the defendants. But Respondent No. 1, as plaintiff, himself pleaded that "defendants insisted that they had obtained the Certificate (permission) from the Income Tax Department and sent it to him". He denied its having been obtained or sent to him. Non-filing of the Written Statement would not resolve this controversy. The plaintiff's allegations, even if treated as admitted, would keep the controversy alive. This fact, therefore, had to be proved by the plaintiff and the Court could not have legally proceeded to pass a judgment unless it was established clearly that the defendants had committed default in not obtaining the Certificate (permission) from the Income Tax Department and sending the same to the plaintiff.

39 The agreement between the parties was entered into in 1992 and for four years the plaintiff had kept quiet and not insisted for the execution of the sale deed in his favour. When he did raise that question, the defendants informed him that the certificate had already been obtained from the Income Tax Authorities and sent to him.

40. Unfortunately, the High Court did not consider this fact and proceeded almost blindly to pass a decree in favour of the plaintiff merely because the Written Statement had not been filed in the case. Learned Single Judge, who passed the decree, did not consider any fact other than the conduct of the defendants in seeking adjournments of the case for purposes of filing the Written Statement. So also, the Division Bench did not consider any fact other than the fact that the defendants had been trying to prolong the proceedings by seeking adjournments, and that too, by changing their counsel. The Division Bench also took into consideration the fact that the appeal filed by the defendants against the decree passed by the Single Judge was beyond time which again indicated their negligence. No other fact was taken into consideration and the decree passed by the Single Judge was affirmed."

30. The submissions as made by the learned counsel for the appellant relying upon the judgment of the Hon'ble Apex Court (supra) establishes that merely failure on the part of the defendant to file the reply to the application will not automatically entitle the applicant to the relief as sought for permission of withdrawal of suit by the plaintiff/respondent.

31. As held by the Hon'ble Apex Court that before passing the judgment, it must be seen that even if the facts set out in the plaint are treated to have been admitted, a judgment could be possibly passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction, therefore, only on being satisfied that there is no fact which needs to be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant, who has not filed the written statement but, if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy.

32 This Court is of the opinion that merely on the basis that the defendant has not filed reply to the application filed by the plaintiff under Order 23 Rule 1 C.P.C, no adverse inference can be drawn against her. The application was filed by the plaintiff and the onus to prove the ingredients of Order 23 Rule 1 C.P.C were upon the plaintiff. She has to make out the case within the parameters of the said provisions of law.

33. Therefore, the contentions of the learned Senior Counsel for respondent No.1 are not sustainable in the present case.

34. Learned counsel for the appellant has relied upon the judgment of the Hon'ble Apex Court in case titled as **H. Siddiqui (dead) By Lrs. vs. A.Ramalingam (2011)4 SCC 240**, wherein it has been held as under:

21 The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on

the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide [Sukhpal Singh v. Thakur Kalyan Singh](#), [Girijanandini Devi v. Bijendra Narain Choudhary](#), [G. Amalorpavam & Ors. v. R.C. Diocese of Madurai Shiv Kumar Sharma v. Santosh Kumari](#) and [Gannmani Anasuya & Ors. v. Parvtini Amarendra Chowdhary](#).)

22 In [B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy](#), while dealing with the issue, this Court held as under: (SCC p. 531, para 4).

4."The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of

law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide [Santosh Hazari vs. Purushottam Tiwari](#), SCC p.188, para 15 and [Madhukar vs. Sangram](#), SCC p. 758, para 5).

35. The Hon'ble Apex Court held in **B.V. Nagesh and another vs. H.V. Sreenivasa Murthy (2010)13 SCC 530**, held as under:-

2 The impugned judgment passed by the High Court arose out of regular first appeal filed under [Section 96CPC](#). It is the grievance of the appellants that the High Court, without adverting to all the factual details and various grounds raised, disposed of the appeal in a cryptic manner. In the light of the above assertion, we verified the impugned judgment of the High Court. The High Court, after narrating the pleadings of both parties, without framing points for determination and considering both facts and law set aside the judgment and decree of the trial Court and modified the same without proper discussion and assigning adequate reasons.

3. How regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. [Order XLI of C.P.C.](#) deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

- a) the points for determination;
- b) the decision thereon;
- c) reasons for the decision; and -

d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide [Santosh Hazari vs. Purushottam Tiwari](#), SCC p 188, para 15 and [Madhukar vs. Sangram](#) SCC P.758, para 5).

5) In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate Court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the Court of first appeal. Accordingly, without going into the merits of

the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law.

36. Learned counsel for the appellant submits that the appeal has been decided by the First Appellate Court without assigning any reasons and in an unsatisfactory manner. As has been held by the Hon'ble Supreme Court, the first appeal is a valuable right of the parties and unless restricted by the law, the whole case is therein open for rehearing both on question of facts and law. Therefore, the judgment of the appellate Court must reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions putforth and pressed by the parties for decision of the Appellate Court. The Appellate Court shall state the points for determination, the decision there on the reasons for the decision and where the decree appealed from is reversed or varied, relief of which the appellant is entitled.

37. In the present case, the said principle has not been adhered to by the First Appellate Court. The appellant has been able to establish that right had accrued to her on

the question of the validity of Will and there was a categorical findings by the learned trial Court, therefore, the appeal along with the suit could not have been permitted to be withdrawn. Therefore, this Court is of the opinion that the judgment as passed by the First Appellate Court calls for interference and, the same is quashed and set aside. After setting aside the impugned judgment, the application filed by plaintiff/respondent for withdrawal of suit under order 23 Rule 1 of C P C is dismissed and the appeal is restored to its original number with direction to the First Appellate Court to decide the appeal afresh in accordance with law.

38. Consequently the instant appeal is allowed and the case is remanded back to the Court of First Appellate Court, who shall decide the appeal afresh on its own merit in view of the mandate of the Hon'ble Apex Court (supra) and decide the appeal.

39. Parties are directed to appear before the First Appellate Court on **16.04.2026**.

Records of the learned trial Court be sent back forthwith.

(Romesh Verma)
Judge

06th April 2026 (veena)