

Nalawade

**BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL  
MUMBAI**

**MISC. APPLICATION NO. 278 OF 2023 (Stay)  
IN  
APPEAL NO. AT006000000134162**

**Balaji Construction Company** ]  
Balaji Arcade, 101, 1<sup>st</sup> floor, S. V. Road, ]  
Kandivli (West), Mumbai – 400 067. ] ... *Appellant*

*versus*

**Jayantilal Makwana** ]  
AA/70, Kamala Vihar, Mahavir Nagar, ]  
Kandivali (West), Bombay – 400 067. ] ... *Respondent*

***ALONG WITH***

**MISC. APPLICATION NO. 276 OF 2023 (Stay)  
IN  
APPEAL NO. AT006000000134167**

**Balaji Construction Company** ] ... *Appellant*  
Balaji Arcade, 101, 1<sup>st</sup> floor, S. V. Road, ]  
Kandivli (West), Mumbai – 400 067. ]

*versus*

**Prashant Sukhadev Mahajan** ]  
A-204, New Gogangiri CHS. Ltd, ]  
Eksar Road, Borivali (West), Bombay – 400 092.] ... *Respondent*

***ALONG WITH***

**MISC. APPLICATION NO. 277 OF 2023 (Stay)**  
**IN**  
**APPEAL NO. AT006000000134185**

**Balaji Construction Company** ]  
Balaji Arcade, 101, 1<sup>st</sup> floor, S. V. Road, ]  
Kandivli (West), Mumbai – 400 067. ] ... *Appellant*

*versus*

**1. Hetal B. Shah** ]  
**2. Brijesh K. Shah** ]  
E/603-604, Dheeraj Presidency, ]  
M.G. Road, Kandivali (West), Bombay – 400 067.] ... *Respondents*

***ALONG WITH***

**MISC. APPLICATION NO. 273 OF 2023 (Stay)**  
**IN**  
**APPEAL NO. AT006000000134186**

**Balaji Construction Company** ]  
Balaji Arcade, 101, 1<sup>st</sup> floor, S. V. Road, ]  
Kandivli (West), Mumbai – 400 067. ] ... *Appellant*

*versus*

**1. Shashikumar Mishra** ]  
Malvani Satyam Co-op. Hsg. Society Ltd.]  
Jankalyan Nagar, Near Billabong School,]  
Malad (West), Mumbai – 400 095. ]  
**2. Rahul Shetty** ]  
A/7, 2<sup>nd</sup> floor, Deepmala Co-op. Hsg. Society Ltd.]  
Baf-hira nagar, Marve Road, ]  
Malad (West), Mumbai – 400 095. ] ... *Respondents*



**ALONG WITH**  
**MISC. APPLICATION NO. 280 OF 2023 (Stay)**  
**IN**  
**APPEAL NO. AT006000000134187**

**Balaji Construction Company** ]  
Balaji Arcade, 101, 1<sup>st</sup> floor, S. V. Road, ]  
Kandivli (West), Mumbai – 400 067. ] ... *Appellant*

*versus*

**Achala Abhijit Patil** ]  
Unit no. 301, Dunhil Shelter, ]  
CHS. Ltd. Ceaser Road, Amboli, ]  
Andheri (West), Mumbai – 400 058. ] ... *Respondent*

**MISC. APPLICATION NO. 275 OF 2023 (Stay)**  
**IN**  
**APPEAL NO. AT006000000134188**

**Balaji Construction Company** ]  
Balaji Arcade, 101, 1<sup>st</sup> floor, S. V. Road, ]  
Kandivli (West), Mumbai – 400 067. ] ... *Appellant*

*versus*

**1. Chintan Mahesh Shah** ]  
**2. Falguni Chintan Shah** ]  
B/205, Nishita Co-op. Hsg. Society Ltd. ]  
Dhanukar Wadi, M.G. Road, ]  
Kandivali (West), Bombay – 400 067. ] ... *Respondents*

**ALONG WITH**



**MISC. APPLICATION NO. 274 OF 2023 (Stay)**  
**IN**  
**APPEAL NO. AT006000000134189**

**Balaji Construction Company** ]  
 Balaji Arcade, 101, 1<sup>st</sup> floor, S. V. Road, ]  
 Kandivli (West), Mumbai – 400 067. ] ... *Appellant*

*versus*

**1. Anjusha Ajit Kadam** ]  
**2. Ajit Abaji Kadam** ]  
 C/1302, Panchsheel Heights, ]  
 C & D Co-op. Housing Society Ltd. ]  
 Mahavir Nagar, Kandivali (West), ]  
 Mumbai – 400 067. ... *Respondents*

***ALONG WITH***

**MISC. APPLICATION NO. 279 OF 2023 (Stay)**  
**IN**  
**APPEAL NO. AT006000000134199**

**Balaji Construction Company** ]  
 Balaji Arcade, 101, 1<sup>st</sup> floor, S. V. Road, ]  
 Kandivli (West), Mumbai – 400 067. ] ... *Appellant*

*versus*

**1. Vikram B. Shah** ]  
**2. Nikita V. Shah** ]  
 A/701, Ruby Classic, Mahavir Nagar, ]  
 Kandivali (West), Bombay – 400 067. ] ... *Respondents*

*Mr. Gauraj Shah a/w. Ms. Shweta Singh i/b. Mr. Yatin Shah, Advocate for Appellant in all matters.*

*Ms. Neha Shah, Advocate for Respondent in appeal no.134162.*

*Mr. Prashant S. Mahajan, Respondent-in-person in appeal no. 134167.*

*Mr. Harshad Bhadbhade a/w. Mr. Anwar Landge, Advocate for Respondent in appeal nos.134185, 134186, 134187, 134188, 134189 & 134199.*



**CORAM : SHRI SHRIRAM R. JAGTAP, MEMBER (J)**

**& DR. K. SHIVAJI, MEMBER (A)**

**DATE : 27<sup>th</sup> OCTOBER 2023**

*(THROUGH VIDEO CONFERENCE)*

**ORDER**

**[PER: DR. K. SHIVAJI, MEMBER (A)]**

This is in pursuance to the order dated 04<sup>th</sup> May 2023 of the Hon'ble Bombay High Court in Writ Petition Nos. 12228 of 2023, filed by appellant, wherein, this Tribunal has been directed *inter alia* to quantify the amounts required to be pre-deposited towards the compliance of the Proviso to Section 43(5) of The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "the Act") in the captioned appeals filed by Appellant promoter.

2. Issues under considerations for the aforesaid purpose in all the captioned appeals arise out of common facts, similar backgrounds and are raising identical questions of law. Therefore, based on consents of the parties, all the above appeals have been heard together for the purpose of compliance of the order of the Hon'ble High Court by this common order as hereunder.
3. It is not necessary to narrate the background details in detail for above purpose. Therefore, it would suffice to narrate that Appellant is promoter, who is developing the said duly registered project with Maharashtra Real Estate Regulatory Authority (in short, MahaRERA) and the project is located at Mahavir Nagar, Borivali, Mumbai. Captioned respondents are purchasers of their respective real estate units in the said project of promoter, are allottees and complainants before MahaRERA. For convenience, appellant and respondents will be addressed hereinafter as promoter and complainants respectively in their original status before MahaRERA.



**4. Background leading to filing of the above appeals; -**

- 5. Complainants case :** On account of delay in delivery of possession of the respective real estate units despite payments of substantial amount by respondents allottees, promoter allegedly failed to deliver possession of the respective units within the agreed time lines, captioned 8 individual and separate complaints came to be filed by respondents allottees before MahaRERA, seeking various reliefs including for direction to promoter *inter alia* to handover possessions of their respective purchased real estate units and interest for the delay in delivery of possession from the agreed timelines besides costs and compensations.
- 6.** Appellant promoter resisted complaints by filing reply before MahaRERA and by submitting that promoter was compelled to terminate the registered agreements for sale entered into between the parties. He further pleaded that the said delay in delivery of the possession was due to the factors beyond the control of the promoter.
- 7.** Upon hearing the parties, learned Member, MahaRERA disposed of above complaints by passing three separate orders dated 28<sup>th</sup> October 2022 (in complaint no. 194706), order dated 31<sup>st</sup> October 2022 (in complaint nos. 198548, 198549, 198550, 198551, 198552 and 198554), and 07<sup>th</sup> November 2022 (in complaint no. 197884) in above set/batch of complaints with *inter alia* following similar directions,
- a. The captioned complaint/s filed by the complainants are hereby allowed.*
  - b. The termination letters dated 12-01-2022 and 13-01-2022 and 13-01-2022 issued by the promoter 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.*
- e.** *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<sup>nd</sup> April, 2020 and 18<sup>th</sup> May, 2020 issued by the MahaRERA and the Notification/Order which may be issued in this regard from time to time.

8. Aggrieved by these orders, appellant promoter has preferred the captioned 8 separate appeals seeking various similar reliefs *inter alia* to set aside the said impugned orders dated 28<sup>th</sup> October 2022, 31<sup>st</sup> October 2022 and 07<sup>th</sup> November 2022 passed by MahaRERA.
9. Appellant being promoter, this Tribunal passed order dated 02<sup>nd</sup> March 2023, wherein appellant promoter has been directed to deposit the entire amounts to be paid to respondents allottees as per the directions issued in the said impugned orders towards the compliance of the Proviso to Section 43(5) of the Act of 2016 (except for appeal no. 134167). On account of non-compliance by pre-depositing these amounts in these appeals, Tribunal gave another opportunity to appellant promoter to comply with the proviso and listed above appeals on 26<sup>th</sup> April 2023 for compliance/ dismissal. Learned counsel for appellant again sought further time to comply with the proviso by appearing before the Tribunal on 26<sup>th</sup> April 2023, which was again granted. Accordingly, based on the specific request of the appellant promoter for time to comply with the proviso, these matters were listed on 02<sup>nd</sup> May 2023 again for compliance/dismissal.
10. It appears that aggrieved by the order dated 26<sup>th</sup> April 2023 of this tribunal (after seeking more time from the tribunal for compliance of the proviso), appellant promoter filed the captioned Writ Petitions before the Hon'ble Bombay High Court, wherein The Hon'ble High Court disposed of these Writ petitions with *inter alia* following observations / directions vide order dated 04<sup>th</sup> May 2023 .....

"2. .... invited my attention to the order dated 31<sup>st</sup> October 2022, passed by RERA and pointed out there from that no amount had been quantified



therein and thus the Petitioner was **unable to pre-deposit the amount under Section 43(5)** as directed by RERA in the order dated 2<sup>nd</sup> 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 by 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.**"

11. Heard learned counsel for the parties *in extenso*. Perused records.

12. In response to the order of the The Hon'ble Bombay Court in para 6 of this order dated 4<sup>th</sup> May 2023 for "*expeditious disposal of these applications*", appellant promoter clarified that there are no written applications, and the said order is based on oral submissions. Parties were directed on 06<sup>th</sup> June 2023 to file their says with regard to the quantification of amounts for compliance of the proviso and parties have filed / circulated their additional affidavits/ written notes.

13. Learned counsel for appellant submits that; -

- a. As per the impugned order passed by MahaRERA, promoter is entitled for set off on the interest amount against the outstanding dues payable by allottees and promoter is supposed to pay interest on actual amount excluding the amount paid towards the stamp duty, taxes etc. and the promoter is also entitled to claim benefits of the "moratorium period" as



mentioned in the notification dated 02<sup>nd</sup> April and 18<sup>th</sup> May 2020 issued by MahaRERA.

- b.** Appellant promoter has filed calculation for the premium and other charges payable to BMC in respect of the project, the calculation of the engineer for the cost of construction and other works required by CFO in respect of additional works to be carried out due to conversion of the project for commercial use. Promoter has also filed a chart prepared by Cost Accountant of the project showing amounts payable by each allottee on pro rata-basis along with unit wise premium statement calculated as of 24<sup>th</sup> July 2023 and statement of total premium including other charges payable by allottees together with the balance purchase price payable for the premises and amounts payable by respondents allottees.
- c.** Appellant promoter has disputed the amounts in respect of the interest payable as claimed by respondents allottees by submitting that no interest is payable to respondents allottees.
- d.** Order passed by MahaRERA under challenge clearly directs that payment of any amount to allottees shall be at the time of handing over of possession and not before that time. Even if, allottees have not filed appeal against the impugned order passed by MahaRERA, there is no requirement to pay any amount to allottees as of today and therefore appellant promoter cannot be penalized and made to pay an amount, which, otherwise the promoter is not required to pay as of today. Hence, there is no requirement of any order of pre-deposit as of today.
- e.** Further denied the contentions of complainants that amount recoverable from allottees has no relevance and submits that these contentions of the allottees need to be discarded. He further denied that allottees are not required to pay premium or additional charges to appellant.
- f.** Further submits that appellant promoter is not liable to pay interest from



01<sup>st</sup> April 2019 for every month of delay till the actual date of possession and denied any liability to deposit any amount in the tribunal.

- g.** Project is stuck as the RERA Authority has not granted extension of the project validity.
- h.** In view of above, there is no question of making any deposit considering the operative portion of the impugned orders in para 22 (e) and 22 (f), wherein it has been directed that promoter at the time of handing over the possession of the said premises to complainants, may set-off the outstanding dues with interest amounts payable if any, by either party, be paid at the time of possession.
- i.** Orders passed by MahaRERA under challenge have given a mechanism for payments of the interest due to delay in delivery of possession, which needs to be adjusted and set off against the amount payable by complainants and after giving the set off of these amounts, complainants are liable to pay to promoter. Therefore, promoter cannot be in a worse off than what has already been ordered against them, especially when promoter has challenged the reliefs granted in favour of allottees of no costs, interest or penalty be levied from promoter. These findings of MahaRERA have not been impugned by allottees. Hence, cannot be made to pay in at present at all.
- j.** Deposits/ Payments in advance would hamper / jeopardise the project funds and would run contrary to findings of MahaRERA, which have not been challenged by allottees.
- k.** Demands for payments from allottees have also been raised by promoter and denied any obligation to pay to complainants. Accordingly, amounts are secured and therefore, there is no requirement of deposit amount in these circumstances. Accordingly, the purpose of Section 43(5) is more than sufficiently served and achieved.





- i. In view of the peculiar facts and circumstances of these cases, promoter urged to waive the requirement of the payment of any deposit under Section 43(5) of the Act of 2016.

**14.** Learned counsel for respondents submits that; -

- a. Respondents allottees are entitled for interest at prescribed rate because of the delay in delivery in possession with respect to agreed timelines from 01<sup>st</sup> April 2019 as has been ordered by MahaRERA in the impugned orders.
- b. In view of the judgment of the Hon'ble Bombay High Court in the case of **Neelkamal Realtors Suburban Pvt. Ltd. & Ors.** on Section 43(5), it is very clear that appellant must pre-deposit entire amounts as directed in the impugned orders, and further drawn attention to the impugned order dated 31<sup>st</sup> October 2022 passed by MahaRERA in para 17(e), which specifically required promoter "*.....to pay interest for delayed possession to complainants from 01-04-2019 for every month of delay till actual date of possession with occupation certificate on the actual amount paid by complainants towards the considerations of the said premises at the rate of MCLR of SBI plus 2% as prescribed under the provisions of Section 18 of RERA and Rules made thereunder.*"
- c. Compliance under Section 43(5) of the Act has nothing to do with the amount allegedly recoverable by appellant promoter from allottees and about the appellant promoter is not obtaining the occupation certificate to utilize the additional FSI.
- d. It is a specific case of the respondents allottees that the entire/ substantial amounts have been duly paid by respective allottees and the building under dispute is complete. However, applicant is intentionally not obtaining occupation certificate because, he wants to utilize additional FSI on the site and therefore, appellant is involving himself in filing frivolous affidavits, which have nothing to do with promoter's request for waiver of pre-

deposits.

- e. Contentions of the promoter with regard to the amounts purportedly recoverable from allottees, have got no relevance at all for compliance of proviso and therefore these contentions of the promoter deserve to be discarded at this stage.
  - f. Without prejudice, allottees are not required to pay any premium or any additional charge as are being demanded by promoter.
  - g. At the stage of compliance of Section 43(5), interpretation of the agreement cannot be done because, the same will be a subject matter of disputes in these appeals in the facts and circumstances of the cases, which can be considered appropriately only after appeals have been admitted after the satisfactory compliance of the Proviso by pre-depositing the entire payable amounts by promoter to complainants in all the appeals.
  - h. Allottee in appeal no. 134167 further submits that balance of convenience lies heavily in favour of allottees.
15. From the rival pleadings, submissions and documents relied upon by the parties, following points arise for our determination and we have recorded our findings against each of them for the reasons to follow:

	POINTS	FINDINGS
1.	Whether Promoter is under obligation to pre-deposit the " <b>entire amounts to be paid to allottees</b> " as per the impugned orders passed by MahaRERA towards compliance of the proviso to the Section 43 (5) of the Act?	In the affirmative.
2.	If yes then, what order?	As per the order.

## R E A S O N S

### Point 1. Pre-deposit under Section 43(5) of the Act.

16. Perusal of the order of the Bombay High Court in the captioned Writ



Petitions in para 2 shows that "*.....promoter was **unable to pre-deposit** the amount under Section 43(5) as directed by RERA in order dated 02<sup>nd</sup> March 2023*" of this Tribunal. He therefore submitted that there was no quantification of the amount either by MAHARERA or RERA." It appears that appellant promoter was unable to pre-deposit on account of certain difficulties in calculating the crystallised amount as per the impugned orders. However now, appellant has specifically declined to deposit any amounts towards the compliance of the proviso.

17. The Hon'ble Bombay High Court has further directed in para 4 of this order dated 04<sup>th</sup> May 2023 that "*.....4. Given this, it is only fair that prior to the hearing of the Appeal, the **amount to be deposited is quantified** by Respondent No.2. needless to mention that the contentions of all parties shall be **kept open in such quantification**.*
18. Accordingly, it is clear that the Hon'ble High Court has given direction with regard to the quantification of the amounts so determined by the impugned orders of MahaRERA and **contentions of all the parties are kept open with respect to such quantifications**.
19. Indisputably, these appeals have been filed by promoter of the said registered project. Hence, provisions of the Section 43 (5) of the Act are attracted. As question revolves around proviso to Section 43(5) of the Act of 2016, the same is being reproduced here as under for the sake of convenience: -

*"(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 at least 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.*

- 20.** In the case of **M/s Newtech Promoters And Developers Pvt. Ltd Vs, State of UP & Ors. [Civil Appeal Nos.6745-6749 of 2021]**, the **Hon'ble Supreme Court** thoroughly considered the relevant provisions of pre-deposit in other enactments and regarding proviso to Section 43(5) of the Act and observed in paragraph Nos 127 and 128 as follows –

*"127. It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allottee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, the **legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount recovered which has been determined by the authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority** in fact, belongs to the allottee at a later*

***stage could be saved from all the miseries which come forward against him.*** "

128. At the same time, it will avoid unscrupulous and uncalled for litigation at the appellate stage and restrict the promoter if feels that there is some manifest material irregularity being committed or his defence has not been properly appreciated at the first stage, would prefer an appeal for reappraisal of the evidence on record ***provided substantive compliance of the condition of predeposit is made over, the rights of the parties inter se could easily be saved*** for adjudication at the appellate stage."

21. Hence, Para 127 and 128 of the judgment stipulates for prior pre-deposits in order to secure the "***the total amount to be paid to the allottee***", as determined in the impugned order/s. It is to avoid any miseries if the outcome of the appeal is in favour of the allottees.
22. It can be seen from the above proviso that in appeals filed by promoter challenging the orders awarding interest to allottees, Tribunal is expected to direct promoter to first deposit ***the total amount to be paid to the allottee*** and these pre-deposits are *sine qua non* before the said appeals be admitted and entertained for further consideration.
23. In paragraphs 31 of the judgment in the case of **Nusli Neville Wadia Vs. Ivory Properties & Ors. [(2020) 6 SCC 5571]**, the Hon'ble Supreme Court has clarified the word "entertain" means to admit a thing for consideration, to adjudicate upon or to proceed to consider on merits as follows; -  

*"31. The expression 'entertain' means to admit a thing for consideration. When a suit or proceeding is not thrown out in limine, but the court receives it for consideration for disposal under the law, it must be regarded as entertaining the suit or proceeding. It is inconsequential what is the final*



decision. The word 'entertain' has been held to mean to admit for consideration, as observed by this

Court in *Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner, Sales Tax, Kanpur*, AIR 1968 SC 488. The expression 'entertain' means to adjudicate upon or to proceed to consider on merits as observed in *Hindusthan Commercial Bank Ltd. v. Punnu Sahu (Dead) through Legal Representatives*, 1971 (3) SCC 124.

32. The meaning of the word 'entertain' has been considered to mean 'adjudicate upon' or 'proceed to consider on merits.' It has been observed in *Hindusthan Commercial Bank Ltd. v. Punnu Sahu (Dead) through Legal Representatives*, 1971 (3) SCC 124 as under:

"4. Before the High Court it was contended on behalf of the appellant, and that contention was repeated in this Court, that Clause (b) of the proviso did not govern the present proceedings as the application in question had been filed several months before that clause was added to the proviso. It is the contention of the appellant that the expression "entertain" found in the proviso refers to the initiation of the proceedings and not to the stage when the Court takes up the application for consideration. This; contention was rejected by the High Court relying on the decision of that court in *Kundan Lal v. Jagan Nath Sharma*, AIR 1982 All 547. The same view had been taken by the said High Court in *Dhoom Chand Jain v. Chamanlal Gupta*, AIR 1962 All 543 and *Haji Rahim Bux and Sons v. Firm Samiullah and Sons*, AIR 1963 All 320 and again in *Mahavir Singh v. Gauri Shankar*, AIR 1964 All 289.

These decisions have interpreted the expression "entertain" as meaning 'adjudicate upon' or 'proceed to consider on merits.' This view of the High Court has been accepted as correct by this Court in *Lakshmiratan Engineering Works Ltd. v. Asst. Comm., Sales Tax, Kanpur*, AIR 1968 SC 488. We are bound by that decision, and as such, we are unable to accept

*the contention of the appellant that Clause (b) of the proviso did not apply to the present proceedings."*

*The word 'entertain' came up for consideration in Hindusthan Commercial Bank Ltd. (supra) in the context of Order XXI Rule 90 as amended by the Allahabad High Court. The expression entertain has been held to mean to adjudicate upon or proceed to consider on merits."*

- 24.** In view of above, the contentions of the appellant promoter that promoter is not required to pre-deposits in the instant cases towards the compliance of the proviso, is legally not tenable on account of the followings; -
- a.** Meaning of the word 'entertain', as has been clarified above by the Hon'ble Supreme Court in the aforesaid judgments and the plain reading of the Proviso to Section 43(5), makes it crystal clear that any appeal filed by promoter cannot be entertained or considered for adjudication or proceed further on merits without the promoter having first complied with the Proviso to Section 43(5) of the Act.
  - b.** Perusal of the proviso to Section 43(5), further reveals that appellant promoter will have to deposit with the Appellate Tribunal "*.... At least 30 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*".
  - c.** Tribunal has no power either to reduce amount or waive such requirements under the Act except some limited judicial discretion in relation to the penalty quantum (between 30-100%).
  - d.** Learned counsel for promoter has also raised the issue of its certain claims allegedly payable by allottees to promoter and submits that these amounts need be deducted from the requirements of the pre-deposits towards the compliance of the proviso. However, perusal of the impugned



orders reveal that this issue is not seen crystalized, determined and quantified in terms of specific amounts to be paid by allottees to promoter, except that promoter has been given liberty to adjust / deduct and set off at the time of handing over possessions, such purported payable amounts are without any quantification/adjudication of these stated claims of promoter.

Therefore, this controversy is an issue to be considered appropriately on merits and is yet to be adjudicated, which can be considered only if, appeals are admitted, and it they are qualified to be entertained. However, according to the provisions of the Act and in view of the judicial pronouncements referred herein above, these appeals cannot be entertained without first the satisfactory compliance of the proviso. Accordingly, in the absence of specific quantified amounts of the purported claim of the promoter in respect of the alleged amounts payable by allottees to promoter, it cannot be permitted to be adjusted/ set off now, for the purpose of compliance of the proviso.

- e. Provisio to the section 43 (5) further reveals that it stipulates for the pre deposit by appellant promoter for the " ..... **total amount to be paid to allottees.....**" and this provision of 43(5) is completely silent about the amounts, if any payable by the allottees to promoter. Hence, it is clear that purported claim of the promoter about its claim to adjust of the amount to be paid by allottees, cannot be allowed at present for the purpose of compliance of proviso. Therefore, in the absence of provisions in the Act to consider such alleged claims of promoter and purportedly payable by allottees to promoter are irrelevant for the purpose of compliance of the proviso.
- f. It is pertinent to note that only a single solitary condition is required to be fulfilled before insisting for mandatory pre-deposits under the proviso





is that ir an Appellant is a promoter. Relevant abstract of the proviso is "**.....if the appellant is a promoter as per the provisions of the Act of 2016.....**". Admittedly, appellant herein, is promoter. Therefore, entire amounts payable to allottees are required to be pre-deposited towards compliance of proviso in the instant case.

- g.** The Hon'ble Supreme Court in para 127 of its judgment in the case of M/s. Newtech Promoters and Developers Pvt. Ltd. (supra) has held that total amounts to be paid to allottees need to be secured first before the appeals filed by promoters are entertained. Therefore, if the contention of the learned counsel for promoter is allowed then, in the event of outcomes of these appeals, if found in favour of allottees on merits and if outcomes are issued in favour of allottees before the delivery of possessions then, allottees complainants will be left with no security for recovery of these amount. In that case, allottees will be subjected to undergo pillar to posts to recover these amounts from promoter. This will defeat the very basic intentions of the proviso itself and is contrary to the above decisions of the Hon'ble Supreme Court.
- h.** Intention of the legislature and rule are for the protection of interests of Consumers of the real estate sector in these provisions, which is aimed at ensuring that these amounts "**to be paid to the allottee**" are to be secured first "**irrespective of the timing of its payment**". These may be at the time of handing over the possession **or otherwise**". The provisions of the section 43 (5) stipulate for predeposit of the entire amounts to be paid to allottees (except in case of penalty, if any, then, between 30 - 100%), whether payable now or any other point of time in future or at the time of handing over the possession notwithstanding the whole or only a part of the impugned order is challenged by the promoter. Hence, the timing of the amount when it has become due, is immaterial



and is not relevant as far as the compliance to the proviso to the Section 43 is concerned.

- i. It is also important to note that the project has been registered under the Real Estate (Regulation & Development) Act, 2016, which provides several welfare provisions to protect interests of consumers as contemplated in the statement of Objects and Reasons of the Act. Regulation 39 of Maharashtra Real Estate Regulatory Authority (General) Regulation, 2017 speaks about saving of inherent powers of the Authority. It reads as under;

*"Nothing in the Regulations shall be deemed to limit or otherwise affect the inherent power of the Authority to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Authority."*

Similarly, Regulation 25 of Maharashtra Real Estate Appellate Tribunal, 2019 speaks about saving of inherent powers of the Tribunal.

*"25(1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Tribunal."*

It means the Regulatory Authority as well as the Appellate Tribunal have inherent powers under the Regulations framed under RERA Act, 2016 to pass appropriate Orders, which are necessary to meet the ends of justice. In exercise of powers thereof in the instant case, it is in the interest of justice to direct the Promoter to predeposit the **total amount to be paid to allottees** as per the impugned orders.

- j. In view of above more particularly the judicial pronouncement by The Hon'ble Supreme Court in the case of M/s. Newtech Promoters and



Developers Pvt. Ltd. (supra) in para no. 127, if Promoter does not deposit this mandatory requirement under the proviso then, it will not only be incorrect but also will be contrary to the legislative mandate as well as per the provisions of the Act. Thus, the contentions of promoter if allowed then, then will defeat the basic purpose of securing the amount to be paid to allottees as per the impugned order.

- 25.** Perusal of the provisions of Section 43(5) and in view of the judicial pronouncements referred herein above, we are of the considered view that promoter is statutorily and mandatorily required to first pre-deposit entire "amounts to be paid to allottees" as crystalized and determined in the order under challenge irrespective of the fact that whether the amount is payable now or at the time delivery of possession amount, without any consideration of the amount to be paid by allottees to promoter. Accordingly, we answer point 1 in the affirmative.

**Point 2; - quantification of pre deposit amount.**

- 26.** As determined here in above and upon perusal of the impugned orders passed by MahaRERA dated 28<sup>th</sup> October 2022, 31<sup>st</sup> October 2022 and 7<sup>th</sup> November 2022, it is clear that appellant need to predeposit the entire amount to be paid to allottees after calculating the required amount of interest at prescribed rate for the delay in delivery of possession from 01<sup>st</sup> January 2020 (after giving the benefits of 3 months and 6 months from 01<sup>st</sup> April 2019 of moratorium period as per the MahaRERA circular no. 13 and 14 as directed in the impugned orders) till the date on which appellant promoter will be pre-depositing these amounts towards compliance of the proviso without any deduction for the amount purported to be paid by allottees and claimed by promoter.
- 27.** Thus, actual amount thus required to be predeposited in the instant cases are dependent on following 3 factors namely, (a) Interest rate, (b) time

duration and (c) the paid amounts-

- a. **Applicable interest rate:** Whereas Rule 18 of The Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017 defines the prescribed rate as hereunder; -

**"18. Rate of interest payable by the promoter and the allottee:**  
*The rate of interest payable by the promoters to the allottees or by the allottees to the promoters, as the case may be, shall be the State Bank of India **highest** Marginal Cost of Lending Rate plus two per cent. "*

Accordingly, the interest rate: in the instant case, is the highest MCLR rate of SBI plus 2 %. These interest rates are in the public domain on the website of the SBI. However, a copy of the same downloaded from the website for the relevant time period is being attached here with at Table no. 1. for ready reference. This prescribed rate is not in dispute in the instant case.

- b. **The time duration for which the interest is required to be calculated:** The period for which the delay has taken place as directed in the impugned orders, will be from 01<sup>st</sup> January 2020 till the date of actual pre deposit to be made by appellant promoters and for the purpose of calculation, it has been taken up to the date of the next hearing, i.e., 27th October 2023 for quantification of predeposit. Therefore, this is also not in dispute.
- c. **The paid amounts on which the interests are required:** As directed in the impugned orders, the paid amounts by allottees to promoter in the respective appeals are also not in dispute.

- 28.** It is pertinent to note here that the (a) paid amounts, (b) prescribed interest rate and (c) the period for which the interest is to be calculated, all these parameters required for calculation of these amounts are not in dispute and





are known to parties for predeposit towards the compliance of the proviso. As such, the appellant promoter is not seen to have raised any such difficulty in calculating the quantum of predeposit amount before the tribunal. On the contrary, rozanama dated 26<sup>th</sup> April 2023 shows that sufficient opportunities were granted to promoter after passing of the order for compliance of Proviso on 2<sup>nd</sup> March 2023 and another opportunity was provided on the hearing held on 10<sup>th</sup> April 2023 for the deposit/compliance. As such, another one more opportunity was also granted based on **specific request of learned counsel for promoter** vide rozanama dated 26<sup>th</sup> April 2023, which shows that,

*"Adv. Mr. Yatin Shah seeks time to comply with proviso to Section 43(5) of RERA as directed earlier. Last chance is granted.*

*Stand over to 2<sup>nd</sup> May 2023 for compliance/dismissal."*

29. Perusal of rozanama further reveal that these appeals filed before the tribunal have not been dismissed for want of compliance, rather these were listed for compliance/ dismissal based on the specific request of appellant promoter for more time for compliance and promoter had not raised earlier, any issue of difficulty in quantifying the predeposit amounts.
30. In pursuance to the order of The Hon'ble High Court, time duration, applicable interest rates and amounts paid by the allottees complainants in each of the appeals have been delineated along with details of the calculations for making predeposits are in the table no. 2, which is being attached here with, and we answer point 2 as above. Accordingly, we proceed to pass the order as follows; -

## O R D E R

- a. Appellant promoter is being directed to predeposit following amounts within 3 weeks from the date of uploading of this order towards the



compliance of the proviso to the Section 43(5) of the Act in each of the 8 captioned appeals as mentioned here under: -

Appeal Nos.	AT006	134185	134186	134187	134188	134189	134199	134162	134167
Complaint Nos.	CC006	198550	198551	198549	198548	198552	198554	194706	197884
Total pre-deposit required for compliance	In Rs. (₹)	648769	1469794	2696183	690148	539236.6	548598.3	292086.5	313665.3

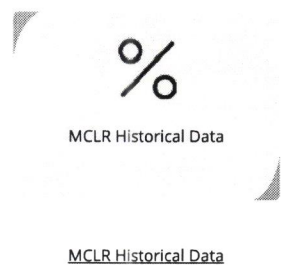
- b. Predeposit amounts so calculated herein above are applicable only if these predeposits are made on 27<sup>th</sup> October 2023 and if, these predeposits are to be made after 27<sup>th</sup> October 2023 then, additional interests from 27<sup>th</sup> October 2023, need to be added herein till the date of actual deposits to be made by appellant promoter.

  
(DR. K. SHIVAJI)

  
(SHRIRAM. R. JAGTAP, J.)



# TABLE 1

[Interest Rates](#) | [Deposit Rates](#) | [Loan Schemes - Interest Rates](#) | [SBI NRI Services - Interest Rates](#) | [Show More](#)


## Marginal Cost Lending Rates

Effective Date	Interest Rate (%)						
	ON	1M	3M	6M	1Y	2Y	3Y
15.09.2023	8.00	8.15	8.15	8.45	8.55	8.65	8.75
15.08.2023	8.00	8.15	8.15	8.45	8.55	8.65	8.75
15.07.2023	8.00	8.15	8.15	8.45	8.55	8.65	8.75
15.06.2023	7.95	8.10	8.10	8.40	8.50	8.60	8.70
15.05.2023	7.95	8.10	8.10	8.40	8.50	8.60	8.70
15.04.2023	7.95	8.10	8.10	8.40	8.50	8.60	8.70
15.03.2023	7.95	8.10	8.10	8.40	8.50	8.60	8.70
15.02.2023	7.95	8.10	8.10	8.40	8.50	8.60	8.70
15.01.2023	7.85	8.00	8.00	8.30	8.40	8.50	8.60
15.12.2022	7.85	8.00	8.00	8.30	8.30	8.50	8.60
15.11.2022	7.60	7.75	7.75	8.05	8.05	8.25	8.35
15.10.2022	7.60	7.60	7.60	7.90	7.95	8.15	8.25
15.09.2022	7.35	7.35	7.35	7.65	7.70	7.90	8.00
15.08.2022	7.35	7.35	7.35	7.65	7.70	7.90	8.00
15.07.2022	7.15	7.15	7.15	7.45	7.50	7.70	7.80
15.06.2022	7.05	7.05	7.05	7.35	7.40	7.60	7.70
15.05.2022	6.85	6.85	6.85	7.15	7.20	7.40	7.50
15.04.2022	6.75	6.75	6.75	7.05	7.10	7.30	7.40
15.03.2022	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.02.2022	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.01.2022	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.12.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.11.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.10.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.09.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30

## Interest Rates

Home Loan

**8.40%\* p.a.**

w.e.f. 01.09.2023

**\*T&C Apply.**

## Quick Links

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15.08.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.07.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.06.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.05.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
15.04.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.04.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.03.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.02.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.01.2021	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.12.2020	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.11.2020	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.10.2020	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.09.2020	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.08.2020	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.07.2020	6.65	6.65	6.65	6.95	7.00	7.20	7.30
10.06.2020	6.70	6.70	6.75	6.95	7.00	7.20	7.30
10.05.2020	6.95	6.95	7.00	7.20	7.25	7.45	7.55
10.04.2020	7.10	7.10	7.15	7.35	7.40	7.60	7.70
10.03.2020	7.45	7.45	7.50	7.70	7.75	7.95	8.05
10.02.2020	7.60	7.60	7.65	7.80	7.85	8.05	8.15
10.01.2020	7.65	7.65	7.70	7.85	7.90	8.10	8.20
10.12.2019	7.65	7.65	7.70	7.85	7.90	8.10	8.20
10.11.2019	7.65	7.65	7.70	7.85	8.00	8.10	8.20
10.10.2019	7.70	7.70	7.75	7.90	8.05	8.15	8.25
10.09.2019	7.80	7.80	7.85	8.00	8.15	8.25	8.35
10.08.2019	7.90	7.90	7.95	8.10	8.25	8.35	8.45
10.07.2019	8.05	8.05	8.10	8.25	8.40	8.50	8.60
10.06.2019	8.10	8.10	8.15	8.30	8.45	8.55	8.65
10.05.2019	8.10	8.10	8.15	8.30	8.45	8.55	8.65
10.04.2019	8.15	8.15	8.20	8.35	8.50	8.60	8.70
10.03.2019	8.20	8.20	8.25	8.40	8.55	8.65	8.75



10.02.2019	8.20	8.20	8.25	8.40	8.55	8.65	8.75
10.01.2019	8.20	8.20	8.25	8.40	8.55	8.65	8.75
10.12.2018	8.20	8.20	8.25	8.40	8.55	8.65	8.75
01.11.2018	8.15	8.15	8.20	8.35	8.50	8.60	8.70
01.10.2018	8.15	8.15	8.20	8.35	8.50	8.60	8.70
01.09.2018	8.10	8.10	8.15	8.30	8.45	8.55	8.65
01.08.2018	7.90	7.90	7.95	8.10	8.25	8.35	8.45
01.07.2018	7.90	7.90	7.95	8.10	8.25	8.35	8.45
01.06.2018	7.90	7.90	7.95	8.10	8.25	8.35	8.45
01.05.2018	7.80	7.80	7.85	8.00	8.15	8.25	8.35
01.04.2018	7.80	7.80	7.85	8.00	8.15	8.25	8.35
01.03.2018	7.80	7.80	7.85	8.00	8.15	8.25	8.35
01.02.2018	7.70	7.80	7.85	7.90	7.95	8.05	8.10
01.01.2018	7.70	7.80	7.85	7.90	7.95	8.05	8.10
01.12.2017	7.70	7.80	7.85	7.90	7.95	8.05	8.10
01.11.2017	7.70	7.80	7.85	7.90	7.95	8.05	8.10
01.10.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.09.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.08.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.07.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.06.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.05.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.04.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.03.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.02.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.01.2017	7.75	7.85	7.90	7.95	8.00	8.10	8.15
01.12.2016	8.65	8.75	8.80	8.85	8.90	9.00	9.05
01.11.2016	8.65	8.75	8.80	8.85	8.90	9.00	9.05
01.10.2016	8.80	8.90	8.95	9.00	9.05	9.15	9.20
01.09.2016	8.85	8.95	9.00	9.05	9.10	9.20	9.25
01.08.2016	8.85	8.95	9.00	9.05	9.10	9.20	9.25

## MCLR Historical Data - Interest Rates

01.07.2016	8.90	9.00	9.05	9.10	9.15	9.25	9.30
01.06.2016	8.90	9.00	9.05	9.10	9.15	9.25	9.30
01.05.2016	8.90	9.00	9.05	9.10	9.15	9.25	9.30
01.04.2016	8.95	9.05	9.10	9.15	9.20	9.30	9.35

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Table No. 2.

(Delay interest payable by Promoter to Allottees)													
Appeal Nos. 				AT006	134185	134186	134187	134188	134189	134199	134162	134167	
Complaint Nos. 				CC006	198550	198551	198549	198548	198552	198554	194706	197884	
Paid amounts (in ₹) 					1732500	3925000	7200000	1843000	1440000	1465000	780000	837625	
Sr. Nos.	Time Period		No. of Days	MCLR rates	MCLR Rate +2%								
	From	To											
1	31-Dec-19	10-Jan-20	10	8.2	10.2	4841.50685	10968.4932	20120.5479	5150.30137	4024.10959	4093.9726	2179.72603	2340.76027
2	10-Jan-20	09-Mar-20	59	8.15	10.15	28424.8664	64396.8836	118129.315	30237.8233	23625.863	24036.0342	12797.3425	13742.7872
3	09-Mar-20	09-Apr-20	31	8.05	10.05	14787.9555	33502.2945	61456.4384	15731.1411	12291.2877	12504.6781	6657.78082	7149.64572
4	09-Apr-20	09-May-20	30	7.7	9.7	13812.5342	31292.4658	57402.7397	14693.5068	11480.5479	11679.863	6218.63014	6678.05137
5	09-May-20	09-Jun-20	31	7.55	9.55	14052.2363	31835.5137	58398.9041	14948.4973	11679.7808	11882.5548	6326.54795	6793.94195
6	09-Jun-20	14-Apr-22	674	7.3	9.3	297524.836	674046.164	1236466.85	316501.167	247293.37	251586.658	133950.575	143846.603
7	14-Apr-22	14-May-22	30	7.4	9.4	13385.3425	30324.6575	55627.3973	14239.0685	11125.4795	11318.6301	6026.30137	6471.5137
8	14-May-22	14-Jun-22	31	7.5	9.5	13978.6644	31668.8356	58093.1507	14870.2329	11618.6301	11820.3425	6293.42466	6758.37158
9	14-Jun-22	14-Jul-22	30	7.7	9.7	13812.5342	31292.4658	57402.7397	14693.5068	11480.5479	11679.863	6218.63014	6678.05137
10	14-Jul-22	14-Aug-22	31	7.8	9.8	14420.0959	32668.9041	59927.6712	15339.8192	11985.5342	12193.6164	6492.16438	6971.79384
11	14-Aug-22	14-Oct-22	61	8	10	28954.1096	65595.8904	120328.767	30800.8219	24065.7534	24483.5616	13035.6164	13998.6644
12	14-Oct-22	14-Nov-22	31	8.25	10.25	15082.2432	34169.0068	62679.4521	16044.1986	12535.8904	12753.5274	6790.27397	7291.92723
13	14-Nov-22	14-Dec-22	30	8.35	10.35	14738.1164	33389.3836	61249.3151	15678.1233	12249.863	12462.5342	6635.34247	7125.54966
14	14-Dec-22	14-Feb-23	62	8.6	10.6	31194.4932	70671.5068	129639.452	33184.0986	25927.8904	26378.0274	14044.274	15081.8397
15	14-Feb-23	14-Jul-23	150	8.7	10.7	76182.5342	172592.466	316602.74	81041.5068	63320.5479	64419.863	34298.6301	36832.5514
16	14-Jul-23	27-Oct-23	105	8.75	10.75	53576.9692	121379.281	222657.534	56994.1438	44531.5068	45304.6233	24121.2329	25903.2663
Total Predeposit required for compliance (in ₹) 						648769	1469794	2696183	690148	539236.6	548598.3	292086.5	313665.3

(DR. K. SHIVAJI)

(SHRIRAM. R. JAGTAP, J.)