

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6082 OF 2006**

1. Bharatiya Bhavan Co-operative Housing Society Ltd., having its office at Bharatiya Bhavan, 72, Marine Drive, Mumbai 400 020.
2. Mr. Sevantilal Jivanlal Parekh, of Bombay, Indian Inhabitant, the Chairman of Petitioner No.1 above-named, residing at Bharatiya Bhavan, 72, Marine Drive, Mumbai 400 020. **...Petitioners.**

//VERSUS//

1. Mrs. Krishna Harinarayan Bajaj, of Mumbai, Indian Inhabitant, residing at Flat Nos.24 and 25, Bharatiya Bhavan, 72, Marine Drive, Mumbai 400 020.
2. The State of Maharashtra. **...Respondents.**

Mr. Shardul Singh, Advocate i/b Ms. Swapnila Rane, Advocate for Petitioners.

Ms. Sonal, Advocate i/b Mr. Ali Kazmi and Mr. Vivek M. Sharma, Advocates for Respondent No.1.

Mrs. M.S. Bane, AGP for State.

Mr. E.B. Sivakumar First Associate a/w Ms. Swati Rane, ASO from Office of the Court Receiver.

CORAM : SANDEEP K. SHINDE, J.
RESERVED ON : 16TH SEPTEMBER, 2022.
PRONOUNCED ON : 15TH DECEMBER, 2022.

JUDGMENT :

1. This Petition under Article 227 of the Constitution of India takes exception to the judgment and award dated 17th July, 2016 passed by the President, Maharashtra State Co-operative Appellate Court, Mumbai in Appeal No.36 of 2006.

2. The operative part of the impugned judgment and award reads as under:

"1] The impugned Judgment and order under challenge passed by Co-operative Court No. 1, Mumbai, on 15/2/2006 is hereby quashed and set aside.

2] The dispute filed by disputant is hereby decreed as under.

3] The disputant is entitled to recover an amount of Rs. 46,78,562.50/- from opponent society being cost of recasting to overhead terrace of the suit flats along with simple interest at the rate of 12% p.a. from September 2004 till realisation of the amount.

4] The disputant is entitled to recover an amount of damages caused to the suit flats to the tune of Rs. 40/- lakhs with simple interest at the rate of 12% p.a. from the date of dispute till realisation of the amount.

5] It is hereby declared and ordered that society is not entitled to recover maintenance charges of the suit flats except charges payable to B. M. C. right from April 2001 upto December 2005.

*6] Parties are directed to bear their own costs.
The trial Court is directed to prepare award*

*accordingly.
Appeal disposed of accordingly.”*

3. Petition was admitted on 19th September, 2006. Pending Petition, petitioner-society deposited Rs.1.23 crores. Out of which vide order dated 4.4.2008, respondent-decree holder was permitted to withdraw Rs.73 lakhs and balance amount was directed to be invested in Nationalised Bank by way of fixed deposit. The said order was challenged in SLP; however, it was not interfered with.

4. Briefly stated facts of the case are as under;

For the sake brevity hereinafter, petitioners and the respondents shall be referred to as ‘Society’ and the ‘Disputant Members’ respectively. Petitioner is tenant co-partnership housing society. Its’ building consists of ground and seven floors; with 26 flats. Flat Nos.24 and 25 were held by one, Mrs. Priti Umesh Khimji. Some where on 27th April, 1987, Mrs. Khimji sought permission of the Society to carry out certain repairs.

5. Mrs. Khimji had given Undertaking to the Society stating, if any damage would cause to the Society’s property then, in that event, she would make good such loss or damage

at her own cost. The Society permitted Mrs. Khimji to carry out repairs/changes, subject to conditions, more particularly set out in the letter dated 8.6.1987.

6. Somewhere on 30.3.1992, Mrs. Priti Khimji agreed to sell her rights, title and interest in the flat nos.24 and 25 on 7th Floor, with car parking spaces to the Disputant (Respondent) for total consideration of Rs.3.29 Crores. Whereafter, Disputant was admitted to the membership of the Society on 19.7.1992.

7. Flat Nos.24 and 25 are situated on entire 7th floor of the Society's building and lie directly under Society's terrace situated on 8th floor, which is exposed to open skies.

8. Disputant's case is, from the very first monsoon of the year 1992, the time she took possession of the aforesaid flats, she observed the leakage from overhead terrace. Thus, she filed various complaints to the officer bearers of the Society and requested them to carry out necessary repairs to the overhead terrace and to the outer wall so as to stop incessant water seepages into her flats.

9. Disputant would allege that Society made no

endeavour to redress her various complaints and allowed the overhead eighth floor terrace to deteriorate. Thus, aggrieved, by the passive attitude of the society and due to leakage during monsoons, she filed complaint with Mumbai Municipal Corporation. Whereafter, on inspection of the said slab, Mumbai Municipal Corporation (BMC for short), issued notice under Section 354 of the MMC Act, directing Society to carry out permanent repairs to the overhead terrace on 8th floor.

10. In the meanwhile, Disputant also filed Dispute, bearing No.518 of 1999 in the first Co-operative Court ('First Dispute' for short) against the Society. Pending dispute, Judge, Co-operative Court vide order dated 22.2.2000, directed Society to carry out permanent water-proofing repairs to overhead terrace.

11. Disputant would allege, that even after aforesaid order dated 22.2.2000 and notice dated 27.4.2000 issued by the BMC, Society deliberately neglected and failed to carry out any repairs to the overhead terrace, which had not only affected Disputant's flat, but also damaged furniture, fixtures, interiors, and structural elements of the building on account of huge water seepage and severally led to corrosion of the structural

steel present in the said slab.

12. Thereafter, Disputant again complained to BMC. Whereupon, notice dated 12.1.2001 was issued under Section 354 of the BMC Act, thereby giving the Society one final opportunity to carry out permanent repairs to the overhead eighth floor terrace.

13. Disputant would allege that society again chose to neglect notice issued by the BMC and thus, BMC was constrained to give permission to Disputant on 25.1.2001, to carry out water-proofing repairs to the overhead eighth floor terrace.

14. It is Disputant's case that the society instead of allowing her, to carry out the said repairs, chose to file Suit No.851 of 2001 in the City Civil Court, Bombay. Whereupon, learned Judge, City Civil Court, Bombay, vide order dated 16.4.2001, directed the Society to carry out permanent repairs to overhead eighth floor terrace, and outer walls of the Disputant's flats and directed to complete the said work on or before 10.6.2001.

15. It is Disputant's case that respondent-society was fully aware that the entire slab above 7th floor would require re-casting which could not be rectified by mere water-proofing repairs, in terms of opinion that had been given by M/s. Mahimpura Consultants, Society's own Structural Engineers. Even then, under the pretext of re-casting of 8th floor slab, Society removed false ceiling of Disputant's flat and put up wooden props over the flat area. Although Society was under obligation to recast the slab on or before 10.6.2001 in terms of the order of the City Civil Court, Society neglected to take any further steps in spite of putting props in half of her flats and making the said area completely inhabitable for her and her family members.

16. In light of the abovesaid approach, Disputant filed contempt notice of motion no.4565 of 2001 in the City Civil Court, Bombay, against the Society.

Reply of the Society in Contempt Motion

17. The Society denied that they have committed wilful disobedience of the order dated 16.4.2001. Society contended that at the time of passing of order on 16.4.2001, the Society

as well as the learned Judge, who had personally visited the premises and then passed the order was of the view that repairs were to be carried out to the Suit Premises. That, in pursuance of the order, Society had employed the architect. However, when the work was undertaken, new things came to the notice of the architect, which was not within the knowledge of either of the parties. Thus, contended when coba of terrace between 7th and 8th floors were removed for water-proofing and ceiling was partially removed, it was revealed that entire slab was in damaged condition and could not be repaired by way of water-proofing. As such, architect opined that whole slab will have to be re-casted and for that purpose, permissions will have to be obtained from the authorities. Thus, upon realising the difficulty, Society decided to carry out the work after monsoon. To that end, Society applied for repair permission. Besides, Society contended, that re-casting would cost around Rs.10 Lakhs and that the Disputant being in arrears of maintenance charges since July, 2000, unless Disputant would pay the arrears, it was not possible to carry out the repairs. As such, Society expressed its inability to carry out the repairs.

18. The Contempt Motion was disposed of by the learned

Judge vide order dated 30.4.2002, by which the earlier order dated 16.4.2001 inter-alia permitting society to carry out repairs to overhead terrace was set aside and disputant was granted liberty to carry out the repairs after obtaining necessary permission from the BMC, if required under the law.

19. The learned Judge found, the Society had not, wilfully disobeyed the order dated 16.4.2001 and, therefore, relief seeking to initiate contempt against the society was refused.

20. In the interregnum on 9.7.2002, Disputant filed the Dispute bearing no.185 of 2002 (Second Dispute) in the First Co-operative Court inter-alia to claim the sum of monies to be spent towards the repairs to be undertaken by her to 8th floor terrace and other related structural repairs in view of the order dated 30.4.2001.

21. Feeling aggrieved by the order granting liberty to the disputant to carry out the repairs, the Society filed an Appeal From Order No.641 of 2002 in this Court.

22. It appears, few suggestions from the Court resulted in the parties coming to amicable settlement atleast in so far as

the controversy relating to casting slab on the top of the 7th floor and thus, on 24.9.2002, this Court passed the following order:

“Heard forthwith.

2. *Without going into the controversy the entire issue can be decided by the present order. The matter pertains to casting slab on the top of the 7th floor. A few suggestion from the Court has resulted in the parties coming to an amicable settlement atleast in so fa as the present controversy is concerned. Hence, the following order:-*

(i) *The Registrar of this Court to appoint a Valuer from the Panel maintained for the purpose of carrying out the work of casting the slab.*

(ii) *The Respondent No. 2 will carry out the work as recommended and advised by the Structural Engineer initially at her own cost. It will be open to the respondent No. 2 to claim recovery from the Appellants if in law so entitled to.*

(iii) *It is open to the Appellants and Respondent No. 2 to give their suggestions through their Architect/Engineer to the Structural Engineer to be appointed for the purpose of carrying out the work. The Structural Engineer will bear in mind the suggestions before allowing the Respondent to carry out the work.*

(iv) *The cost of commission will be borne equally by the Appellants and respondent No. 2. The entire work to be completed within four months of the Appellants obtaining permission for casting the slab/repairs.*

Liberty to the parties to apply if permission has not been applied for and obtained within a period of two months from today.

Appeal From Order disposed of accordingly. No order as to costs.

Parties to act on an ordinary copy of the order duly authenticated by the Sheristedar/Personal Secretary of this Court."

23. That, in view of the consent order dated 24.9.2022 passed, by this Court in AO NO.641 of 2002, M/s. Parlekar and Dallas were appointed as structural engineer/valuer by the Registrar of the High Court, by consent of both the parties to supervise the work of casting.

24. In January, 2004, work of re-casting of 8th floor terrace was commenced by the contractors of Disputant under the supervision of M/s. Parlekar and Dallas and Co-supervision of the Structural Engineer of the Society, and completed in December, 2005.

25. Disputant claims, that she had incurred an expenditure of Rs. 46,78,562.50 paise for the said re-casting and allied work. She affected the said payment, which was ratified by M/s. Parlekar and Dallas. Disputant claimed that respondent-society, all throughout was kept informed about the said expenditure incurred by her, Society never raised any

objection to it.

26. Disputant after completion of said work of re-casting moved the second amendment application in the Dispute No.185 of 2002, whereby she claimed a specific amount of Rs. 46,78,562.50 paise alongwith interest from the Society, which had been spent by her for re-casting and its allied repairs. The amendment was allowed and parties to the dispute were allowed to file fresh documents and lead fresh evidence in the said dispute.

27. The learned Co-operative Court framed 14 issues amongst which following two issues are relevant, to decide controversy.

1. Whether the Disputant proved that she was entitled to recover the amount of Rs. 46,78,562.50 paise expended for re-casting 8th floor slab, as certified by the Structural Engineer appointed by the High Court, from the Society with interest at the rate of 21% p.a. ?
2. Whether Disputant proves, that due to negligence on the part of opponent Society, there were heavy leakages to the Disputant's flats from the overhead terrace, which

caused damage/loss to furniture, fixtures, paintings worth Rs.51 lakhs ?

28. The learned Judge, Co-operative Court dismissed the dispute by Judgment and Award dated 15.2.2002 on the following grounds;

- i. that, for want of leave under Order II Rule 2 of the CPC for omitting to claim damages while instituting the first dispute, Disputant could not have sued the Society in respect thereof, in the second dispute i.e. 185/2002, inasmuch as whole claim arose out of one and the same cause of action;
- ii. that, extensive additions and alterations including removal and re-building of 90% of internal walls carried out by Mrs. Priti Khimji-(predecessor-in-title of the Disputant) and further alterations by Disputant in a quite old building caused damage to the structure for which Society cannot be held responsible;
- iii. that, the disputant failed to prove that negligence on part of the Society, caused damage to overhead 8th floor terrace, causing damage to furniture, fixtures and

interiors in the flats.

29. The said Judgment and Award dated 15.2.2002 was carried in appeal by the Disputant-member, before the Maharashtra State Co-operative Appellate Tribunal Mumbai.

30. The learned Appellate Court, vide judgment and award dated 18th July, 2006 held thus;

(i) Dispute was not barred by Order 2 Rule 2 of the CPC;

(ii) Disputant has proved her entitlement to recover the amount of Rs. 46,78,562.50 with interest @ 12% pa from September, 2004 till realisation;

(iii) Disputant is entitled to recover damages caused to Suit Flat to the tune of Rs.40 Lakhs with simple interest at the rate 12 % pa from the date of dispute till realisation;

(iv) That Society is not entitled to recover maintenance charges from April, 2001 upto December, 2005 in respect of Suit Flats except charges payable to BMC;

31. Feeling aggrieved by the judgment and award passed by the Maharashtra State Co-operative Appellate Court Mumbai, Society has preferred this Writ Petition.

32. As stated, Writ Petition was admitted on 19.9.2006. Pending Petition society deposited Rs.1.23 Crores in this Court out of that amount respondent was permitted to withdraw Rs.

73 lakhs and balance amount has been invested in fixed deposit with Nationalised Bank.

33. Heard learned counsel for the Parties. Perused the evidence.

34. Well, before adverting to the arguments of Counsel for the respective parties, it may be stated that this Court, in exercise of its power of superintendence, can interfere in findings of facts, only, when there has been a patent perversity in the orders of Tribunals and Courts sub-ordinate to it or where there has been a gross and manifest failure of justice or basic principles of natural justice have been flouted. As such, in exercise of its power of superintendence, High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the Tribunals or Courts subordinate to it, is a possible view. Herein findings of the Trial Court and the Appellate Court are at variance and conflicting. Therefore, it is but, essential to re-look at evidence, to ascertain whether findings on the following points were perverse, warranting interference;

i. whether evidence admits that, damage caused to

overhead 8th floor terrace slab of the Society's building was due to extensive alterations/additions carried out by the Disputant and/or her predecessor or whether slab deteriorated over the period of years for want of its timely maintenance by the Society?

ii. whether the damage caused to furniture and fittings and interiors in the Flat No.25/26, of the Disputant, was due to negligence on the part of the Respondent-Society to repair overhead 8th floor terrace?

iii. whether the Respondent/Disputant, has proved her entitlement to recover costs of Rs.46,78,562/- with interest at the rate of 21% till its realization from the Society?

35. The Trial Court categorically held, that extensive additions, alterations including removal and re-building of 95% of internal walls, carried out by Mrs. Preeti Umesh Khimji, (predecessor-in-title of the Disputant) and further alteration by Disputant in quite old building, caused damage to the structure and therefore, Society cannot be held responsible. The Trial Court further held that Disputant failed to prove

negligence on the part of the Society resulted into and caused damage to furniture and fixtures and interiors in the flats. The Appellate Court in appeal reversed both the findings and held that Disputant has proved to recover the cost incurred by her for recasting of slab from the Society with interest at the rate of 12% per annum and further held that Disputant Member is entitled to recover Rs.40,00,000/- towards damages with interest at the rate of 12% per annum from the Society. Therefore, core issue is, who caused the damage to the overhead terrace on the 8th floor of the building? Whether the Disputant Member or whether it was due to negligence on the part of the Society. Because, this issue has been answered by the Appellate Court, contrary to the Trial Court's answer, I deem it appropriate to answer this issue first.

Discussion

36. Initially, the building of the Society consisted of ground and five floors. In the year 1971 and in 1972, two additional floors were constructed. Mrs. Preeti Khimji, was the Member of the Society and owner of Flat Nos.24 and 25 on the 7th Floor (top most floor) of the building. She sold these two flats to the Disputant vide agreement for sale dated 30th

March, 1992. Whereafter in July, 1992, the Disputant occupied these two flats. Evidence admits that, in the month of April, 1987, Mrs. Preeti Khimji - erstwhile owner of the flats, sought permission from the Society to carry out the repairs of the following nature:

(i) Extensive additions, alterations including removal and re-building of 95% of internal walls. (emphasized)

(ii) Removal, waterproofing and reconstruction of toilets. (emphasized)

(iii) Enclosing of Balconey. (emphasized)

(iv) Blocking of one or two windows and finishing them with plaster. (emphasized)

(v) Making new window opening and providing operable windows. (emphasized)

(vi) Removal, waterproofing and reconstruction of the open terrace at the rear of my flat for the purpose of landscaping.

(vii) Construction of planter bags in rooms and landscaping on the terrace.

(viii) Removal of existing electrical wiring, installation and providing new.

(ix) Construction of plaster of paris false ceiling in the entire apartment.

(x) Painting of internal walls and external walls and ceiling.

37. Whereafter, on 8th June, 1987, the Society granted permission to carry out the above repairs, alterations and

additions in Flat Nos.24 and 25 upon certain terms and conditions. It appears that the erstwhile owner of the flats had given undertaking that she would not cause nuisance to the Members while making additions and alterations in the said flats and will make good if loss or damage caused to the building of the Society at her cost. It is also not in dispute that Mrs. Preeti Khimji amalgamated Flat Nos.24 and 25. Thus, it could be seen from the above facts that Mrs. Preeti Khimji had carried out substantial structural alterations and additions in the flats by re-building 95% of internal walls; blocking of one or two windows; making new window opening and enclosing balconies. In any case, evidence, confirms, the Disputant, after taking possession of the flats in July, 1992, noticed a seepage/leakage in Flat Nos.24 and 25 from the overhead terrace and thus vide letter dated 30th July, 1992, requested the Society to take remedial steps at the earliest. However, Society did not take its cognizance. Therefore, Disputant, again vide letter dated 11th August, 1992, complained about grave leakage problem in one of her bedrooms due to huge crack in side wall of her flat. It was followed by written complaints' on 17th November, 1993 and 25th April, 1994. The complaint dated 25th April, 1994 clearly conveys, that the

Society overlooked Disputant's request. However, since monsoon was approaching fast, the Disputant was willing to get the terrace tarred, as a temporary solution to overcome the leakage problem. The Disputant's evidence shows the letter dated 25th April, 1994 was followed by not less than 7 to 8 written complaints; yet the Society did not pay heed nor had taken remedial measures to stop the leakage and/or to repair the overhead terrace on the 8th floor. On the contrary, in the Annual General Meeting held on 25th January, 1998, Society resolved not to attend any repair work to the Society's building above 5th floor. Under these circumstances, in November-December, 1998 and February, 1999, the Disputant complained about inaction of the Society, to the BMC in respect of leakage into her flats. Whereupon, the BMC issued a notice on 4th December, 1999 and directed the Society to carry out repair and submit Structural Audit Report. Pursuant thereto, the Society engaged M/s. Mahimtura Consultants Pvt. Ltd. to submit the Structural Audit Report. Consultants opined, that overhead terrace slab was heavily deteriorated, the steel area in the same had corroded and reduced in size to great extent and therefore, advised to recast the slab altogether (emphasis supplied). In spite of it,

Society did not bother to carry out waterproofing work and therefore, Disputant requested BMC to grant her permission to carry out the waterproofing work.

38. Responding thereto, on 25th January, 2001, the BMC granted permission to Disputant to carry out waterproofing work to terrace on the 8th floor level, as the Society had failed to carry out repairs. The validity of this permission was questioned by the Society in the suit, contending that the Disputant has no right to carry out the repairs on the 8th Floor terrace slab, as it is the property of the Society. Rather, Society had shown its willingness to carry out repairs. In view of the said circumstance, learned Judge of the City Civil Court visited the site on 13th April, 2001 and further by order dated 16th April, 2001 observed that “there is a leakage to the 7th floor. The leakage on clear perusal to a layman as well, would indicate that this leakage is not man-made leakage, but it is on account of natural forces”. As such, Society was directed to carry out the repairs at its own costs. Thereafter, the Society, caused the false ceiling of Disputant flat opened and the terrace slab was supported by props. But, Society did not carry out the repair work, on the pretext of obtaining the

permission from various authorities. Under the circumstances, the City Civil Court, vide order dated 30th April, 2002, recorded a *prima facie* finding that Society had no *bona fide* intention to resolve the grievance of the Disputant in respect of repairs and held that the Disputant was at liberty to carry out the repair by obtaining necessary permissions from BMC. The Society being aggrieved by the permission granted, by the Court to the Disputant to repair the terrace, preferred an Appeal from Order in the High Court. In the appeal from order proceedings, this Court permitted the Disputant to carry out the work, as recommended and advised by a panel Structural Engineer, initially at her cost; and clarified that it will be open to the Disputant to claim the recovery from the Appellant, if in the law so entitled. The Disputant accordingly in consultation with the M/s. Parlekar and Dallas carried out the repair of recasting on the 8th floor terrace slab and bore the costs of Rs.46,78,562/-. The repair began in June 2004 and completed in 2005.

39. Thus, it could be seen from the above facts that the Society's structural consultant M/s. Mahimtura opined that overhead terrace slab was heavily deteriorated and steel area

in the same had reduced in size to great extent due to corrosion. The report of M/s. Mahimtura, being opinion of experts and not disputed by the Society, it could be said and held that the overhead slab was deteriorated due to reduction in the size of steel area due to corrosion over a period of years and therefore, damage to it, was not attributable to acts and omissions at least to the Disputant. Evidence, convey, that, Disputant started occupying the flats in July, 1992 and soon thereafter, on 30th July, 1992, she wrote a letter to the Society complaining seepage from her overhead terrace. Moreso, there is no evidence on record suggesting, after Disputant purchased flats in March, 1992, she had carried out extensive alterations/additions in the flats. On the contrary, evidence, in no uncertain terms, suggest, the predecessor-in-title of the Disputant, had carried out extensive structural repairs in the flat by re-building 95% of internal walls, which I have highlighted above. Now, whether such structural alterations and additions made by the predecessor of the Disputant aggravated and/or triggered the degeneration of the overhead slab or not was a disputed question, but has not been addressed by the Trial Court. Nonetheless, the fact remains the evidence on record does not suggest damage to

overhead terrace slab, was attributable to acts and/or omissions of the Disputant.

40. On the contrary, the evidence led by the Disputant, has proved that the Society at every possible occasion avoided and/or neglected to carry out the repair to the overhead terrace on 8th floor. Not only that, but as and when the Disputant was permitted to carry out repair by BMC or under the Court's orders, it was objected to by the Society by filing the Suit and Appeals, yet did nothing. Above all, Society's attitude was visible from the resolution, passed in its Annual General Meeting on 25th January, 1998, wherein it was resolved not to attend any repair work to the Society's building above 5th Floor.

41. As such, Society's deliberate avoidance and negligence to repair its property, i.e. the overhead terrace on the 8th floor was very much visible and has been proved by the Disputant. Therefore, the finding recorded by the Trial Court, that Society was not negligent in carrying out the repair work to the overhead terrace, but the acts of the Disputant and her predecessor-in-title had caused damage to

the overhead terrace on the 8th floor is not only erroneous, but was perverse. On the other hand, the finding recorded by the Appellate Court that the Society was negligent in maintaining its property and attributing the lapses to the Society in discharging their duty to repair/maintain the overhead terrace on 8th floor, cannot be faulted with.

42. For all abovesaid reasons, I hold that the finding, recorded by the Appellate Court, that sheer negligence of the Society caused damage to the overhead terrace on the 8th floor, calls for no interference.

43. The next question that arises is, whether the Disputant is entitled to recover the costs incurred by her in recasting the overhead slab on 8th floor. Having regard to the finding recorded by the Appellate Court that overhead terrace being the property of the Society and the Society having overlooked report of its own Structural Engineer coupled with the lapses on its' part to take the cognizance upon various complaints, made by the Disputant and its approach towards issue even by avoiding the judicial orders passed by the Co-operative Court and the City Civil Court, it is to be held that the finding of the

Appellate Court that Disputant is entitled to recover the costs of Rs.46,78,562/- from the Society at the rate of 12% per annum, calls for no interference. In any case, the amount expended by the Disputant for recasting the slab was certified by the structural engineers appointed by the High Court. The evidence has proved that the amount so expended was paid by the Disputant through bank. The overhead terrace being the property of the Society, but having failed to maintain and repair the same and further Disputant had expended Rs.46,78,562/- for its repairs, she is entitled to recover it from the Society, with interest at the rate of 12% per annum.

44. The next question is, whether the impugned Judgment awarding damages to the Disputant, in the sum of Rs.40,00,000/- with simple interest at the rate of 12% per annum from the Society, calls for interference?

45. Sections 73 and 74 of the Contract Act, 1972 ('said Act' for short), contain provisions, relating to breach of contractual obligations. Section 73 of the said Act, deals with damages arising from breach of a contractual obligation, resulting in losses to the aggrieved party. Under this Section,

the damages, that are awarded to the aggrieved party, are in the nature of unliquidated damages, upon assessment of loss and injury suffered and does not compensate for indirect or remote losses, arising from such breach. Thus, for awarding damages, regardless of the extent of damages, there must be a breach of contract before damages can be claimed. In the case at hand, the Disputant claims that her furniture, fixtures, fittings and interiors in the flats got damaged due to heavy seepage from overhead terrace. The overhead terrace is the property of the Society and it is obligation of the Society to maintain its property in good condition, in terms of its bye-laws. The bye-laws of the co-operative society constitutes a contract between the Society and its constituents.

46. I have concluded hereinabove, that Society neglected and/or avoided to maintain the overhead terrace on the 8th floor and thereby, breached the bye-laws (contract). Therefore, I hold the Disputant was entitled to claim damages for loss caused to property, fixtures, fittings, paintings and interiors in her flats, due to seepage of water from overhead terrace. However, in order to seek damages, the person making the claim, must show that he/she has suffered a loss.

47. The Hon'ble Supreme Court in the case of ***Maula Bux Vs. Union of India [(1969) 2 SCC 554]*** held, that the Court is competent to award reasonable compensation, in case of a breach even if no actual damage is proved to have been suffered in consequence of breach of contract. However, the Hon'ble Supreme Court also held, that in case of breach of some contracts, it may be impossible for the Court to assess compensation, arising from breach. In such a case, the sum named by the parties, if it be regarded as genuine pre-estimate, may be taken into consideration, as the major of the reasonable compensation, but not, if the sum named is in the nature of the penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

48. Herein, claim for damages was declined by the Trial Court; but granted by the Appellate Court. The Disputant claimed Rs.51,00,000/- damages from the Society, under two heads; one, Rs.21,00,000/- for damage caused to fittings, furniture and fixtures in the flats, AND Rs.30,00,000/- on account of damage caused to extensive painting work,

paintings and beautification in the flats. The Disputant, to substantiate the claim of Rs.21,00,000/-, relied on the agreement dated 30th March, 1992, contending that she had purchased the furniture worth Rs.21,00,000/- from Mrs. Khimji-erstwhile owner of the flats. To put it differently, the Disputant claimed, that consideration for flats paid to Mrs. Khimji, was inclusive of cost of furniture worth Rs.21,00,000/-, and to that end, placed on record agreement to sell dated 30.12.1992. Except that, Disputant did not plead material facts, like kind of fittings, furniture its' particulars like make, age, and cost of each of the items, in the plaint. Thus, only evidence produced, was agreement to sell and nothing more. Even otherwise, the annexure appended to the agreement listing out furniture items, did not bear the signatures of the parties. Thus, for want of pleadings of material facts required to be pleaded in terms of Order VI of the CPC, the Society could not effectively meet and/or dispute the claim of the Disputant on this count. Even in the affidavit of evidence, the Disputant did not describe the nature and kind of furniture and fittings, purchased by her from Mrs. Khimji. Insofar as the evidence of Mr. Shailesh Bajaj (husband of the Disputant) is concerned, he simply produced the agreement to sell in support of the claim for damages.

Moreover, Disputant did not take pains to examine Mrs. Khimji, from whom the furniture and fixtures were purchased by her. In the light of this kind of evidence, finding of the Trial Court that the Disputant failed to prove that she had purchased furniture worth Rs.21,00,000/- from the erstwhile owner of the flats, cannot be said to be perverse.

49. Now, even assuming, the Disputant had purchased the furniture worth Rs.21,00,000/-, but whether the evidence on record admits, that said furniture and fixtures were damaged due to heavy seepage of water from the overhead terrace of the flat. The Disputant, to prove the factum of damage caused to the furniture, examined Mr. Sandeep Sikchi. The evidence reveals, that Mr. Sikchi had visited the flats on or around in December, 2003 i.e. soon after, it was purchased by the Disputant. At the material time, he found that there was no damage to the flat. Thus, evidence of Mr. Sikchi was of no assistance to the Disputant. In course of the trial, Mr. Agrawal, was appointed, as a Court Commissioner, to inspect the Disputant's flat. The Court Commissioner submitted report in the year 2003. However, report does not support support Disputant's case, in the sense, the Court Commissioner had

observed in report, that while re-casting of terrace slab, further damage will be caused to the walls, windows, door, toilet paints, fittings, fixtures, false ceiling and also wall paintings, which are not movable type and which are presently not damaged. Thus, his report neither assessed kind of damage caused to property of the Disputant nor quantified amount of loss suffered. Moreover, it is evident from record, that though the report was supported with the photographs of the suit flat, nevertheless, Mr. Agrawal admitted in the cross-examination, that neither he personally clicked the photographs nor had gone to take the measurement of damaged portion of the flat. In that manner, taking into account the evidence of Mr. Harinarayan Bajaj (husband of the plaintiff), Mr. Agrawal, Court Commissioner, and Mr. Sandeep Sikchi, in my view, the Disputant, at the first place, failed to prove, (i) furniture worth Rs.21,00,000/- was purchased by her from Mrs. Khimji-erstwhile owner of along with flats, and (ii) cost of interior was around Rs.30,00,000/-, and further failed to prove by acceptable evidence, that she had suffered loss due to damage caused to furniture, fittings, interiors etc. Even otherwise, evidence indicates, Disputant had noticed seepage from terrace in June, 2003 i.e. soon after, she purchased the flats. If

that was the fact, Disputant, as a prudent person, was expected to take measures to prevent damage being caused to movable property. Evidence does not indicate any such measures or precautions were taken by the Disputant. This renders the Disputant's claim indefinite. Moreover, Disputant neither examined herself as a witness nor examined interior decorator to prove factum of damage caused to the property. All these factors, which had bearing over the issue, were neither deliberated nor considered by the Appellate Court at all. That being the case, findings of the Appellate Court on this count/issue, call for interference. As a consequence, judgment and order, awarding damages in the sum of Rs.40,00,000/- to the Disputant, are quashed and set aside.

50. Yet, legality of another finding rendered by the Appellate Court, that Society is not entitled to recover maintenance charges of the suit flats, except property taxes, for the period April, 2001 to December, 2005, is questioned and challenged in this petition. It appears, Appellate Court was of the view that, during April, 2001 to December, 2005, since wooden props were fixed up by the Society in Disputant's half portion of flat, family members of the Disputant were required

to stay in the remaining half portion. On this Count, Appellate Court, held the acts of the Society caused inconvenience to family members of the Disputant and thus, Society is not entitled to recover maintenance charges. This finding calls for interference for want of evidence and therefore, is quashed and set aside.

51. Having regard to facts of the case and evidence, Court is of the view, had the Society repaired and maintained overhead terrace on the 8th floor and Disputant would not have suffered over a period, since 1992 till date. Indisputably, acts and omissions of the Society call for interference in Disputant's rights to live peacefully and enjoy the flats for not less than 14 years. In that view of the matter, though the petition is partly allowed, it is subject to cost of Rs.2,00,000/-, which would meet the ends of justice, in the facts and circumstances of the case.

52. Pending petition, Petitioner-Society has deposited Rs.1,23,00,000/-, out of which, Disputant was permitted to withdraw Rs.73,00,000/- against the security of flat and balance amount has been invested in Nationalised Bank by way of fixed deposits. Now, in terms of this judgment,

Disputant is entitled to recover an amount of Rs.46,78,562/- from the Society, with simple interest at the rate of 12% p.a. from September, 2004 till its realisation. In addition thereto, Disputant is entitled to recover the cost of Rs.2,00,000/- from the Society, imposed by this Court.

53. Needless to say, that in view of the findings recorded by this Court, the security, offered by the Disputant as against the amount of Rs.73,00,000/- withdrawn by her, stands released. As such, Registry shall calculate the net amount payable to the Disputant, if any, above Rs.73,00,000/- and the balance amount shall be refunded to the Society, subject to fees of Court Receiver, if any, payable in terms of Bombay High Court (Original Side) Rules, 1980. Let, this exercise be done, within four weeks from the date of uploading this Judgment on the website of this Court.

54. At this stage, the request of learned Counsel for the Respondent-Disputant to stay the order, directing to refund the balance amount of the Society, is rejected. Likewise, the request made by the learned Counsel for the Petitioner to stay effect of the Judgment for the period of six weeks, stands rejected.

55. Petition is partly allowed and the rule is made absolute in terms thereof. Petition is disposed of accordingly.

(SANDEEP K. SHINDE, J.)