

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 731 OF 2023

WITH

INTERIM APPLICATION NO. 18286 OF 2023

IN

SECOND APPEAL NO. 731 OF 2023

WITH

INTERIM APPLICATION NO. 366 OF 2024

Balaji Construction Company

... Appellant

Versus

Anjusha Ajit Kadam & Ors.

... Respondents

WITH

SECOND APPEAL NO. 727 OF 2023

WITH

INTERIM APPLICATION NO. 18143 OF 2023

IN

SECOND APPEAL NO. 727 OF 2023

Balaji Construction Company

... Appellant

Versus

Jayantilal Makwana

... Respondent

WITH

SECOND APPEAL NO. 734 OF 2023

WITH

INTERIM APPLICATION NO. 18290 OF 2023

IN

SECOND APPEAL NO. 734 OF 2023

Balaji Construction Company

... Appellant

Versus

Vikram B Shah

... Respondent

**WITH
SECOND APPEAL NO. 737 OF 2023
WITH
INTERIM APPLICATION NO. 18295 OF 2023
IN
SECOND APPEAL NO. 737 OF 2023**

Balaji Construction Company

... Appellant

Versus

Achala Abhijit Patil and Anr.

... Respondents

**WITH
SECOND APPEAL NO. 736 OF 2023
WITH
INTERIM APPLICATION NO. 18294 OF 2023
IN
SECOND APPEAL NO. 736 OF 2023
WITH
INTERIM APPLICATION NO. 364 OF 2024**

Balaji Construction Company

... Appellant

Versus

Prashant Sukhadev Mahajan

... Respondent

**WITH
SECOND APPEAL NO. 733 OF 2023
WITH
INTERIM APPLICATION NO. 18289 OF 2023
IN
SECOND APPEAL NO. 733 OF 2023**

Balaji Construction Company

... Appellant

Versus

Chintan Mahesh Shah

... Respondent

WITH
SECOND APPEAL NO. 735 OF 2023
WITH
INTERIM APPLICATION NO. 18288 OF 2023
IN
SECOND APPEAL NO. 735 OF 2023
WITH
INTERIM APPLICATION (ST) NO. 3239 OF 2024
IN
SECOND APPEAL NO. 735 OF 2023

Balaji Construction Company

... Appellant

Versus

Shashikumar Mishra

... Respondent

WITH
SECOND APPEAL NO. 732 OF 2023
WITH
INTERIM APPLICATION NO. 18287 OF 2023
IN
SECOND APPEAL NO. 732 OF 2023

Balaji Construction Company

... Appellant

Versus

Hetal B Shah

... Respondent

...

Mr. Gauraj Shah a/w Mr. Keyur Adhvaryu i/b Mr. Yatin R. Shah, for the Appellants in all Second Appeals.

Mr. Harshad Bhadbhade a/w Ms. Arya Sapre, for Respondents in SA/731/2023, SA/734/2023, SA/737/2023, SA/736/2023, SA/733/2023, SA/735/2023, SA/732/2023.

Mr. Mutahhar Khan a/w Ms. Nehaa Shah i/b Mr. Dhiren H. Shah, for Respondent in SA/727/2023.

...

CORAM : **SANDEEP V. MARNE J.**
RESERVED ON : **6 FEBRUARY 2024.**
PRONOUNCED ON : **20 FEBRUARY 2024.**

JUDGMENT :-

1) These Second Appeals filed by the Appellant challenge common Order dated 27 October 2023 passed by Maharashtra Real Estate Appellate Tribunal (**Appellate Tribunal**) directing Appellant to pre-deposit the specified amounts towards compliance with proviso to Section 43 (5) of Real Estate (Regulation and Development) Act, 2016 (**RERA**).

2) Briefly stated, facts of the case are that Appellant is a promoter who is developing a project named 'Gajanan Plaza'. Respondents are the allottees of various flats, with whom the promoter has executed Agreements for Sale agreeing to deliver possession of respective flats on various agreed dates. Respondents approached Maharashtra Real Estate Regulatory Authority (**MahaRERA**) by filing their respective complaints against Appellant seeking possession of their respective flats along with interest for delayed delivery of possession. MahaRERA proceeded to allow the complaints filed by Respondents by Order dated 31 October 2022 and set aside the termination letters issued by Appellants terminating the allotment letter/agreements with a further direction for execution of supplementary agreements in accordance with terms and conditions of the MOU executed with other allottees of the project. Appellant was directed to handover possession of commercial premises allotted to the Respondents as per supplementary agreements to be executed with them. Appellant was further directed to pay interest for delayed possession to the Respondents from 1 April 2019 till grant of possession. However, MahaRERA directed that the

amount of interest shall be paid by the Appellant to the Respondents after obtaining full occupancy certificate by setting it off against outstanding dues with interest payable by Respondents. MahaRERA further directed that Appellant would be entitled to claim benefit of moratorium period as per Notifications/Order Nos. 13 and 14 dated 2 April 2020 and 18 May 2020.

3) Aggrieved by MahaRERA's Order dated 31 October 2022, Appellant has filed Appeals before the Appellate Tribunal. The Appellate Tribunal passed Order dated 2 March 2023 directing the Appellant to deposit the entire amount ordered by MahaRERA in compliance of the proviso to Section 43 (5) of RERA. Since Appellant did not deposit the amount as directed by Order dated 2 March 2023, Appellate Tribunal passed Order dated 10 April 2023 holding that the Appeals are liable to be dismissed and posted the Appeals for compliance/dismissal on 26 April 2023. It appears that on 26 April 2023, the Appeals were dismissed.

4) Appellant filed various Writ Petitions in this Court challenging the Order dated 26 April 2023 complaining that MahaRERA had not quantified the amounts payable under the Order dated 31 October 2022. This Court was therefore informed that the Appellant was unable to pre-deposit the amount under Section 43 (5) of RERA. This Court therefore disposed of the Writ Petitions directing the Appellate Tribunal to quantify the amount to be pre-deposited by the Appellant. The Appellate Tribunal has accordingly passed Order dated 27 October 2023 quantifying the amount of pre-deposit to be made by the Appellant in compliance of proviso to Section 43 (5) of RERA. While doing so, the Appellate Tribunal has also considered and rejected the objection of Appellant that no deposit is required to be made in terms of MahaRERA's order. Appellant is aggrieved by the Order dated 27 October 2023 and has filed the present Appeals.

5) This Court has admitted the Appeals by formulating the following substantial questions of law:

“i) Whether the Appellants can be directed to deposit the amount of interest as a pre-condition for entertainment of Appeals before the Appellate Tribunal when the liability of the Appellant to pay such interest is not in praesenti but in future?”

ii) Whether the Appellate Tribunal is justified in directing deposit of the entire amount of interest when proviso to sub-Section (5) of Section 43 permits deposit of 30% of the penalty?”

6) The learned counsel appearing for parties have canvassed submissions in support of their respective contentions. It would be necessary to record the submissions canvassed by the learned counsel appearing for the parties.

7) Mr. Shah, the learned counsel appearing for the Appellant would submit that no amount is payable by the Appellant as of now in pursuance of the Order passed by MahaRERA on 31 October 2022. That MahaRERA has clearly directed in para 17(f) of its Order that the interest is payable to the Respondents only at the time of procurement of occupancy certificate. That the interest is thus payable to the Respondents *in futuro* and not *in praesenti*. That Proviso to sub-Section 5 of Section 43 contemplates deposit of only the amount which is to be paid to the allottee in pursuance of the Order under challenge. That since no amount is payable to Respondents as of now, there is no question of Appellant pre-depositing any amount under Proviso to sub Section 5 of Section 43 as a precondition for entertainment of the Appeals. Additionally, Clause (h) in para 17 of MahaRERA's Order further grants benefit of moratorium while computation of interest, which factor is not taken into consideration by the Appellate Tribunal while passing the impugned Order. He would submit that Appellant is entitled to receive not only last installments of consideration from Respondents, but various other

amounts under the agreements and that as of now nothing is due or payable by Appellant to the Respondents. That MahaRERA has not directed Appellant to pay any amount to the Respondents and therefore Proviso to Section 43 (5) is not attracted in the present case.

8) Mr. Shah would further submit that in absence of determination of any amount payable by Appellant to the Respondents under the Order of MahaRERA, Proviso to Section 43 (5) becomes inapplicable to the facts of the present case. That Appellant has an excellent case on merits where it wants to agitate various issues such as validity of termination of agreements, conversion of project from residential to commercial, non-payment of amounts under the agreements by Respondents, illegal sales effected by some of the original allottees etc. That Appellant is prevented from arguing the said points on merits by the Appellate Tribunal by unnecessarily insisting on pre-deposit under Proviso to Section 43 (5), when in fact nothing is due and payable to the Respondents. Inviting my attention to regulation 25 (i) of Maharashtra Real Estate Appellate Tribunal Regulations, 2019. Mr. Shah would submit that Appellate Tribunal otherwise has inherent powers to pass appropriate orders in the case, which ought to have been exercised in favour of Appellant considering the facts and circumstances of the present case.

9) Mr. Shah would submit that the Appellant is entitled for adjustment of amounts receivable by it by determining the amount of pre-deposit. That such adjustment is permitted to be made in various other statutes, especially the taxing statutes. In support of his contention, he would rely on the judgment of the Apex Court in ***M/S. S. E. Graphites Private Limited v. State of Telangana & Ors.*** Civil Appeal No. 7574 of 2014 decided on 10 July 2019. Relying on the Judgment of the Apex Court in ***New Tech Promoters and Developers Private Limited Vs. State of Uttar Pradesh***

and Ors.¹, Mr. Shah would contend that only the amount which is determined by the Regulatory Authority becomes payable under proviso to Section 43 (5). Lastly Mr. Shah would contend that Appellant has enough assets to satisfy any Order that may be passed by the Appellate Tribunal at the time of final hearing of the appeals. That the Regulatory Authority and Appellate Tribunal have been clothed with necessary powers under Section 43 (5) of RERA to recover amounts due as arrears of land revenue. He would accordingly pray for dismissal of the Appeals.

10) *Per contra* Mr. Bhadbhade, the learned counsel appearing for Respondents in Appeal No. 731 of 2023, 727 of 2023, 734 of 2023, 737 of 2023, 736 of 2023, 733 of 2023, 735 of 2023, 732 of 2023 would oppose the Appeals and support the Order passed by the Appellate Tribunal. He would submit that there is a specific direction by MahaRERA for payment of interest in the Order dated 31 October 2022 and that therefore it is erroneous to contend that nothing is directed by MahaRERA to be paid by the Appellant. That the benefit of deferment of interest and adjustment thereof against amounts payable by Respondents is available only in the event of Appellant complying with the Order of MahaRERA. That once Appellant decides to challenge MahaRERA's Order, the amount of interest payable in the Order must be deposited towards compliance with Proviso to Section 43 (5). That Appellant must show bonafides by depositing the amount payable under the MahaRERA's Orders in accordance with para 134 of the Judgment of Apex Court in **New Tech Promoter** (Supra). That Section 43 (5) is applicable only in case of Appeal preferred by promoter. Therefore, what is payable by flat purchaser under the agreement to the promoter is irrelevant for the purpose of pre-deposit to be made under proviso to Section 43 (5). Inviting my attention to sub-section 1 of Section 18 of RERA, Mr. Bhadbhade would

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contend that the interest is already payable to the Respondents for delay in delivery of possession and if Appellant wants to avoid payments of that interest to Respondents, by filing Appeal before Appellate Tribunal, it must first deposit the amount of interest payable under Section 18 (1) as directed by MahaRERA.

11) Mr. Bhadbhade would then highlight the conduct of Appellant by submitting that the Appellant was agreeable to deposit the entire amount of interest and filed Writ Petition before this Court complaining that it was unable to do so on account of absence of quantification of the amount of interest payable under the Order of MahaRERA. That the Appellant cannot now turn about and question the liability to deposit the interest. Mr. Bhadbhade would pray for dismissal of the Appeals.

12) Mr. Khan, the learned counsel appearing for Respondents in Second Appeal No. 727 of 2023 would also oppose the Appeal adopting the submissions canvassed by Mr. Bhadbhade. Additionally, Mr. Khan would submit that Writ Petitions were not filed by Appellants without prejudice to its right to challenge any pre-deposit under proviso to sub Section 5 of Section 43. That the liability to pay interest by Appellant has been crystallized and the amount payable towards such interest has also been crystallized that therefore the Appellant must make a pre-deposit of such interest as a condition precedent for entertainment of Appeals under Proviso to Section 43 (5). That the deferment of payment of interest to the Respondents is in the larger interest of the project and not for the benefit of the Appellant. The Appellant therefore cannot seek benefit of such deferment for the purpose of defeating the statutory scheme of the pre-deposit under Proviso to sub Section 5 of Section 43. Mr. Khan would pray for dismissal of the Appeals.

13) In rejoinder, Mr. Shah would contend that while passing order in Writ Petitions the Single Judge of this Court has specifically left all the rights and contentions open and therefore filing of Writ Petitions cannot be construed as waiver of right to challenge any pre-deposit by Appellant. Inviting my attention to the architect's certificate, Mr. Shah would contend that the Appellant is in a position to satisfy all claims of Respondents and therefore its bonafides cannot be doubted.

14) Rival contentions of the parties now fall for my consideration.

15) The moot question that arises for consideration in the present Appeals is about requirement of the Appellant to make a pre-deposit of amount of interest as per MahaRERA's order dated 31 October 2022 towards compliance of Proviso to Section 43 (5). It would therefore be necessary to reproduce Sub-Section 5 of Section 43 which reads thus:

“43. Establishment of Real Estate Appellate Tribunal

(1) -----

(2) -----

(3) -----

(4) -----

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:”

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.”

16) The requirement of making pre-deposit under Proviso to Section 43 (5) is applicable only in respect of an appeal filed by the promoter. When the flat purchaser/allottee files an appeal, there is no requirement of making any pre-deposit. Since the appeals in the present case are filed by the

promoter, Proviso to Section 43 (5) gets attracted. According to the Appellant, *‘the total amount to be paid to the allottee including interest and compensation imposed on him’* within the meaning of the Proviso has to be the amount which is payable on the date of passing of Order by MahaRERA. That such ‘total amount’ does not and cannot mean the amount which is payable to the complainant in future.

17) No doubt, the objective behind introduction of Proviso to sub Section 5 of Section 43 is to ensure that the promoter does not engage the flat purchasers in endless litigation without any consequences. The Proviso to Section 43 (5) ensures that the promoter first deposits the entire amount payable under MahaRERA’s order in the Appellate Tribunal if he desires to challenge MahaRERA’s order. The provision acts as deterrent against promoters and seeks to curb tendency to indulge in unnecessary litigation. The basic idea behind Proviso to Section 43 (5) is that the amount which a promoter is made liable to pay under Regulatory Authority’s Order must be deposited in the Appellate Tribunal.

18) In the present case, MahaRERA, while allowing the Complaints filed by Respondents, has passed following Order on 31 October 2022:

“17.Considering the above facts and findings as stated, the following Order is passed :-

- a. The 6 complaints filed by the complainants are hereby allowed.*
- b. The termination letters dated 12-01-2022 and 13-01-2022 issued by the respondent for cancellation of the allotment letters/agreements for sale/MOU in favour of the complainants are hereby set aside.*
- c. Both the parties are directed to execute the supplementary agreements in accordance with the terms and conditions of the MOU executed with the other allottees of this project within a period of 30 days from this order.*
- d. The respondent is directed to handover possession of the said commercial premises allotted to the complainants as per the supplementary agreements to be executed with the complainants. The respondent promoter is further directed to pay interest for the delayed possession to the complainants from 01-04-2019 for every month of delay till the actual date of possession with*

occupancy certificate on the actual amount paid by the complainants towards the consideration of the said premises at the rate of Marginal Cost Lending Rate (MCLR) of SBI plus 2% as prescribed under the provisions of section 18 of the RERA and the Rules made thereunder.

f. However, in view of the mitigating circumstances beyond the control of the respondent promoter and also to ensure that the said project is not jeopardised due to the outflow of finances and is completed keeping in mind the interest of the other buyers of the said project at large, it is directed that the amounts of interest shall be paid by the respondent promoter to the complainants after obtaining the full occupancy certificate. The respondent promoter at the time of handing over possession of the said premises to the complainants, may set off the outstanding dues with the interest amount payable by it to the said complainants and the balance amount if any, by either party be paid at the time of possession.

g. Needless to state here that the actual amount as provided under Section 18 of the RERA means the amount paid by the complainants towards the consideration of the said premises only, excluding the stamp duty, registration charges and taxes etc. paid to the government.

h. With regard to the payment of interest to the complainants, the MahaRERA further directs that the respondent promoter is entitled to claim the benefit of "moratorium period" as mentioned in the Notifications/Orders Nos. 13 and 14 dated 2 April 2020 and 18 May 2020 issued by the MahaRERA and the Notification/Order which may be issued in this regard from time to time."

19) Thus, under Order dated 31 October 2022, the Appellant promoter is directed to pay interest to the Respondents for delayed possession from 1 April 2019 till the date of delivery of possession with occupancy certificate on actual amounts paid by them towards consideration of the premises. In ordinary course the directions to pay interest would come into effect forthwith. However, considering the facts and circumstances of the case where the promoter is not put under financial restraint thereby jeopardizing the entire project, MahaRERA has directed that the entire amount of interest till the date of possession shall either be paid or adjusted against amount receivable from Respondents at the time of delivery of possession. The Promoter is also granted the benefit of moratorium period during Covid-19 pandemic while computing the quantum of interest. Thus, if the promoter was to obey the Order passed by MahaRERA, he becomes entitled to avail both the special benefits of deferment of liability to pay interest till possession as well as application of moratorium period. It must

be borne in mind that the special exemption for deferring the payment of interest by Appellant is given only for the purpose of ensuring that the entire project is not put in jeopardy and that other flat/office purchasers do not suffer. This dispensation is not granted to protect any interest of the promoter. Such deferment would therefore not mean that promoter would get a licence to treat the Order passed by MahaRERA as imposing no obligation as on the date of passing of the Order. If the promoter decides to challenge MahaRERA's order, the protection of deferment of payment of interest cannot be applied while deciding the issue of pre-deposit under Proviso to Section 43 (5). There is determination of the amount by the Regulatory Authority, the liability on promoter is fastened and only the time for making the payment is postponed. Therefore it cannot be countenanced that no liability is fixed at the present on Appellant.

20) The objective behind making mandatory pre-deposit under proviso to Section 43 (5) is to put a deterrent on promoters from engaging flat purchasers in endless litigation without any consequences for him. If this objective is borne in mind, permitting Appellant to prosecute Appeals challenging MahaRERA's order without any consequence of making pre-deposit would destroy the very objective behind incorporation of Proviso to sub Section 5 of Section 43.

21) In its decision in *Newtech Promoters* (Supra) the Apex Court has held in para 133 to 137 as under:

*“133. Similarly, the condition of pre-deposit has been examined recently by this Court in *Tecnimont (P) Ltd. Vs. State of Punjab*, where the validity of Section 62(5) of the Punjab Value Added Tax Act, 2005 (PVAT) which imposes a condition of 25% of pre-deposit for hearing of first appeal has been upheld. Section 62(5) of the PVAT Act reads as follows:*

“62. First Appeal. - (1)-(4)

(5) No appeal shall be entertained, unless such appeal is accompanied by satisfactory proof of the prior minimum payment of twenty five per cent of the total amount of tax, penalty and interest, if any.”

134. To be noticed, the intention of the instant legislation appears to be that the promoters ought to show their bona fides by depositing the amount so contemplated.

135. It is indeed the right of appeal which is a creature of the statute, without a statutory provision, creating such a right the person aggrieved is not entitled to file the appeal. It is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi judicial litigations and it is always be circumscribed with the conditions of grant. At the given time, it is open for the legislature in its wisdom to enact a law that no appeal shall lie or it may lie on fulfillment of pre-condition, if any, against the order passed by the Authority in question.

136. In our considered view, the obligation cast upon the promoter of pre-deposit under Section 43(5) of the Act, being a class in itself, and the promoters who are in receipt of money which is being claimed by the homebuyers/allottees for refund and determined in the first place by the competent authority, if legislature in its wisdom intended to ensure that money once determined by the authority be saved if appeal is to be preferred at the instance of the promoter after due compliance of pre-deposit as envisaged under Section 43(5) of the Act, in no circumstance can be said to be onerous as prayed for or in violation of Articles 14 or 19(1)(g) of the Constitution of India.

Question 5 : Whether the authority has the power to issue recovery certificates for recovery of the principal amount under Section 40(1) of the Act?

137. To examine this question, it will be apposite to take note of Section 40 that states regarding the recovery of interest or penalty or compensation to be recovered as arrears of land revenue, and reads as under:

“40. Recovery of interest or penalty or compensation and enforcement of order, etc.— (1) *If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.”

22) The Apex Court has thus held that since right to file Appeal is statutory in nature, it must be filed only in accordance with the conditions stipulated in the relevant provision conferring the right of Appeal. Since one of the intentions behind prescribing condition for pre-deposit is to show bonafides of the Appellant, in the present case the Appellate Tribunal cannot be faulted in expecting that the Appellant deposits the amount arising out of MahaRERA's order as pre-condition for entertaining the Appeal.

23) I am therefore of the view that, even if liability to pay interest is deferred by MahaRERA in the overall interest of the project, such deferment is granted only if the promoter is willing to be abide by the Order of the Regulatory Authority. Such deferment will have no effect on promoter's liability to make pre-deposit under Proviso to sub Section 5 of Section 43. Therefore, Appellant must deposit the amount quantified by the Appellate Tribunal as a pre-condition for entertainment of its Appeals.

24) Also of relevance in the present case is the conduct exhibited by the Appellant. After the Appellate Tribunal passed Orders dated 2 March 2023, 10 April 2023 and 26 April 2023 dismissing the Appeals for non-compliance with Proviso to Section 43 (5), Appellant approached this Court by filing Writ Petitions complaining that it is unable to make a pre-deposit in absence of quantification of amount by the Appellate Tribunal. In various Writ Petitions filed by Appellant, this Court passed Order dated 4 May 2023 which reads thus:

"1. The present writ petitions impugn an order dated 26th April, 2023, by which, the Appeal filed by the Petitioner before the MAHARERA Appellate Tribunal came to be dismissed. Learned counsel for the Petitioner invites my attention to the impugned order and points out that the said Appeals were dismissed since the Appellant had not complied with the order dated 2nd March 2023, by which order, the Appellant was directed to deposit the entire amount

as ordered by RERA in compliance with the proviso to Section 43(5) of RERA.

2. Learned counsel then invited my attention to the order dated 31st October, 2022, Passed by RERA and pointed out therefrom that no amount had been quantified therein and thus the Petitioner was unable to pro-deposit the amount under Section 43(5) as directed by RERA in the order dated 2nd March, 2023. He therefore submitted that there was no quantification to the amount to be deposited either by MAHARERA or RERA.

3. Learned counsel for the Respondents also did not dispute that this amount, that was required to be deposited, had not been quantified.

4. Given this, it is only fair that prior to the hearing of the Appeal, the amount to be deposited is quantified Respondent No.2. Needless to mention that the contentions of all parties shall be kept open in such quantification.

5. In view of this order nothing further survives in these Petitions. By consent. the Petitions are disposed of.

6. Respondent No.2 is directed to dispose of these applications as expeditiously as possible.”

25) I have gone through memo of Writ Petition (L) No. 12225 of 2023 in which the Appellant had apparently raised a specific ground that nothing was payable by the Appellant to the Respondents as per the Order of MahaRERA. However when the Petitions were listed before this Court on 4 May 2023 Appellant did not argue before this Court that the Order dated 26 April 2023 be set aside as the Appellant was not required to deposit any amount. On the contrary, it invited an Order for quantification of the amount to be pre-deposited under Proviso to Section 43 (5). Having chosen to invite an Order from this Court to seek quantification of the amount of pre-deposit, the Appellant is now estopped from taking *volte face* and contend that no amount is required to be deposited by it under Proviso to Section 43 (5). Of course, it must be clarified here that Appellant's conduct is not the main reason for my disinclination to interfere with the Order of MahaRERA. The requirement of pre-deposit is upheld in the present case essentially on the ground that mere deferment of liability to pay interest would not constitute an exception to Proviso under Section 43(5).

26) Reliance of Mr. Shah on the Judgment of the Apex Court in **M/s. S. E. Graphites Private Limited** (supra) does not assist the case of Appellant. The case before the Apex Court related to compliance with pre-condition of producing proof of payment of tax for entertainment of Appeal under the provisions of APGST Act 1957. The issue before the Apex Court was about adjustment of amount stated in the tax credit certificate issued in favour of the Appellant. The Apex Court has remanded the proceedings before the High Court for not answering the plea raised by the Appellant therein about adjustment of the amount reflected in tax credit certificate. The judgment of the Apex Court is thus inconclusive as to whether any adjustment was indeed required to be done in the facts of that case and an Order of remand to the High Court is made by the Apex Court. Even otherwise, in case before the Apex Court, the amount reflected in tax credit certificate was already paid and the issue was about its adjustment. In the present case, the liability to pay interest has crystalized and since interest is not actually paid, there is no question of any adjustment.

27) There is yet another angle from which the present case needs to be viewed. The Appellant has filed Appeals before the Appellate Tribunal seeking termination of agreements with Respondents. If the Appellant succeeds in the said relief before the Appellate Tribunal, issue would arise about entitlement of the Respondents for refund of payments made to the Appellant. The issue of payment of interest on the amount to be refunded may also arise. Thus success of Appellant in the Appeals before Appellate Tribunal may entail financial liability on it, which may be of higher magnitude than the liability to pay interest as per the direction of the Regulatory Authority. Seen from this angle, deposit of amount towards interest as per MahaRERA's order appears to be justified.

28) I therefore do not find any glaring error in the Appellate Tribunal's Order in expecting Appellant to pre-deposit the amount of interest payable under Regulatory Authority's Order dated 31 October 2022.

29) There is just one aspect where limited relief can be granted to the Appellant in the present case. MahaRERA has directed in para 17 (h) of its Order that while computing the amount of interest payable to the Respondents, the Appellant promoter shall be entitled to claim the benefit of moratorium period as mentioned in the Notifications/Order Nos. 13 and 14 dated 2 April 2020 and 18 May 2020. Thus, while computing the interest payable to the Respondents at the time of delivery of possession, the period covered by the moratorium will have to be excluded. Thus, the amount of interest during moratorium period is not payable by the Appellant even in future. The Appellate Tribunal has however not deducted the amount of interest during moratorium period and has considered the entire period from 1 April 2019 onwards for determining the amount of pre-deposit to be made by Appellant under proviso to Section 43 (5). Thus, what is not payable at any point of time is directed to be deposited under Proviso to Section 43 (5). This is an error on the part of the Appellate Tribunal in the impugned Orders where slight correction would be needed.

30) I accordingly proceed to answer first question of law formulated by holding that the Appellant must deposit the amount of interest as directed by MahaRERA as a pre-condition for entertainment of Appeals before the Appellate Tribunal, even though its liability to pay such interest is not in *praesenti* but in future. This would however be subject to deduction of amount of interest in respect of COVID-19 pandemic period as per Notifications/Order Nos. 13 and 14 dated 2 April 2020 and 18 May 2020.

31) So far as the second question of law about deposit of 30% penalty under Proviso to sub-Section 5 of Section 43 is concerned, Mr. Shah has fairly conceded that what is directed to be paid by MahaRERA is not penalty but interest, which would be covered by the expression '*the total amount to be paid to the allottee*'. In the light of the above, the second question formulated can be answered holding that the entire amount awarded by MahaRERA (subject to minor modification) must be deposited and issue of deposit of any penalty does not arise in the present case.

32) I accordingly proceed to pass following Order:

ORDER

- i) The Appeals filed by Appellant are partly allowed to the limited extent of directing the Appellate Tribunal to deduct the amount of interest payable during the moratorium period covered by Notifications/Order Nos. 13 and 14 dated 2 April 2020 and 18 May 2020 issued by MahaRERA. The Judgment and Order of the Appellate Tribunal dated 31 October 2022 shall be modified to this limited extent and rest of the Order is maintained.
- ii) The Appellate Tribunal shall accordingly pass a fresh Order determining the exact amount to be pre-deposited by the Appellant for compliance with proviso to Section 43 (5) of RERA after deducting the amount of interest in respect of moratorium period as directed above.
- iii) An Order for fresh computation shall be passed by the Appellate Tribunal as expeditiously as possible, preferably by 31 March 2024.

iv) Only in the event of the Appellant depositing the amount so determined by the Appellate Tribunal on or before 30 April 2024, the Appeals filed by it shall stand restored.

33) With the above directions all the Appeals are disposed of. There shall be no order as to costs.

34) In view of disposal of all Appeals, all Interim Applications do not survive and the same are also disposed of.

[SANDEEP V. MARNE J.]