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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL (ST) NO.13781 OF 2018
WITH
CIVIL APPLICATION NO.560 OF 2018
IN
SECOND APPEAL (ST) NO.13781 OF 2018**

M/s Sea Princess Realty]
having its office at Ashokraj "H" Wing] Appellant
1st Floor, S.V. Road, Goregaon (West)]
Mumbai 400 062]

V/s.

1. Mr. Rajesh Mehta]
age: 46 years, Occn. Business]
2. Mrs. Nisha Rajesh Mehta]
age: 46 years, Occn. Busines.] Respondents.
Both residing at: 11, Vandana,]
4th road, Juhu Scheme, Vile Parle]
(West), Mumbai 400 056.]

**ALONG WITH
SECOND APPEAL (ST) NO.13802 OF 2018
WITH
CIVIL APPLICATION NO.554 OF 2018
IN
SECOND APPEAL (ST) NO.13802 OF 2018**

M/s Sea Princess Realty]
having its office at Ashokraj "H" Wing] Appellant
1st Floor, S.V. Road, Goregaon (West)]
Mumbai 400 062]

V/s.

1. Mr. Manoj Mehta]
age: 51 years, Occn.Business]
2. Mrs. Sonal Manoj Mhehta] Respondents
age: 48 years, Occn. Business]
Both residing at: A/101Krishnaraj]
St. Xavier School Road, Ville Parle]
(West), Mumbai 400 056]

ALONG WITH
SECOND APPEAL (ST) NO.13813 OF 2018
WITH
CIVIL APPLICATION NO.553 OF 2018
IN
SECOND APPEAL (ST) NO.13813 OF 2018

M/s Sea Princess Realty]
having its office at Ashokraaj "H" Wing] Appellant
1st Floor, S.V. Road, Goregaon (West)]
Mumbai 400 062]

V/s.

Mr. Bhupendra Ramji Vira]
residing at: B/1103, Reema residency] Respondents
Shimpoli Road, Chiku Wadi, Borivali (W)]
Mumbai 400 092]

ALONG WITH
SECOND APPEAL (ST) NO.13822 OF 2018
WITH
CIVIL APPLICATION NO.555 OF 2018
IN
SECOND APPEAL (ST) NO.13822 OF 2018

M/s Sea Princess Realty]
having its office at Ashokraaj "H" Wing] Appellant

1st Floor, S.V. Road, Goregaon (West)]
Mumbai 400 062]

V/s.

1. Mr. Rajesh Jain]
Age: 43 yrs. Occn. Business]

2. Mr. Umesh Jain]
age: 38 years, Occn. Business]

] Respondents.

Both residing at: Kanchan,]
Near Jain Mandir, post. Umbarpada]
Saphale, Taluka: Palghar]
District: Palghar 401 101]

ALONG WITH
SECOND APPEAL (ST) NO.13826 OF 2018
WITH
CIVIL APPLICATION NO.559 OF 2018
IN
SECOND APPEAL (ST) NO.13826 OF 2018

M/s Sea Princess Realty]
having its office at Ashokraj "H" Wing] Appellant
1st Floor, S.V. Road, Goregaon (West)]
Mumbai 400 062]

V/s.

Mr. Nitin V Shah]
residing at: 501 plot No.505 B]
Vishal Complex CHS Ltd.] Respondent.
S.V. Road, Near N.L. College,]
Malad (W), Mumbai 400 064.]

ALONG WITH
SECOND APPEAL (ST) NO.13835 OF 2018
WITH
CIVIL APPLICATION NO.557 OF 2018

**IN
SECOND APPEAL (ST) NO.13835 OF 2018**

M/s Sea Princess Realty	]
having its office at Ashokraj "H" Wing	] Appellant
1 st Floor, S.V. Road, Goregaon (West)	]
Mumbai 400 062	]

V/s.

Mr. Manoj D Vatavat	]
age: 43 years,	]
residing at: B/101/102 Sea Land Tower	] Respondent
Opp. Sai Mandir, Jesal Park, Bhayandar (E)	]
District: Thane 401 105.	]

**ALONG WITH
SECOND APPEAL (ST) NO.13842 OF 2018
WITH
CIVIL APPLICATION NO.558 OF 2018
IN
SECOND APPEAL (ST) NO.13842 OF 2018**

M/s Sea Princess Realty	]
having its office at Ashokraj "H" Wing	] Appellant
1 st Floor, S.V. Road, Goregaon (West)	]
Mumbai 400 062	]

V/s.

Sheela Ramji Vira	]
Age: 57 years	]
residing at: B/1103, Reema residency	] Respondent
Shimpoli Road, Chiku Wadi, Borivali (W)	]
Mumbai 400 092	]

Mr. Abhijeet Desai a/w Mr. Jaydeep A Sringare and
Mr. Avadhut P. Bidaye, for appellant in all the appeals.
Mr. Mustafq Safiyuddin and Ms. Munaf Virjee i/by
ABH Law LLP, for respondent in all the appeals.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 7th JUNE, 2018.

COMMON ORAL JUDGMENT :

1] Heard learned counsel for the appellant and respondents.

2] With consent of both the learned counsel, these Second Appeals are taken up for final hearing at the stage of admission itself.

3] These Second Appeals are preferred against the order dated 4th April, 2018, passed by Maharashtra Real Estate Appellate Tribunal (MahaRERA), [hereinafter to be referred to as “Appellate Authority”), Mumbai; whereby all the 7 appeals preferred on behalf of appellants herein came to be dismissed; whereas the counter appeals preferred by the allottees, who are respondents herein came to be allowed.

4] These appeals were preferred against the order dated 16.01.2018, passed by the Chairperson, Maharashtra Real Estate Regulatory Authority, in the complaints preferred under Section 18 of Real Estate (Regulation and Development) Act, 2016. The respondents allottees had grievance that they had, booked the Apartments in the project, named Gundecha Trillium undertaken by

the appellant and had made substantial payment to the extent of more than 91 to 95% of the consideration price upto December, 2014. However, they had not received possession of the apartments by the stipulated period, that is upto 31st December, 2016 and hence they had sought direction for payment and interest and also for necessary action.

5] Appellant, being the promoter has contended before the Chairperson, MahaRERA that as per clause No.22 of the agreement, if the delay in completion of the project was on account of the reasons beyond his control, he was entitled to the extension of the period for completion of project and accordingly the appellant has cited several factors, beyond his control, such as demonetization, implementation of G.S.T. etc, and sought concession from payment of interest.

6] The Chairperson MahaRERA, has to some extent, accepted these contentions. However, held that the appellant is liable to pay interest at the rate of 10% for the period of six months to the respondents, on the total consideration amount, as per provisions of Section 18 of the Act. At the same time, as it was pointed out by the appellant that the Occupancy Certificate has already been obtained by the appellant, Chairperson MahaRERA advised the respondents to

take possession of their respective apartments within 30 days from the date of order. It was further directed that while making payment of the balance amount to the appellant, at the time of taking possession, respondents shall be entitled to adjust the amount as stipulated in para 8 of the order.

7] Being dis-satisfied with this order, both the Promoter-appellant and respondent-allottees approached the Appellate Tribunal. The grievance of the promoter-appellant was that when the Chairperson of MahaRERA has accepted the explanation given by appellant to some extent considering clause 22 of the Agreement and has given concession to the extent of 6 months, it was not proper to direct payment of interest for further period of six months. It was submitted that the discretion was given to the Architect as per clause 22 of the agreement to certify the reasons for the delay and if he has given the grounds on account of which there was delay, then it was not proper on the part of the Chairperson, MahaRERA to disbelieve the same. Hence, he should have granted concession from payment of interest for the entire period.

8] Per contra, on behalf of respondents, the submission advanced was that concession granted even in respect of six months

period was not proper in view of the observation made by the Chairperson himself that the reasons advanced by appellant for delay in completion of the project are of general nature.

9] It may be stated at this stage that before the Appellate Tribunal, on behalf of the appellant the Completion Certificate issued by the Architect, was produced to show that the construction was complete in every way and on the basis of same, the Occupancy Certificate was also granted. Respondents, however, challenged the Occupancy Certificate, issued by the Municipal Corporation, on the basis of the joint inspection report carried out by the employees of the appellant and respondents showing, that the construction was not at all complete and on the own showing of the appellant on the RERA website, the construction was complete at some places, 0%, at some places 90% and in some places it was 95%. The Appellate Tribunal, therefore, vide its impugned order was pleased to hold that if on the own showing of the appellant, the construction was not fully complete, including construction relating to other amenities such as Club house etc., then certificate issued by the Architect Manoj Dubal was factually incorrect. Therefore, Appellate Tribunal requested the Secretary of the MahaRERA, to independently initiate action against the Architect under the provisions of RERA.

10] So far as the grievance of -respondent allottees is concerned, it was accepted by the Appellate Tribunal and considering that the work of construction was not complete and the reasons for the same were not explained by the appellant herein, despite several opportunities by giving necessary chart. The Appellate Tribunal, thus, held that appellant has failed to complete the obligation and therefore appellant is not entitled for concession from payment of interest. The Appellant Tribunal was, therefore, pleased to allow the appeals preferred by the respondents and dismissed the appeals preferred by the present appellant and directed payment of interest w.e.f. 1.1.2017 till actual handing over of the individual flats to each of the allottees, duly complete in all respect, with amenities as illustrated in paragraph No.5 of the agreement.

11] Thus, the concession of payment of 10% interest for the period of six months prior to 31st December, 2016, which was granted by the Chairperson MahaRERA, was cancelled by the Appellate Tribunal, making the appellant to pay interest for entire period of delay from 1st January, 2017.

12] Being aggrieved by this order of the Appellate Tribunal,

these Second Appeals are preferred.

13] The first and foremost challenge raised on behalf of learned counsel for respondents is to the maintainability of Second Appeals. It is submitted that as per Section 58 of the Real Estate (Regulations and Developments) Act, 2016, though the Second Appeal to High Court lies from the order of the Appellate Tribunal, it can be only on one or more grounds specified in Section 100 of the Code of Civil Procedure. It is submitted that as per Section 100 of C.P.C., the Second Appeal can lie only on substantial question of law. According to learned counsel for respondents, in this case no such substantial question of law is either expressly spelt out in the appeal memo or is involved. According to learned counsel for respondents, the entire exercise undertaken by the Chairperson MahaRERA and the Appellate Tribunal is only on the factual aspects and the factual findings cannot be assailed in the Second Appeal, as this Court cannot convert itself into a third Chamber of facts.

14] To counter this submission, the learned counsel for appellant has drawn attention of this Court to clause Nos (L), (M), (N), (O) and (P) of the Appeal Memo to submit that these clauses raise the questions of law.

15] In order to appreciate the submissions on this point, it would be necessary to read these clauses in the Appeal Memo.

16] As per clause No.(L) of the Appeal Memo, it is contended that the learned Tribunal in its appellate jurisdiction ought not to have appreciated fresh evidence led at the instance of the complainant viz-a-vis photos, documents and joint inspection carried by the allottee with one Mr. Shah and Ghadigaonkar. It is further contended that Mr. Shah and Mr. Ghadigaonkar, though the employees of the appellant, were incapacitated to make any endorsement insofar as the status of work is concerned. They were not even authorized at the instance of the appellant to provide any status report, and in view thereof, as the impugned order is passed by the Appellate Tribunal relying on this joint inspection report and allowing fresh evidence, it is unsustainable and is liable to be set aside.

17] In clause No.(M), of the Appeal Memo, it is stated that the Appellate Tribunal was not empowered under Section 53 of the Real Estate (Regulation and Development) Act, to direct initiation of any action against Architect for his alleged default especially under Section 53 of the said Act, inter alia at the threshold that, he is not even been afforded with any opportunity of being heard and secondly

that his role as an Architect is not recognized under the provisions of the said Act. Hence on this aspect also, the impugned order cannot be sustained.

18] In clause No.(N) of the Appeal Memo, it is stated that the Appellate Tribunal has failed to take into consideration that the certificate of the Architect Manoj Dubal & Associates dated 1st November, 2017 was strictly in accordance with the sanction plan issued by Municipal Corporation and upon considering the said Completion Certificate, Municipal Corporation, after carrying out the fact finding exercise and upon ascertaining that there is no deviation from the sanction plan as issued, was pleased to issue the Occupancy Certificate . Also the application to grant occupancy certificate was supported with the Completion Certificate of Site Supervisor and Structural Engineer and hence the Tribunal has erred upon exercising its appellate jurisdiction in summarily watering down and/or negating the said Occupancy Certificate issued by the Corporation. Therefore, on this count also the order of the Tribunal stands vitiated.

19] In clause (O) of the Appeal Memo, it is stated that the Tribunal has committed a manifest error by connecting the

Occupancy Certificate/Completion Certificate to that of the alleged incomplete work of 5% to an extent of club house, staircases or podium which according to the Municipal Corporation Act, the D.C. Regulations or even in view of the RERA Act cannot be connected to each other and hence on this ground also the impugned order needs to be quashed.

20] In clause (P) of the Appeal Memo, it is stated that appellant in his capacity as promoter was entitled to invoke Clause 22 of the Agreement dated 7th November, 2013, according to which as their file was not acted upon by the legal department of the Municipal Corporation for a period of one year from 1st March, 2016 to 10th October, 2017, it eventually had caused delay in completion of the project. The Tribunal has not considered the said fact which was squarely falling within the scope and parameters of Clause 22 of the agreement. Hence, on this ground also the order passed by the Tribunal is unsustainable.

21] According to learned counsel for appellant, the averments made in these clauses of Appeal Memo raise substantial questions of law. However, as rightly submitted by learned counsel for respondent, none of these grounds raise any question of law, for remain

substantial questions of law.

22] The law is fairly well settled that the Second Appeal cannot be entertained unless substantial question of law is spelt out in the appeal memo or is shown to be involved in the appeal. In this respect, learned counsel for respondent has rightly placed reliance upon various judgments of the Apex Court. In the case of **Gurudev Kaur and others -vs- Kaki and others [(2007) 1 SCC 546]**, after analyzing the cases decided by the Privy Council and this Court and after considering the Amendment in Code of Civil Procedure of the year 1976, the Apex Court was pleased to hold in paragraph No.17 as follows :-

“70. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly

understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question". (emphasis supplied)

23] In paragraph Nos. 71, 72 and 73 of the said judgment the Hon'ble Apex Court was further pleased to hold that :-

"71. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100 C.P.C. have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.

72. When Section 100 C.P.C. is critically examined then, according to the legislative mandate, the interference by the High Court is permissible only in cases involving substantial questions of law.

73. The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be and they added a note of warning that no Court in India has power to add to, or enlarge, the grounds specified in Section 100". (emphasis supplied)

24] In the case of **Ashok Rangnath Magar -vs- Shrikant Govindrao Sangvikar**, [(2015) 16 SCC 763], also in the light of the provisions contained in Section 100 CPC, and ratio laid down by the Apex Court in various authorities, it was held in paragraph No.18 as follows :-

"18. In the light of the provision contained in Section 100 Code of Civil Procedure and the ratio decided by this Court, we come to the following conclusion:

(i) On the day when the second appeal is listed for hearing on admission if the High Court is satisfied that no substantial question of law is involved, it shall dismiss the second appeal without even formulating the substantial question of law;

(ii) In cases where the High Court after hearing the appellate is satisfied that the substantial question of law is involved, it shall formulate that question and then the

appeal shall be heard on those substantial questions of law, after giving notice and opportunity of hearing to the Respondent;

(iii) In no circumstances the High Court can reverse the judgment of the trial court and the first appellate court without formulating the substantial question of law and complying with the mandatory requirements of Section 100 Code of Civil Procedure”.

25] Learned counsel for respondents has then placed reliance on the latest judgment of Apex Court, in the case of **Surat Singh (dead) -vs- Siri Bhagwan and ors [(2018) 4 SCC 562]**, wherein after considering the general scheme of Section 100 C.P.C, along with interplay between Sections 100(4) and 100(5), the Apex Court was pleased to hold in paragraph NO.20 as under:-

“20. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the Appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the Appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance

of notice to the Respondent of the memo of appeal along with the question of law framed by the High Court”.

(emphasis supplied)

26] The ratio that can be called out from these judgments of the Hon'ble Supreme Court is that the High Court must “satisfy” itself that the case involves substantial question of law, then only it can entertain the Second Appeal and for that it is obligatory on the part of appellant to precisely state in the Memo of Appeal the “substantial question of law” involved in the appeal and thereafter, it is for the High Court to formulate such substantial question of law. If no such substantial question of law is precisely stated in appeal memo and the High Court also is not satisfied about it, then the Second Appeal has to be dismissed in limine at the threshold itself.

27] In the instant case, admittedly the appellant has not precisely stated in Appeal Memo, the substantial questions of law involved in the appeal. Whatever grounds which are taken in clause Nos.(L), (M), (N), (O) and (P), of the Appeal Memo, stated in detail hereinabove, cannot in any way be called as substantial questions of law. What these grounds state is that the Appellate Tribunal should have considered certain aspects or Appellate Tribunal should not have relied upon the fact finding exercise undertaken and then

persons who had undertaken the said exercise were not having authority to do so though they are the employees of the appellant. What is stated in these clauses is that the Appellate Tribunal was not correct in passing the impugned order considering the scope and parameters of Clause 22 of the agreement. At the most what is contended is that the Appellate Authority has not followed the procedure laid down in section 53 of the Act. However, none of these contentions are in the nature of substantial question of law, which is, thus neither pleaded nor stated in the appeal memo, which is the mandatory requirement as per law laid down by the Apex Court in the judgment of **Surat Singh -vs- Siri Bhagwan (supra)**. Whatever grievances are raised by appellant in these grounds of appeal memo are only challenges to the order passed by Appellate Tribunal, but they are not even raising any question of law.

28] Much grievance is raised about the fact that the Appellate Tribunal has gone into question of Completion Certificate issued by the Architect and has held that it is in contradiction to the information given by the appellant on the RERA website and finding that information to be factually incorrect, the Secretary, MahaRERA is requested to independently initiate action under the provisions of RERA against Architect.

29] Needless to state that this direction cannot be called as question of law involved in this Appeal especially in view of the fact that this Competition Certificate was produced by the Appellant itself, before the Appellate Authority for the first time and the Appellate Authority hence was constrained to pass such order. It is a matter of record that the Architect's Certificate of Competition was not produced before the Chairperson MahaRERA, and the Occupancy Certificate issued by the Municipal Corporation, was produced, as submitted by learned counsel for respondents, before the Chairperson MahaRERA, at the time of final hearing. The enquiry before Chairperson MahaRERA was in respect of delay in completion of the project and Chairperson MahaRERA found that some reasons were justifiable for the delay and granted concession of six months from the payment of interest to the appellant. In the light of Occupancy Certificate produced by the Appellant, it was observed by the Chairperson MahaRERA that the respondents are advised to take possession of the apartment so that the appellant need not further pay the interest.

30] This order was under challenge before the Appellate Tribunal by both parties. Respondents were aggrieved as the

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concession from payment of interest of six months was granted to the appellant; whereas appellant was also aggrieved that as the concession for entire period of one year was not granted. Hence, the Appellate Tribunal was constrained to consider the certificate issued by the Architect in contradiction to the joint inspection report and the information given by appellant himself in RERA website, showing of the construction was not at all complete and on own showing of the appellant on the RERA website, the construction was complete at some places, 0%, 90% and in some places it was 95%. Thus, the entire project was not complete. As a result, therefore, it was held that the certificate of Completion issued by the Architect cannot be called as correct. The Appellate Tribunal also found that, if on the own showing of the appellant, on 9.1.2018, also the work at some places was 0%, 90% and in some cases 95%, then it cannot be accepted that the project was complete in all respects so as to issue Occupancy Certificate.

31] The Appellate Tribunal, in this respect, has also considered the relevant clauses in the agreement, relating to definition of flat and it was found that it includes not only particular apartment but also various amenities, outside areas, club house etc and therefore, as admittedly the construction of these outside

amenities was not started or at least not completed, the Appellate Tribunal was pleased to cancel the concession given by the Chairperson, MahaRERA from payment of interest for the delayed period of six months and directed the interest on the entire period of one year. The Appellate Tribunal has also considered the photographs produced on record and the report of joint inspection carried out by the allottee with Viren Shah and Suresh Ghadigaonkar and then held that the Completion Certificate given by the Architect was not factually correct and therefore, directed the Chairperson, MahaRERA, to initiate enquiry independently against Architect.

32] Thus, the entire exercise which was undertaken by the Appellate Authority was in the light of facts brought before it and on its appreciation of the factual aspects of the rival cases which were for the first time brought before it, that too, by the appellant, by showing the Completion Certificate of the Architect in order to counter some photographs which were produced by the respondents before the Chairperson MahaRERA and also before the Appellate Tribunal. So whatever Appellate Tribunal has done is on appreciation of evidence, which was brought before it, admittedly by both parties and on the face of it, such appreciation of evidence cannot be called as in any way suffering from such illegality, so as to interfere in the

Second Appeal, especially when the Apex Court has given a caution that judges should not enter into such reappreciation of evidence in the Second Appeal so as to convert it in “third trial on facts”. Therefore, even assuming that appreciation of evidence as done by the Appellate Tribunal, is not correct, that appreciation being based on the factual aspects of the case, in the Second Appeal, this Court cannot re-enter therein.

33] About the procedure to be followed by the Appellate Tribunal in respect of which much grievance is raised by appellant, when the report of the joint inspection was relied upon, it was not challenged and secondly it cannot be said that Tribunal has committed any illegality in considering the same. Moreover, the Appellate Tribunal has mostly relied upon the information given by the appellant himself on the RERA website, which was found contradictory and on the basis of which, the impugned order was passed. The point, therefore, to be stressed is that the Second Appeal cannot lie against the finding based on appreciation of evidence .

34] As regards the order passed by the Appellate Tribunal, requesting Chairperson, MahaRERA to initiate independently an action under the provisions of RERA Act against the Architect, in my

considered opinion, at the most Architect Manoj Dubal can be aggrieved thereby, but at the instance of appellant, who has not made out any case, raising any substantial question of law, these Second Appeals, cannot be entertained. The reasons given by the Appellate Tribunal disentitling the appellant to concession from payment of interest for the entire period being based on the factual aspects, this Court should restrain itself from interfering with the same.

35] Thus, as these Second Appeals do not involve any substantial question of law, no case is made out for admission. Accordingly the appeals stand dismissed.

36] In view of dismissal of the Appeals, pending Civil Applications therein are also disposed off.

[DR.SHALINI PHANSALKAR-JOSHI, J.]