

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 23 OF 2003

Mr. Sharad Prabhudas
Sapana Garden Flat No. B-5,
Chogm Road, Socorro,
Porvorim, Goa.

..... Appellant
Original Plaintiff

V e r s u s

1. M/s. Sapana Real Estates
A registered Partnership Firm
With its office at Nanu House
Varde Valaulicar Road,
Margao, Goa.
2. Shri Sandesh Krishna Naik,
Partner of m/s. Sapana Real Estates
Nanu House, Varde Valaulicar Road,
Margao, Goa.
3. Mr. Krishna Nanu Naik,
Partner of M/s. Sapana Real Estates
Nanu House, Varde Valaulicar Road,
Margao, Goa.
4. Mr. P. K. Naik,
Partner of M/s. Sapana Real Estates
Nanu House, Varde Valaulicar Road,
Margao, Goa.
5. Mr. N. K. Naik, (Alias Mahesh Naik)
Partner of M/s. Sapana Real Estates
Nanu House, Varde Valaulicar Road,
Margao, Goa.

..... Respondents
Original Defendants

Mr. S. D. Lotlikar, Senior Advocate with Ms. Aditi Naik, Advocate for the Appellant

Mr. Rohit Kapadia, Senior Advocate with Mr. D. Pangam, Mr. Pranav Desai and Ms. Ketki Naik, Advocates for the Respondents.

Coram :- F. M. REIS, J

Reserved for Judgment on : 16th February 2017
Pronounced for Judgment on : 31st March, 2017

JUDGMENT

Heard Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Appellants and Mr. Rohit Kapadia, learned Senior Advocate appearing for the Respondents.

2. The above Appeal was admitted on 02.05.2003 on the following substantial questions of law thereafter an additional substantial question of law was framed after hearing the parties on 31.03.2016 which read as follows :

(1) Whether the Courts below could have come to legally interpret that the payments made by the Plaintiff to G.A.Naik and Y.G.Naik though on instructions of Defendant No.5, were not in terms of the Agreement dated 2/8/1985, when the burden of proof shifted on the Defendants, once the Plaintiff had discharged his burden by proving that fact of payment of the money to the said G.A.Naik and Y.G.Naik, who were the authorized representatives of Defendant No.1, as held out by Defendant No.1 in its brochure, in the absence of the Defendants to examine Defendant No.5 ?

(2) Whether it is impermissible for a Respondent, in the absence of cross objections, to challenge any finding of the Trial Court's Judgment and Decree ?

ADDITIONAL SUBSTANTIAL QUESTIONS OF LAW , framed upon hearing the parties on:

(3) Whether the First Appellate Court has misconstrued the document at Exhibit PW1/8 executed between the parties to come to the conclusion that the appellant was not entitled for the relief sought in the suit.

(4) Whether in any event the Lower Appellate court was justified to dismiss the suit in toto in the peculiar facts and circumstances of the case.

3. Briefly, it is the case of the Appellants that the Appellant entered into an Agreement on 02.08.1995 with the Respondents to purchase a flat bearing no. B-5 in Building B in the Complex known as Sapana Gardens at Porvorim. The Appellant who is of Portuguese National Citizen of Indian Origin, desired to purchase a place for residential purpose. The Appellant engaged the services of M./s. Straight Deal to look after the interest of the Appellant during his absence from India and in order to keep up with the commitment in respect of the payments to be made to the Respondents, the Appellant kept signed cheques to be issued as per the demands made by the Respondents with the said M/s. Straight Deal. Thereafter, the Appellant was directed to pay a part payment of a sum of Rs.2,07,000/- to G. A. Naik and Y.

G. Naik at Bombay who are representatives of the Respondent no. 1 whose name figures in the brochure issued by the Respondents. It is further contended that to facilitate the Appellant to find the residence of the said representative at Bombay, the Respondent no. 5 drew a sketch in his own handwriting indicating the road and the telephone of the said representatives. Accordingly, the Appellant paid the said sum of Rs.2,07,000/- by four cheques dated 26.08.1995 which were postdated to the said representatives. All the monies for the payments came from the NRI Account of the Appellant in Citibank in Mumbai. The Appellant thereafter came to Goa on 08.03.1996 and began dealing directly with the Respondents and when the Appellant came down to Goa and inspected the construction of the said Flat in the complex, it was found that large number of work was incomplete. After going through the accounts, the Appellant also realised that he had paid a sum of Rs.9,08,000/- to the Respondents and their representatives though the Agreement was for a sum of Rs.8,30,000/- and additional amount was towards extra work. As per the Agreement, the Respondents were to give possession to the Appellant within 30 months and thereafter the Appellant took possession of the Flat on 05.04.1998 and on which day all the keys of the suit Flat were handed over to the Appellant and thereafter the Appellant furnished the said Flat besides he also installed imported furniture which were duly cleared by the customs authorities. In spite of the above facts, the Respondents wrote a letter to the Appellant dated 12.06.1998 demanding

payments and threatened termination of the Agreement. A reply was sent by the Appellants, inter alia, stating that the Respondent has been paid and in case any balance amounts are to be settled, the same would be paid after the accounts are finalised. But, however, the Respondents started erecting a gate to the entrance building where the said Flat was located and, as such, the Appellant rushed to the Civil Court on 30.06.1998 and obtained an Order of injunction. Vide letter dated 07.07.1998, the Respondents attempted to terminate the Agreement after receiving the summons from the Civil Court by sending such notice to M/s. Straight Deal, though it has not been received by the Appellant. The Respondents filed their written statements and denied that the full amounts were paid to the Respondents and stated that a sum of Rs.2,07,000/- paid to the representative of the Respondents in Mumbai were paid unauthorisedly though the brochure of the Respondent indicated the name of the said representative. After hearing the arguments on the temporary injunction, the learned Trial Judge confirmed the ex parte ad-interim by Order dated 15.09.1998. The Respondents preferred an Appeal before the learned Addl. District Judge which came to be disposed of on 09.09.1999. A Revision was preferred before this Court which came to be disposed of by an Order dated 27.07.2000 with a direction that the amount ordered to be deposited by the Appellant in the High Court be paid to the party who is found entitled to receive at the end of the trial. It is contended by the Appellant that said Order was passed based on concession by both

the sides on joint submissions. It is further pointed out that after the suit was filed and the Appellant began residing in the subject Flat, it was learnt by the Appellant that the plans shown originally to the Appellant and the Licences issued revealed that large number of structures were unauthorised and four buildings were located on the proposed approved by-pass National Highway. The Appellant as such filed a Writ Petition No. 54 of 1999 which came to be admitted. After evidence was recorded in the Suit, the learned Trial Judge passed a Judgment dated 25.01.2002 partly decreeing the suit rendering a finding that the termination of the Agreement was bad in law and also directing that the amount be paid to the Respondents. Being aggrieved by the said Judgment, the Appellant preferred an Appeal before the Appellate Court which came to be allowed by the learned Addl. District Judge by setting aside the Judgment of the learned Trial Court. Being aggrieved by the said Judgment passed by the Lower Appellate Court dated 30.12.2002, the Appellant has preferred the present Appeal which came to be admitted on the aforesaid substantial questions of law.

4. Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Appellant, has submitted that the learned Trial Judge on appreciating the evidence on record has come to the conclusion that the alleged termination by the Respondents after the filing of the suit was bad and that the Appellant was entitled to continue with the possession of the subject Flat. The learned

Senior Advocate further pointed out that the sum of Rs.2,07,000/- was paid by the Appellants to the Respondent no. 1 through their representative in Mumbai. It is further pointed out that though the learned Trial Judge had directed that the amount deposited in the Court be paid to the Respondent no. 1, the Appellant chose not to challenge the said findings in view of the joint submission recorded by this Court whilst disposing of the Revision preferred by the Respondents that the said amount would be paid to the person who is entitled to receive such amount. It is further submitted that though the Appellant had paid the said amount, the learned Judge had erroneously come to the conclusion that the Appellant was liable to pay the said amount. It is further pointed out that the Respondents preferred an Appeal before the Lower Appellate Judge who has erroneously come to the conclusion that the Appellant was occupying the Flat as a licensee, forgetting the fact that the Appellant had paid the total consideration and was handed over possession of the subject Flat unconditionally. Learned Senior Advocate further submits that the Agreement itself shows that the Respondents were engaged to carry out the construction of the Flat and, as such, the rights of the Respondent no. 1, if any, was restricted to the payment for services rendered in putting up in such construction and, as such, the findings of the Lower Appellate Court that the Appellants were mere licensees is perverse and cannot be sustained based on the Agreement executed between the parties. It is further pointed out that the two

representatives who had received the amount at the instance of the Appellants one of them in fact was shown in the Brochure of the Respondent no. 1 to be entitled to receive bookings of the Flat in the subject Complex at the instance of the Respondent no. 1. Learned Senior Counsel further pointed out that the Bank Statements of the Citi Bank clearly shows that such amount was paid to the Respondents and it was incumbent upon the Respondents to examine the said persons in case they desired to dispute the receipt of such payment. It is further submitted that the Lower Appellate Court has misconstrued the Agreement between the parties to erroneously come to the conclusion that the Appellant was occupying the premises as a Licensee. Learned Senior Advocate further pointed out that the findings of the learned Judge that the termination is legal is totally erroneous, the Respondents proceeded with such illegal expedients only after receipt of summons in the suit. The learned Senior Advocate as such pointed out that the substantial questions of law framed by this Court are to be answered in favour of the Appellants. Learned Senior Advocate submits that it is always open to the Appellate Court to examine the correctness or otherwise of the adverse findings before the learned Trial Court against a Respondent and, as such, the view taken by the Lower Appellate Court that the Appellants were not entitled to dispute the correctness of the findings without filing cross objections is totally erroneous and contrary to the law well settled. Learned Senior Advocate further pointed out that in such circumstances, the

Judgment of the Lower Appellate Court cannot be sustained and deserves to be quashed and set aside. It is further submitted that the Co-operative Society has also been formed and the subject land has already been transferred in favour of such Society and the Appellant has been residing in the said Flat since the year 1998.

5. On the other hand, Shri Rohit Kapadia, learned Senior Advocate appearing for the Respondents, has disputed the said contention. The learned Senior Advocate has pointed out that whether the occupation of the subject Flat by the Appellant is a Licence or not is a question of fact and it is not open to this Court to re-appreciate the evidence in the present Second Appeal to take a contrary finding. It is further submitted that a licensee has no interest in the property and its possession is on behalf of the owners and, as such, the question of the Appellants claiming any right to the subject Flat and obtaining an injunction is totally unjustified. Learned Senior Advocate further submits that the first substantial question of law would entail re-appreciation of evidence and, as such, the question of carrying out such exercise in the present Second Appeal would be contrary to the well settled principles of law. Learned Senior Advocate further submits that it is well settled that in a Second Appeal, the Court cannot re-appreciate the evidence or take a contrary view on the findings of fact rendered by the fact finding Courts and, as such, any interference in such findings would be an

erroneous exercise of jurisdiction in the present Second Appeal. Learned Senior Advocate further pointed out that as the Appellant has not filed cross objections before the Lower Appellate Court, the findings rendered by the learned Trial Judge were binding on the Lower Appellate Court and, as such, the grievances raised by the Appellant on that count is totally misplaced and deserves to be rejected. The learned Senior Advocate further pointed out that the contention of Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Appellant that the Agreement itself is misconstrued is totally erroneous and in any event there is no foundation to that effect in the pleadings and, as such, it is not open to the Appellants to raise a different case in the Second Appeal. Learned Senior Advocate further pointed out that in such circumstances, the Appellant is not entitled for any reliefs as, admittedly, the Lower Appellate Court has come to the conclusion that the Respondents have terminated the Agreement in accordance with law in terms of the Agreement. Learned Senior Advocate further submits that as the Appellants have failed to establish their right to obtain a relief as prayed for, the question of granting a y relief in favour of the Appellant by this Court would be totally unjustified. Learned Senior Advocate in support of his submissions has relied upon the Judgment of the Apex Court reported in **(1997) 4 SCC 713** in the case of **Panchugopal Barua & Ors. vs. Umesh Chandra Goswami & Ors.**, to point out that the High Court is not entitled to entertain an Appeal on a new point. Learned Senior Advocate has also relied upon the Judgment of

the Apex Court reported in **(2014) 15 SCC 405** in the case of **Arsad Sheikh & anr. vs. Bani Prosanna Kundu & Ors.**, to contend that the scope of a Second Appeal is limited to the substantial question of law framed at the time of the admission of the Appeal or at any later stage if the High Court is satisfied that such a question of law arises from the fact found by the Courts below. The learned Senior Advocate has also relied upon the Judgment reported in **(2015) 11 SCC 782** in the case of **Lisamma Antony & anr. vs. Karthiyayani & anr.**, to point out that when there is no substantial question of law, the High Court cannot re-appreciate the evidence and re-examine the findings of fact. Learned Senior Advocate has also relied upon the Judgment of the Apex Court reported in **(2012) 5 SCC 370** in the case of **Maria Margarida Sequeira Fernandes vs. Erasmo Jack De Sequeira**, in support of his submission as to the rights of a licensee in an immoveable property. Learned Senior Advocate has also relied upon the Judgment of the Apex Court reported in **1993 Supp (2) SCC 518** in the case of **Pathan Murtazakhan Dadamkhan & Ors. vs. Pathan Pirkhan Amdumiyan**, in support of his contention that a new plea cannot be raised in a Second Appeal. Learned Senior Advocate as such submits that the Appeal be rejected.

6. I have duly considered the rival contentions and with the assistance of the learned Senior Advocates, I have also gone through the

records. The records reveal that by an Agreement dated 02.08.1995, annexed as 'A' to the plaint, a Flat admeasuring 115.20 square metres super built up was agreed to be taken up by the Appellant for a total consideration of Rs.8,30,000/-. It is the case of the Appellants that he had paid a total sum of Rs.9,08,000/-. In the last payment in favour of the Respondents a sum of Rs.1,21,000/- was paid on 06.09.1996. At Para 13 of the plaint, the Appellant has pleaded that he owed to the Defendant a total sum of Rs.9,08,000/- being a sum of Rs.8,30,000/- towards the cost of a Flat and remaining amount towards the maintenance, Society formation, electricity, Miscellaneous, etc. It is further pointed out that the Respondents put the Appellant in possession on 05.04.1998 and since then the Appellant has been residing in the subject Flat. It is pertinent to note that on the said date, the Appellant also paid a sum of Rs.1,21,000/- by cheque to the Respondents herein which receipt is duly acknowledged. The Respondents filed their written statements and claimed that the Agreement on which the Appellant is basing his claim is already terminated vide its notice dated 07.07.1998. The fact that the Agreement dated 02.08.1995 was executed between the parties has not been disputed. The dispute raised by the Respondents was essentially that no amounts were received from the Respondent from any representative of the Defendants at Mumbai. It was also disputed that a sum of Rs.2,07,000/- were received by any representative on behalf of the Respondents. The dispute raised by the

Respondents is essentially that the said sum of Rs.2,07,000/- were not received by the Respondents and, as such, the Respondent were entitled to terminate the Agreement. An additional written statement was also filed by the Respondents, inter alia, contending that the said G. N. Naik was still representing the Respondents in Mumbai only for the purpose of booking of premises.

7. Based on the said pleadings, the matter went for trial and the learned Trial Judge whilst disposing of Regular Civil Suit no.578/2000 based on the pleadings of the parties, framed nine issues. Whilst examining issue nos. 1 and 2, the learned Judge found that the Defendant no. 5/Respondent no. 5 requested the Appellant to issue a cheque to their representative at Bombay and also drew a sketch at exhibit Pw.1/F in his own handwriting indicating how to reach the address of the representative. It was also contended that there was no other reason for the Appellants to issue a cheque of Rs.2,07,000/-. The learned Judge also noted that admittedly said Shri G. A. Naik and Y. G. Naik were the representatives of the Respondent no. 1 at Bombay as it is evident from the brochure at exhibit Pw.1/B and the admission of Dw.1 that he was the agent for booking. The learned judge further noted that the names G. A. Naik and Y. G. Naik, did not figure in the Agreement between the parties. It is further noted that the said two persons also have not given a receipt for such an amount. It is further pointed out

that the letter produced on record at exhibit Pw. 1/B wherein it indicates that the said amount advanced to them is not part of the consideration of the Agreement dated 02.08.1995. The learned Judge also noted that merely because the defendant no. 5/Respondent no. 5 has not been examined, it does not stand to prove the case of the Appellant as the burden was on the Appellant to prove the payment of the said amount to G. A, Naik and Y. G. Naik and that too at the instructions of the Respondent no. 5 which has not been proved. The learned Judge also noted that the said G. A, Naik and Y. G. Naik in fact were the beneficiaries of the said amount received from the Bank. The learned judge has also considered the correspondence exchanged between the parties and dispositions of the parties and other witnesses and found that there is no evidence as discussed above that the Respondent no. 5 instructed the Appellant to pay the amount to G. A, Naik and Y. G. Naik and drew the sketch and also that the Appellant paid an amount of Rs.2,07,000/- in respect of the suit flat as the said persons had refused to accept such amount was paid on account of the suit flat. The learned Trial Judge further noted that once the Appellants have failed to establish that the full consideration for the suit flat was paid, he is liable to pay to the Respondents the amount as claimed in the written statement and deposition. Hence, the issue no. 2 was answered in the negative. But, however, considering that the Appellant is in possession of the suit flat since 05.04.1998 and paid a considerable amount towards the cost of the flat and

only last two instalments were to be paid together with miscellaneous expenses for extra work and also taking note of the fact that the Appellant had deposited a sum of Rs.1,79,995/- as per exhibit 31 before this Court in terms of the Order dated 27.07.2000, the learned Judge found that it could be in the interest of justice to direct the payment of the amount deposited being a sum of Rs.1,79,995 including an amount of Rs.30,000/- towards extra works which are otherwise not disputed by the Appellant. The learned Judge whilst dealing with issue no. 9, has held that according to the Respondents, the Agreement dated 02.08.1995 has been terminated on account of the breach by the Appellant by letter at exhibit Dw.1/J. But, however, the learned Judge found that the records reveal that the notice dated 07.07.1998 terminating the Agreement was given after the filing of the suit on 30.06.1998, the and after the plaint along with exhibits and the Order of injunction was served on the Respondents on 01.07.1998, the learned Judge also noted that as per the Agreement, a notice has to be served through registered post AD at the specific address and in case of delay in making the payment of instalment, a notice in writing in that behalf would be issued on or after 15th day from the date of which such delay in instalment had fallen due. The learned Judge noted that admittedly no termination notice was sent to the Appellant immediately after the expiry of 15 days i.e. of the letter dated 30.10.1996, letter dated 21.06.1997, letter dated 20.08.1997, letter dated 15.07.1997 and so also letter dated 17.10.1997. The learned

Judge also found that termination letter was sent only after the filing of the Suit and, as such, answered the issue in the negative.

8. Whilst dealing with issue nos. 4, 5, 6 and 7, the learned Judge noted that considering that the Appellant has to pay a sum of Rs.1,79,995/- and that there is no evidence that the said amount has been paid by the Appellant and received by the Respondents, the Order passed by this Court dated 27.07.2000 had observed that while passing the final Judgment, the Trial Court shall consider the deposit of amount which has been made in the Court for appropriate payment to the party which is found entitled to receive it. Consequently, the learned Judge partly decreed the Suit restraining the Respondents from evicting the Appellants and its family members from the suit flat and further restrain from blocking the gate leading to the suit flat provided the said sum of Rs.1,79,995/- deposited is paid to the Respondent no. 1 and, consequently, would be deemed to be the owners of the flat.

9. The Lower Appellate Court whilst disposing of the Appeal preferred by the Respondents, by Judgment dated 30.12.2002 in Regular Civil Appeal no. 21/2002, framed four points for determination. Whilst deciding the first point (a) framed by the learned Judge, it has been found that the learned Judge has wrongly observed that admittedly Shri G. A. Naik and Shri Y. G. Naik were the representatives of the Respondent no. 1 at Mumbai as it is

evident from exhibit Pw.1/B. The learned Judge noted that what was stated by Dw. 1 is that Shri G. A. Naik, in Mumbai, is their representative for booking and that he has now learnt that Shri Y. G. Naik, is the son of G. A. Naik. The learned Judge also noted that Dw. 1 had stated that G. A. Naik had no authority to receive payment nor have they given any authority to the Appellant to pay the money to G. A. Naik. The learned Judge also noted that a letter has been produced by the Pw. 1 from Citi Bank and N. A. Global Consumer Bank showing that an amount of Rs.1,00,000/- has been paid to Mr. G. A. Naik and another sum of Rs.1,07,000/- has been paid to Mr. Y. G. Naik between 28.08.1995 to 05.09.1995. The learned Judge further noted that it cannot be understood why the said cheques were issued in the name of said two persons and not in the name of Respondent no. 1. The learned judge also noted that the letter at exhibit Pw. 1/P dated 09.10.1999 clearly shows that the payment by the Appellant to G. A. Naik has been disowned and further stated that such amount was a repayment of a cash amount taken by the Appellant. The learned Judge also examined the correspondence between the parties and noted that it shows that an outstanding amount was payable by the Appellant. The learned Judge further noted that the circumstances disclosed that the Defendant no. 5/Respondent no. 5 had drawn a sketch and requested the Appellant to deliver the amount to said G. A. Naik, who did not have any direct link to establish the fact that said G. A. Naik and Shri Y. G. Naik had received the

amount on behalf of the Respondent no. 1. The learned Judge also noted whether a cash amount was taken for payment of customs duty would not be relevant to the said dispute in the present case. The learned Judge as such noted that the learned Trial Judge has rightly come to the conclusion that the sum of Rs.1,79,995/- is still in arrears to be paid by the Appellant. Whilst dealing with point (b), the learned Judge found that since last two instalments have not been paid as well as costs for extra item have not been reimbursed, the Respondents wrote a letter dated 17.10.1997 at exhibit Dw. 1/I to the Appellant, informing that a total sum of Rs.1,48,789/- was payable and to pay by Demand Draft. The learned Judge further found that a reminder was also sent at exhibit Pw. 1/J also informing the costs of extra items and total amount as such due of Rs.1,79,995/-. The learned Judge also noted that by notice dated 07.07.1998, the Respondent no. 1 terminated the said Agreement. The learned Judge further found that termination was good and valid until the payment of the outstanding amount. The learned Judge further noted that the finding of the learned Trial Judge that the Agreement clearly stipulates the manner of termination is a wrong interpretation of the clauses of the Agreement. The learned Judge after examining the material on record, has found that there is a preponderance of probabilities close to persistency that the Appellant has been duly served with the notice of termination of the Agreement. The learned Judge as such held that the Agreement dated 02.08.1995 has been duly terminated by the Respondents. Whilst examining

point no. (c), the learned Appellate Court noted that clause (6) of the Agreement dated 02.08.1995 clearly stipulates that subject to the payment of the instalments, the builder shall complete the said flat in the building in all respects with minimum compliance and specifications mentioned in Schedule II therein and tender the possession to the prospective purchaser on or before the expiry of 30 calendar months from the date of the Agreement. The learned Judge noted that handing over possession was depending upon the instalments fixed in the Agreement and, as such, the permission given to the Appellant to furnish the flat pending payment of the entire instalments cannot amount to tendering of possession of the suit Flat as per the Agreement. The learned Judge also noted that Occupancy certificate at exhibit Dw.1/N and the completion Certificate is at exhibit Dw.1/O. The learned Judge also noted that there is no letter of handing over possession produced on record of the suit Flat. The learned Judge further noted that letter at exhibit Pw. 1/J clearly shows that possession was offered to be delivered on payment of the amount. The learned Judge has also noted that only on payment of the full amount, the possession could be delivered. The learned Judge as such found that the Appellant has misused the permission granted to him by the Respondents to store his articles though he is in unauthorised and illegal possession and noted that the learned Trial Judge has failed to consider that such possession was unlawful. The learned Judge as such decided point (c) holding that the possession is illegal and unauthorised. Whilst dealing with

point (d), the learned Judge noted that permanent injunction can be granted under Section 38 of the Specific Relief Act to prevent the breach of obligation existing in his favour. The learned Judge as such found that a sum of Rs.1,79,995/- was due and payable by the Appellant to the Respondents. The learned Judge further noted that though some findings of the Trial Judge are good, however, others are bad and in fact the Trial Judge ought to have struck off issue no. 3 whether the Appellant proved that the Agreement dated 02.08.1995 is valid and binding on the Defendants as irrelevant. The learned Judge found that as there was a breach of the Agreement, the Agreement was not valid and binding on the Respondents and they have terminated such Agreement. The learned Judge as such allowed the Appeal and set aside the Decree passed by the learned Trial Judge.

10. From the foregoing findings arrived at by the Courts below, it has been held that there was an Agreement to construct a flat for the Appellant dated 02.08.1995 whereby a substantial amount of the costs of the consideration was duly paid to the Respondent no. 1. There is a dispute with regard to an amount of Rs.1,79,995/- which the Appellant claims to have paid to the representative of the Respondent no.1 G. A, Naik and Y. G. Naik. It is contended by the Respondent no. 1 that no payment was received by the said two persons on behalf of the Respondent no. 1 nor were they authorised to receive such amount. The Appellant is admittedly occupying the subject

premises from 05.04.1998. It is contended by the Respondent no. 1 that it was only a permission to keep the furniture and as the Respondents began erecting a gate at the entrance where the suit Flat was located, the Appellant filed the suit on 30.06.1998 and obtained an interim relief which was served on 01.07.1998 on the Respondents. The subject termination by the Respondent no. 1 was by notice dated 07.07.1998 addressed to M/s. Straight Deals which the Appellant alleged have not received till date. The Order of injunction granted was confirmed on 15.09.1998 and an Appeal was preferred before the learned Addl. District Judge which came to be disposed of on 09.09.1999. A revision was preferred before this Court which came to be disposed of by Order dated 27.07.2000 with a direction that the amount which has been deposited by the Appellant in the High Court be paid to the party which is found entitled to receive at the end of the trial. What emerges from the findings on facts is that the Respondent no. 1 disputes the payment of a sum of Rs.2,07,000/- which the Appellant admittedly paid in the hands of Mr. G. A. Naik and Mr. Y. G. Naik, who the Respondent no. 1 claims to be not authorised to receive the amounts on behalf of the Respondent no. 1. The learned Trial Judge has in fact found that though the payments were made to the said two persons by the Appellants, there was no material on record to show that the said persons were authorised by the Respondent no. 1. to receive payments on their behalf towards the subject Flat. The Lower Appellate Court has also found that the letter produced on record of the said

Shri G. A. Naik at exhibit Pw. 1/P which shows that the said Mr. G. A. Naik had stated that he had not received any amount on behalf of the Respondent no. 1 would show that the amounts paid to said Mr. G. A. Naik and Mr. Y. G. Naik, were not part of the consideration of the suit Flat as it was claimed that such amounts were paid by the Appellant in repayment of the amounts towards customs duty payable by the Appellant. Both the Courts have also noted that said Mr. G. A. Naik was in fact authorised to take bookings on behalf of the Respondent no. 1. The Lower Appellate Court found that non-examination of Mr. G. A. Naik was irrelevant as the Appellant has failed to establish that he was duly authorised to receive amounts on behalf of the Respondent no. 1. But, however, the fact remains that a sketch is placed on record prepared in the handwriting of the Respondent no.5/Defendant no. 5 disclosing to the Appellant the road they would have to take to reach the residence of said Mr. G. A. Naik who is the father of Mr. Y. G. Naik. The fact that amounts were transferred from the NRI Account of the Appellant in favour of the said Mr. G. A. Naik and Mr. Y. G. Naik, has been duly established. The Defendant no. 5-Respondent no. 5 has not been examined in the Court. The sketch produced on record in the handwriting of Respondent no. 5 was delivered to the Appellant. Once it is established that Mr. G. A. Naik was the booking Agent for Flats in the subject building in Mumbai appointed by the Respondent no. 1 and when the Appellants have established a payment of a sum of Rs.2,07,000/- in the hands of said Mr. G.

A. Naik and Mr. Y. G. Naik and the sketch prepared by the Respondent no. 5 is established, the burden shifted on the Respondents to establish that Mr. G. A. Naik had limited powers or exceeded the power whilst dealing with the prospective Flat purchases of the Respondent no. 1. In the written statement filed by the Respondents, it has been admitted that the said G. A. Naik, was an agent in Mumbai but contending that he was only a booking agent and had no authority to collect money on behalf of the Respondent no.1. In fact, the Appellant sought clarification from the said G. A. Naik that such amounts were paid towards the part consideration of the cost of constructing the subject Flat. The contents of the letter addressed by the said G. A. Naik at Exhibit PW1/P are seriously disputed by the Appellant and, as such, cannot by itself support the case of the Respondents that such amount was paid towards the custom duty. What has to be noted is that the Appellant proceeded to the address drawn on the sketch by the Respondent no.5 to contact the said G. A. Naik to make such payment. In terms of Section 186 of the Contract Act, the authority of an agent may be express or implied. Once it is established that the Appellant proceeded to hand over the amount at the instance of the Respondent no.5 who is one of the partners of the Respondent no.1 and when the said G. A. Naik is admitted to be an agent though claimed to be only a booking agent, the circumstance can clearly imply that he was authorised to receive such payment specially when neither the said G. A. Naik nor the Respondent no.5 who has prepared the sketch

have entered the witness box to show that such amount has been received towards the payment of custom duty as claimed by the Respondents. In such circumstances, the Courts below were not justified to come to the conclusion that the amounts so paid were not in connection with the suit agreement. But the fact remains that this Court whilst disposing of the application for temporary injunction, had directed the deposit of the disputed amount of Rs.1,79,995/- which included the amount towards extra work, by the Appellant which has been duly complied with.

11. Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Appellant, upon instructions, states that in view of the said Order of this Court, the Appellant has not challenged the directions to pay such amount to the Respondent no. 1 herein. In such circumstances, though the Courts below have erroneously found that the Appellant has failed to establish that the said amount of consideration was not paid by the Appellant, nevertheless, I find that the non-examination of the Defendant no. 5/Respondent no. 5 and said Mr. G. A. Naik to prove the contents of the said two documents Pw. 1/F and Pw. 1/P, the Court would have to draw an adverse inference against the Respondent no. 1 herein. No doubt, the Courts below have concurrently found that the Appellant has failed to establish that the said Mr. G. A. Naik was duly authorised by the Respondent no. 1 to receive the amount from the Appellant on their behalf but, however,

the fact remains that as said Mr. G. A. Naik was a booking Agent representing the Respondent no. 1 in Mumbai, the Courts below were not justified to cast the burden on the Appellant to establish the extent of such authority.

12. The extent of the authority of Mr. G. A. Naik would be an aspect to be established by the Respondent no. 1 herein. Once it is admitted position that Shri G. A. Naik was a booking Agent for the Respondent no. 1 and the Appellant had in fact claimed that a substantial sum of money was paid to said G. A. Naik and his son towards the balance amount payable by the Appellant towards the consideration of the subject Flat, the burden had shifted on the Respondent no. 1 to establish that he had exceeded his authority in receiving such amount. The contention of the Respondents based on the said letters addressed by said G. A. Naik to the Appellant cannot be accepted as the contents whereof are not admitted by the Appellant in the Court nor the Respondent no. 5 who had guided the Appellant to the residence of G. A. Naik, was also not examined in Court. Such payments were effected by the Appellant in the course of the business relationship between the Respondent no.1 and the said G. A. Naik who was admittedly a booking agent. The Respondent no.1 has not produced the terms of authority upon which the said G. A. Naik was authorised to function as a booking agent in Mumbai. In such circumstances, the Courts below

have taken an erroneous view with that regard by placing the burden on the Appellant to establish that said G. A. Naik and his son were entitled to receive the amounts on behalf of the Respondent no. 1.

13. In this connection, the Apex Court in a Judgment reported in **2006 (5) SCC 545** in the case of **Hero Vinoth vs. Seshammal**, has observed at Para 24 thus :

“24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by

any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

Taking note of the said observations, I find that as wrong legal inference has been drawn based on the findings of fact arrived at by wrongly casting the burden of proof on the Appellant, the first substantial question of law framed in the above Appeal has to be answered in favour of the Appellant. As such, I find that the Courts below have erred in holding that the payments made by the Appellant to G. A. Naik and Y. G. Naik, though on instructions of Respondent no. 5, were not in terms of the Agreement dated 02.08.1995 as the burden of proof shifted on the Respondents once the Appellant had discharged his burden by establishing the payment of the money to said G. A. Naik and his son Y. G. Naik, who were representatives of the Respondent no. 1 in Mumbai. The first substantial question of law is answered accordingly.

14. With regard to the second substantial question of law, I find that the Lower Appellate Court found that the Appellant is not entitled to challenge the finding of the learned Trial Judge that the total consideration was not paid to the Respondent no. 1 in terms of the subject Agreement dated 02.08.1995. In terms of Order 41 Rule 22 of the Civil Procedure Code, it is open to the Respondents to challenge any finding which is adverse to him without filing a Cross Appeal provided he supports the decree passed in his favour.

15. The Apex Court in the Judgment reported in **2003(9) SCC 606** in

the case of ***Banarsi & Ors. vs. Ram Phal***, has observed at Para 10 thus :

“10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a *finding*. The difference which has resulted we will shortly state. A respondent may *defend* himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to *attack* any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is *partly* in favour of the appellant and *partly* in favour of the respondent.

(ii) The decree is *entirely* in favour of the respondent though an *issue* has been decided against the respondent.

(iii) The decree is *entirely* in favour of the respondent and all the *issues* have also been answered in favour of the respondent but there is a *finding* in the judgment which goes against the respondent.”

Taking note of the said observation in the present case, the Appellant has supported the Decree passed by the learned Trial Judge and, as such, was entitled to question the findings of the learned Trial Court adverse to him even without filing cross objections.

16. In such circumstances, the learned Lower Appellate Court was not justified in refusing to allow the Appeal to challenge such findings in the Appeal preferred by the Respondents. The second substantial question of law is answered accordingly.

17. With regard to the third substantial question of law, on perusal of the Agreement at Exhibit Dw.1/4 dated 02.08.1995, the Respondent no. is styled as the Builder and the Appellant is styled as a Prospective Purchaser. The Agreement provides that the owner of the land had permitted the Builder to either sell Flats or construct part of the building. It further provides that the Prospective Purchaser/the Appellant herein, had approached the Builder/Respondent no. 1 herein to construct for him Flat no. B-5, situated on the second floor to be constructed in the said premises. The Agreement clearly provides that it was an Agreement to construct a Flat for the Appellant on payment of the consideration referred to therein. In April 1998, the Appellant started occupying the subject flat. In such circumstances, the said

Agreement was merely an Agreement to construct a Flat for a specific consideration. Even assuming there was a default in the payment of an amounts, a notice had to be served by the Respondent no. 1 in writing to pay such amount. Before April 1998, there is no material to suggest that any such notice to that effect was served by the Respondent no. 1 to the appellant claiming any amounts. Even assuming there was any non-payment in the amounts payable by the Appellant, the Respondent no. 1 would at the most be entitled to the recovery of the defaulted amount from the Appellant. It is well settled that the rights of the parties crystallise as on the date of the filing of the suit. The suit in the present case was filed by the Appellant on 30.06.1998. the alleged termination was only in July 1998 after the filing of the Suit. Despite of a communication by the Respondents that all correspondence be addressed to the Appellant at his residential and not at the address of his Agent which was notified to the Respondent no. 1 much before the filing of the suit, the subject termination was allegedly served on the Agent of the Respondents Straight Deals who had already communicated the Respondent no.1 that all correspondence to be addressed to the Appellant directly. In such circumstances, I find that as on the date of the filing of the Suit, considering the nature of the Agreement executed between the Appellant and the Respondent no. 1 for construction of the Flat and as it was admitted during the arguments that the property was already conveyed to the Society, the learned Trial Judge was justified to

grant the reliefs in favour of the Appellant and direct the amount deposited before this Court be recovered by the Respondent no. 1. The Lower Appellate Court was not justified to interfere in the Judgment of the learned Trial Judge on the ground that the Agreement was terminated by failing to examine the consequences of such termination only after filing of the Suit and the service of the interim injunction on the Respondents herein. As on the date of the filing of the Suit, the alleged termination was not in existence and, no counter claim was filed by the Respondent no.1 to that effect and, as such, the learned Trial Judge was justified to grant the reliefs in favour of the Appellant herein.

18. Mr. Rohit Kapadia, learned Senior Advocate appearing for the Respondents has stressed on the fact that the Appellant was only permitted by the Respondent no. 1 to keep the furniture in the premises and the possession continued with the Respondent no. 1. There is no material on record produced by the Respondent no. 1 to suggest that the Appellant was only permitted to keep the furniture in the premises. The fact that the Appellant was occupying the subject premises from April 1998, is clearly found from the findings of the Courts below. The learned Senior Advocate has laid emphasies in the Judgment of the Apex Court in the case of ***Maria Margarida Sequeira Fernandes vs. Erasmo Jack De Sequeira*** (supra) to contend that the Appellant cannot be said to be in possession of the subject

premises as he was merely a licensee. In fact, the Apex Court in the said Judgment has specified the principles of law by observing at Para 97 thus :

“97. Principles of law which emerge in this case are crystallised as under:

(1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

(2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

(3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

(4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour.

(5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.”

19. In the present case, it is not the case of the Respondent no.1 that the Appellant was either his friend, care taker or servant. On the contrary, the records show that the consideration for the subject Flat was paid by the Appellant to the Respondents though there was a dispute with regard to a sum of Rs.1,79,995/- which was directed to be deposited in this Court at the time of the disposal of the temporary injunction application. In such circumstances, the Judgment relied upon by the learned Senior Advocate appearing for the Respondents, is not applicable to the facts of the present case. The Judgment of the Apex Court reported in **Lisamma Antony & anr. vs. Karthiyayani & anr.** (supra) relied upon by the learned Senior Advocate, would not be applicable to the facts of the present case. The substantial question of law framed after hearing the parties is based on the erroneous interpretation of the Agreement admittedly executed between the parties and the consequences thereof.

20. The Judgment in the case of **Pathan Murtazakhan Dadamkhan & Ors. vs. Pathan Pirkhan Amdumiyan** (supra) is also not at all applicable to the facts of the present case as the interpretation of the documents and the clauses relied upon by the Lower Appellate Court based on the admitted facts of the cases, does not require any re-appreciation of evidence as was otherwise in the said Judgment.

21. For the aforesaid reasons, I find that the Lower Appellate Court was not justified to set aside the Judgment of the learned Trial Judge on the ground that the Respondent no. 1 had terminated the Agreement which was admittedly after the filing of the suit and such termination was not in accordance with the terms of the Agreement as referred to herein above. In any event, the learned Trial Judge had directed the payment of the disputed amount to the Respondent no. 1 herein. As such, the Judgment passed by the learned Trial Judge was justified in the facts and circumstances of the case and interference by the learned Lower Appellate Court is unreasonable and contrary to law. Admittedly, the Appellant is occupying the premises from April 1998 much before the filing of the Suit after it was handed over by the Respondent no. 1. At the most, the claim of the Respondent no. 1 that the disputed amount has not been paid, has been considered by the learned Trial Judge whilst passing the Decree in favour of the Appellant. As such, the impugned Judgment passed by the Lower Appellate Court cannot be sustained and deserves to be quashed and set aside.

22. In view of the above, I pass the following :

ORDER

(i) The Appeal is partly allowed.

(ii) The impugned Judgment passed by the Lower Appellate Court dated 30.12.2002 is quashed and

set aside.

(iii) The Judgment of the learned Trial Judge is restored.

(iv) Appeal stands disposed of accordingly with no orders as to costs.

F .M. REIS, J.

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