REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4690 OF 2022
(Arising out of SLP (C) NO.19226 OF 2021)

UTPAL TREHAN .... APPELLANT(S)

VERSUS

DLF HOME DEVELOPERS LTD. .... RESPONDENT(S)

WITH

CIVIL APPEAL NOS. 4691-4692 OF 2022
(Arising out of SLP (C) NOS.5871-5872 OF 2022)

J U D G M E N T

ANIRUDDHA BOSE, J.

Leave is granted on the limited question which was formulated by this Court at the time of issue of notices, by the order passed on 3rd January 2022 in SLP (C) No.19226 of 2021. So far as SLP (C) Nos.5871-5872 of 2022 are concerned, leave is granted on the point on which the appellants thereof had confined their grievances, recorded in our order passed on 19th

April, 2022. We shall refer to these points later in this judgment. The controversy which we shall address in this judgment revolves around the quantum of compensation that the appellant in SLP (C) No.19226 of 2021 (now appeal) would be entitled to receive because of delay in delivery of possession of a flat as also the appellant's obligation to pay maintenance charges in respect thereof.

2. The specific disputes giving rise to these appeals relate to an Apartment Buyers' Agreement, executed on 3rd December, 2008 between Utpal Trehan (whom we shall henceforth refer to as "allottee") and DLF Home Developers Limited (we shall refer to them as the "builder") for purchase of a flat, within a complex named New Town Heights in Sector-91, Gurgaon (now Gurugram), Haryana. This was booked by the allottee on depositing a sum of Rs.5 lakhs in March 2008. The allotment letter was issued on 16th April 2008, and allocation was made of Apartment No. GBD-153 along with its parking. As per the Apartment Buyers' Agreement, the area of the flat was to be 1760 square feet (super area). The consideration amount was Rs.45,12,000/-, to be paid as per instalment payment plan

forming part of the Agreement. The stipulation relating to possession of the flat is contained in Clauses 11 and 17 of the said Agreement. A copy of the draft Agreement has been annexed to the allottee's paper book. In substance, the time for possession has been stipulated to be within 36 months from the date of execution of the Agreement subject to certain qualifications and exceptions incorporated in the Agreement itself. This date of delivery of possession, along with the effects thereof, underwent certain changes, as there was delay on the part of the builders in getting certain regulatory clearance. Mr. Pinaki Mishra, learned Senior Advocate has appeared for the builder and the allottee has appeared in person before us.

3. The facts forming genesis of the grievances of the allottee have been summarised in the decision of the National Consumer Dispute Redressal Commission ("National Commission") delivered on 23rd July 2021, which is under appeal before us. We quote below the relevant passages from this decision:-

> *"**12.** ..... The allotment letter dated 16.04.2008 and Annexure-3 to the Apartment Buyer's Agreement dated 03.12.2008 provided a "Time Linked Payment Plan" under which 95% of the sale consideration*

(including Rs. 5,00,000/- of booking amount) had to be paid in 11 instalments starting from 29.05.2008 and ending on 29.06.2010. Vide Clause-12 of the Allotment Letter dated 16.04.2008 and Clause-11 of Apartment Buyer's Agreement dated 03.12.2008, the possession had to be handed over within 36 months from the date of agreement. Environment Clearance Certificate was delayed as such the builder could not start construction till May, 2009, i.e. more than one year from booking. In such circumstances, the builder through letter dated 26.03.2009, amended the terms of the agreement and the payment of the instalments were changed as "construction Linked Payment Plan". The builder has simultaneously provided various benefits to the buyers, i.e. Advance Payment Rebate in the shape of interest at the rate of 13% p.a. on the amount in excess of 35% of sale price as on 26.03.2009, 5% discount of basic sale price, increase of approximately 5% area and compensation for delayed possession @ Rs.10/- per Sq. ft. per month from the date of expected possession till actual possession and Timely Payment Rebate, equivalent to 10% basic sale price. Letter dated 23.06.2009 and statement of account dated 10.06.2013 prove that the benefits of (i) Rs.9059/- as Advance Payment Rebate, (ii) Rs. 1,98,000/- as 5% discount of basic sale price and (iii) increase of 5% area have been given to the complainant.

13. *The complainant argued that "Timely Payment Rebate" and "compensation for delay in possession" had not been given in statement of the account dated 10.06.2013, for which he was entitled. The builder has denied the Timely Payment Rebate on the ground that in spite of service of demand letter dated 29.12.2011, the amount due was not deposited till last date i.e. 18.01.2012, rather it was deposited on 27.01.2012 (without including the amount of interest accrued on it in the meantime). As the time was essence of contract and this instalment was not deposited in time as such the complainant was not entitled for Timely Payment Rebate."*

(quoted verbatim from paperbook)

We shall discuss separately the position of the respective parties as regards obligation of the allottee to pay maintenance charges.

4. The allottee had approached the Delhi State Consumer Disputes Redressal Commission ("State Commission"), in the month of May 2015, after the builder had raised additional demands under different heads. As per the allottee, the total sum, as demanded, added upto Rs.9 lakhs approximately. Otherwise, the allottee claims to have had cleared the requisite instalments. At that point of time, the main complaint of the allottee was of being deprived of certain payment related benefits on being offered possession of the flat. He was being denied these benefits, since as per the builder, the allottee had made default in payment within the due date on demand of the developer of the ensuing instalment. As would be apparent from the said passages of the decision under appeal, the builder's contention is that by a notice of 29th December 2011, the allottee was to pay the next instalment by 18th January 2012, but this was paid on 27th January 2012. The builder thus alleged nine days' delay. The allottee's stand on this count, on

the other hand, was that he had not received the notice of 29th December 2011, but on receiving a reminder on 22nd January 2012, he cleared the dues on 27th January of that year.

5. The delivery and payment stipulations were modified on account of delay in getting environmental clearance and these modifications, as made by the builder, has been summarised in the passage quoted above from the National Commission decision. So, we are avoiding a repeat of these modification terms in this judgment.

6. Before the State Commission, the allottee prayed for the following reliefs:-

> *"4. ..... **i.** Give the possession of the said flat at the earliest.*
>
> ***ii.** Pay an amount of Rs. 10,00,000/- as compensation for causing mental trauma and agony to complainant due to delay in giving the possession.*
>
> ***iii.** Also pay additional delayed possession rent @ Rs. 15/- sq. ft. till the possession is offered to complainant.*
>
> ***iv.** Further waive of the undue/unjustifiable demand already raised towards the final dues settlement.*
>
> ***v.** To pay Rs. 50,000/- towards the expenses incurred by the complainants towards telephonic communications and personal visits made to OP since 2006.*

vi. *To pay a sum of Rs. 75,000/- towards the payment of litigation expenses."*

(quoted verbatim from paperbook)

7. During pendency of the proceeding before the State Commission, an application was filed by the builder to bring on record certain subsequent events. What was sought to be brought on record included crediting to the allottee compensation for delayed possession of Rs.4,22,816/-, Timely Payment Rebate of Rs.4,02,076/- and interest of Rs.14,082/-. This application also highlighted that certain sum of money was already credited to the allottee's account under the head of Early Payment Rebate. This application also showed the liability of the complainant (i.e. the allottee) of Rs.3,16,899/- as maintenance charges, Rs.96,000/- as IBM charges and Rs.14,18,203/- as holding charges. The said application appears to have been filed subsequent to an attempt at mediation while the dispute was pending before the State Commission.

8. The State Commission found that there was deficiency in service and the complaint was allowed in following terms:-

*"20. ..... **i.** OP shall issue fresh offer of possession of the apartment in question i.e. GBD-153, New Town Heights in Sector-91, Gurgaon to the complainant and shall handover the possession of the apartment to the complainant within a period of 06 weeks.*

***ii.** OP shall also execute the sale deed/conveyance deed and get it registered in the name of the complainant on payment of stamp duty, registration charges and other incidental charges, if any, by the complainant, within a period of one month thereafter.*

OP shall pay to the complainant the delayed compensation @ Rs. 10/- per sq. ft. per month for the delayed period from the agreed date of possession i.e. March, 2011 till the date of fresh offer of possession after adjusting the delayed compensation already paid to the complainant."

(quoted verbatim from paperbook)

9. On the question of maintenance charges, however, the State Commission went against the allottee, holding : -

"19. As regards payment of Rs 3,16,899/- towards maintenance charges, and Rs.14,18,204/- toward holding charges @ Rs. 10 per square feet till 11.10.2018, as is stated in the aforesaid handing over the cheque issued earlier a new cheque can be issued against the same.

As on date, the complainant is liable to make the following payment as per the agreement:

i. Maintenance charges (till 30.09.2018) – Rs.3,16,899.

ii. IBMS (Interest Bearing Maintenance Security) – Rs. 96,000/-

iii. Holding Charges (@ Rs. 10/- per sq. ft. till 11.10.2018) – Rs.14,18,203/-.

However, upon suggestions from this Hon'ble Commission, the opposite party shall consider waiving the holding charges accruing day by day and hence, nothing remains payable to the opposite party. The maintenance security and the maintenance charges incurred towards upkeep of the multi-storey building as mentioned above shall be payable to the Condominium Association who are maintaining the property inquestion since the date the

property was ready for possession and was conveyed/offered to the complainant."

(quoted verbatim from paperbook)

10. One of the critical issues which was examined by the State Commission was as to whether there was any delay in payment of instalment by the allottee upon demand being made. This question arose as the builder had denied certain benefits to the appellant which would have accrued to him if timely payment of instalments was made on demand. The builder alleged that the demand in this case was made on 29th December 2011 requiring the allottee to make payment by 18th January 2012. As we have already discussed, the allottee took the plea that the letter of 29th December 2011 was never received by him and when he received a reminder letter of 19th January 2012 on 22nd January 2012, he made the payment on 27th January 2012, factoring in certain holidays which intervened. The State Commission examined this issue and gave a finding on fact that the material on record did not establish that the demand notice of 29th December 2011 was served on any adult family member/known person of the allottee and that the developer had failed to prove service of

demand notice upon the allottee. The State Commission thus held that the allottee could not be deprived of the benefits outlined in the builder's letter of 26th March 2009 on the allegation of failure to pay instalment within due date.

11. The appeal of the allottee to the National Commission was mainly against the finding given by the State Commission on maintenance charges. The builder questioned legality of that part of the decision of the State Commission under which they were directed to issue fresh offer of possession and payment of delayed compensation.

12. The National Commission partly allowed both the appeals, inter-alia holding:-

> *"In view of aforementioned discussions First Appeal No. 1530 of 2019 is partly allowed and First Appeal No. 1638 of 2019 is partly allowed. DLF Home Developers Ltd., (the builder) is directed to (i) offer possession of the apartment in dispute to the complainant afresh and hand over possession to the complainant within 6 weeks and execute the sale/conveyance deed in his name, within one month thereafter, on payment of stamp duty, registration charges and other incidental legal charges, (ii) pay compensation for delay in possession, i.e interest @ Rs. 6%- per annum on the sale price deposited by him for the delayed period from July, 2013 till the date of fresh offer of possession, adjusting "Early Payment Rebate" of Rs.95,136/- as mentioned in statement of account dated 10.06.2013 and (iii) pay "Timely Payment Rebate" i.e 10% of basic sale price. The builder is entitled to realise/adjust the Maintenance charges, from the date of issue of Occupation*

> *Certificate and cost of increased area (i.e. the area increasing to 5% of the increased area). The builder shall pay a cost of Rs.50,000/- to the complainant to meet out his litigation and other expenses."*
>
> **(quoted verbatim from paperbook)**

13. So far as the allotee's appeal is concerned, (arising out of SLP (C) No.19226 of 2021) at the time of issue of notice, this Court had passed the following order:-

> "Heard petitioner in person.
> Issue notice limited to the question of maintenance charges as provided for by NCDRC in the concluding part of the order impugned. Notice may be made returnable in four weeks.
> Dasti service in addition to order in process permitted."

14. In the appeal filed by the builder, at the stage of issue of notice on the petition for special leave to appeal, it was recorded in our order of 19th April 2022 that the learned counsel appearing for the petitioner, (i.e., the builder) essentially confined his submissions to the grievance of the petitioner-developer in regard to the directions by the National Commission and the State Commission for making 'a fresh offer of possession'. We have indicated earlier in this judgment that we are granting leave restricted to these two questions only.

15. We shall first deal with the question of directions to pay to the builder maintenance charges. In the definition Clause

and Clauses 19, 20 and 39 of the Apartment Buyer's Agreement dated 3rd December 2008, it has been specified:-

> ***"Definitions***
> ……
> ***Maintenance Agency"*** *means DHDL or association of allottees or such other agency/body to whom the maintenance of the Said Building/Said Complex (including common areas and facilities) is handed over by DHDL and who shall be responsible for providing the maintenance services within the Said Building /Said Complex and who shall be entitled to collect the Maintenance Charges."*
> ***"19. <u>Maintenance of the Said Building/Said Complex/Said Apartment</u>***
>
> *In order to provide necessary maintenance services, upon the completion of the Said Building/ Said Complex the maintenance of the Said Building/Said Complex may be handed over to the association of Apartment allottees or such other agency/ body/ company/ association of condominium. The Allottee agrees to execute Maintenance Agreement (draft given in Annexure VII to this Agreement) with the Maintenance Agency or any other nominee/ agency or other body/ association of Apartment owners as may be appointed by DHDL from time to time for the maintenance and upkeep of the Said Land/the Said Building/the Said Complex. This Agreement shall not be deemed to be executed till the same is signed by all the parties. The Allottee further undertakes to abide by the terms and conditions of the Maintenance Agreement and to pay promptly all the demands, bills} charges as may be raised by the Maintenance Agency from time to time. DHDL reserves the right to change, modify, amend, impose additional conditions in the Maintenance Agreement at the time of its final execution. The Maintenance Charges shall become applicable/ payable from the date DHDL has received the occupation certificate/the date of allotment whichever is later. It is further clarified that DHDL may at its sole discretion hand over the maintenance of the Said Building/ Said Complex to anybody/association of Apartment owners of the Said Building/Said Complex including but not limited to any body/ association of condominium of the Said Building/ Said Complex, as the case may be, at any time before/ after the construction of*

the Said Building/ Said Complex is complete either for each building or for the entire Said Complex and the Allottee specifically gives his consent to this proposal. It is further specifically clarified that the draft Maintenance Agreement, set out in Annexure VII to this Agreement is merely an indicative Agreement that is proposed to be entered into with the Allottee for maintenance and upkeep of the Said Building/ Said Complex, however, if at any time, after having taken over the Said Building/ Said Complex, the said association of Apartment owners/ condominium of association decides to modify, alter, add, delete any one or more of the terms and conditions of the Maintenance Agreement, the Allottee shall not have any objection to the same and shall execute the Maintenance Agreement as may be required by the Maintenance Agency or association of Apartment owners or association of condominium or its nominees or assigns.

20. <u>Fixation of total Maintenance Charges</u>

The total Maintenance Charges shall be more elaborately described in the Maintenance Agreement (draft given in Annexure VII). The Maintenance Charges shall be levied from the date of occupation certificate or the date of allotment, whichever is later and the Allottee undertakes to pay the same promptly. It is agreed by the Allottee that the payment of Maintenance Charges will be applicable whether or not the possession ofSaid Apartment is taken by the Allottee. The Maintenance Charges shall be recovered on such estimated basis which may also include the overhead cost on monthly/quarterly intervals as may be decided by the Maintenance Agency and adjusted against the actual audited expenses as determined at every end of the financial year and any surplus/deficit thereof shall be carried forward and adjusted in the maintenance bills of the subsequent financial year. The estimates of the Maintenance Agency shall be final and binding on the Allottee. The Allottee agrees and undertakes to pay the maintenance bills on or before due date as intimated by the Maintenance Agency.

……

39. Association of apartment owners

The Allottee agrees and undertakes to join association/ society of apartment owners as may be formed by DHDL/Company on behalf of Apartment owners and to pay any fees, subscription charges thereof and to complete such documentation and formalities as may be deemed necessary by DHDL/ Company for this purpose."

(quoted verbatim from paperbook)

16. Annexure VII to that Agreement appears at Page 185 of the paperbook in SLP (C) No. 19226 of 2021, which is in the form of a draft. The actual copies of the Agreements, if executed, have not been annexed to the paperbooks filed in either of these two appeals. No material has otherwise been produced before us to show if the Maintenance Agreement (Annexure VII to the main Agreement) was executed or not. Be that as it may, even if we proceed on the basis that the maintenance Agreement is applicable, the same constitutes a tripartite Agreement involving the builder, New Town Heights Condominium Association, a registered society and the purchaser. This is in the format of a standard form Agreement with several portions thereof left blank. In the counter affidavit of the builder, it has been stated that the maintenance charges are not paid to them but to the statutory condominium association of allotees who actually renders maintenance services recovered from each allotee. That association to us appears to be an independent body and there is nothing on record to demonstrate that such association is an agent of

either the builder or the purchasers. In Clause 39 of the Apartment Buyers' Agreement, there is hint that such an Association might be formed by the builder but no particular of its formation, or for that matter, its existence have been shown before us at the time of hearing.

17. The definition of Maintenance Agency means "DHDL (the builder) or association of allottees or such other agency……." but the conjunction "or" as has been applied in the definition clause ought to mean in the alternative and this definition cannot be construed to infer that even after handing over the maintenance work to an association, the builder shall continue to remain as a maintenance agency entitled to collect maintenance charges. The clause relating to fixation of total maintenance charges only specifies the obligation of an allottee to pay such charges and the substantive Agreement specifies again that the maintenance charges would be payable to the maintenance agency.

18. In so far as the subject dispute is concerned, the builder's case, as stated above, is that the maintenance agency is to receive the maintenance charges but no specific case has

been made out that the builder themselves are carrying on the maintenance work, which could have brought them within the definition of maintenance agency under the main Agreement. In such circumstances, we are unable to appreciate as to how, in dealing with the allotees' complaint against the builder, the two statutory fora passed orders which effectively required the allotee to make over payment as maintenance charges to a third party, the association in this case. We have already observed that from the materials on record, no principal-agent relationship has been established between the builder and the association as regards the Maintenance Agreement entitling the builder to claim and receive maintenance charges. The builder, at best, is facilitator in organising a maintenance agency. The overall obligation of a flat buyer to pay maintenance charges may be derived from interpretation of clause 20 of the main Agreement. But without any claim from the entity, who are to render maintenance services and charge for the same, in our opinion, the two statutory fora ought not to have directed the allottee to make payment of maintenance charges. The National and the State Commissions, in our opinion, have committed error in directing the allotee to make payment of maintenance

charges, which ought to have been paid to the association when there was no claim from the association in the first place. Secondly, nothing has been brought to our notice from which it could be inferred that the builder had the authority to represent the association for collecting maintenance charges. On the other hand, as we have already indicated, the builder's own case is that the maintenance charges ought to be paid to the association. The latter (i.e., the association) has not been impleaded as a party at any stage of these proceedings. Nor they have prosecuted any claim.

19. We must point out here that from the two orders of the State and the National Commissions, we do not find that the point on right of the builder to claim maintenance charges was specifically discussed. In the complaint before the State Commission, point was taken that in absence of delivery of possession, charging for maintenance by the association was unjustified but the principle which we have discussed in the preceding three paragraphs are purely legal issues and goes to the root of the dispute relating to payment of maintenance charges. Moreover, question of law formulated in paragraph 2D

of the allottee's special leave petition (now appeal), in our opinion, is broad enough to cover this issue. While determining rights of parties on a question of law which emerges from the pleadings and crystallises for adjudication, we cannot ignore answering that question. For otherwise, an incorrect principle of law may have to be laid down on account of failure of the litigants in raising it in clear terms. Moreover, the nature of the dispute having originated from a consumers' grievance, the role of the Court has to be beyond just being an adjudicatory forum in an adversarial cause, and must have an element of proactivity in public interest. Having returned a specific finding on this point, we do not consider it necessary to deal with the allottee's contention that claim of maintenance charge was unjustified in absence of possession of the subject-flat being delivered to them.

20. Now we shall turn to the legality of the decision under appeal issuing direction upon the builder to make payment of delayed compensation. The provision relating to delayed compensation is contained in Clause 17 of the main Agreement:-

> *"17. <u>Failure to deliver possession : Remedy to DHDL:</u>*
> *The Allottee agrees that if the construction and development of the Said Complex is abandoned or DHDL is unable to give possession within thirty six (36) months from the date of execution of this Agreement or such extended periods as permitted under this Agreement, DHDL shall be entitled to terminate this Agreement whereupon DHDL's liability shall be limited to the refund of the amounts paid by the Allottee with simple interest @ 6% per annum for the period such amounts were lying with DHDL and DHDL shall not be liable to pay other compensation whatsoever.*
> *However, DHDL may, at its sole option and discretion, decide not to terminate this Agreement in which event DHDL agrees to pay only to the Allottee(s) and not to anyone else and only in cases other than those provided in Clauses 14, 15, 16 and 50 and subject to the Allottee not being in default under any term of this Agreement, compensation @ Rs. 5/- per sq. ft. of the Super Area of the Said Apartment per month for the period of such delay beyond thirty six (36) months or such extended periods as permitted under this Agreement. The adjustment of such compensation shall be done only at the time of conveyancing the Said Apartment to the Allottee first named in this Agreement and not earlier."*
>
> **(quoted verbatim from paperbook)**

21. As there was delay in obtaining regulatory clearance for the project, the builder themselves had made certain modifications in the terms of the Agreement, providing certain benefits to the flat buyers. This was done by the communication dated 26th March 2009 (at page 223 of the

paper book in the allottee's appeal). The relevant portion of this communication reads:-

> *"As far as "New Town Heights" is concerned, we would like, to mention here that the necessary Building Plan Approvals for all the sectors of "New Town Heights" have been received. As you know, we are a highly compliant organisation, and we would like to start construction only after we have received the final Environment Clearance, which is awaited. As soon as we receive the same, we shall commence the construction. However, to allay any fear that you might have as far as the handing over period is concerned, we hereby revise the Compensation Clause No. 17 of the Agreement to Sell, to the extent of doubling the Compensation payable to Rs. 10/- psft per month, as against Rs. 5 /- psft per month, that was applicable earlier. Similarly, if the customer delays in taking over the possession once the possession is offered by the Company, he/she shall also be liable to pay Holding Charges at the same rate, ie., Rs. 10/- psft per month, for the delay involved in taking over the possession.*
> *We stand behind our promised date of delivery as 3 years, as we have already communicated earlier. We have amended this clause to "3 Years from the date of booking" instead of '3 years from the date of Agreement', which was the earlier commitment."*
>
> **(quoted verbatim from paperbook)**

The direction of the State Commission on delayed compensation has already been quoted in this judgment. The National Commission, however, modified this directive, which has also been quoted in the earlier paragraph. This modification has been questioned by the allotee.

22. Paragraphs 15 and 16 of the National Commission's decision disclose the reasoning for modifying the directive of the State Commission upon the builder to pay delayed compensation. Such modification is as regards the quantum of compensation and the relevant part of the National Commission's order is reproduced below:-

> *"15. So far as the compensation for delayed possession is concerned, the complainant has accepted part of the benefits given under the letter dated 26.03.2009 and is claiming remaining benefits. By this letter, mode of payment of the instalments were changed as "construction Linked Payment Plan". The construction was started in May, 2009. After adjusting the amount till March, 2009 and the benefits given by the letter dated 26.03.2009, on it, the complainant was asked to deposit instalment some time in 2010. Demand notice dated 16.03.2012, shows that Terrace Floor Slab was completed at that time and demand notice dated 18.06.2012 shows that the builder had applied for issue of Occupation Certificate, which has been issued on 28.02.2013. Thereafter, final accounts of the buyers were prepared and possession was offered through letter dated 10.06.2013. Due to delay in starting construction payment schedule of the instalments was changed and to mete out suffering of the buyers, various benefits were provided. Delay in offering possession had occurred as construction could not be started for more than one year of booking. If the buyers were required to payment instalments on later dates than the dates fixed in the agreement, then how it can be expected that the possession could be given within three years of the agreement. In the circumstances, the builder was justified in not giving compensation for delayed possession in the statement of account dated 10.06.2013.*

> *16. However, as we found that the complainant was entitled for "Timely Payment Rebate" as such statement of the account dated 10.06.2013 and demand on its basis was illegal. In such circumstances we direct the builder to pay 6% p.a. interest on the amount deposited by the complainant toward basic sale price, as compensation for delay in possession from July 2013 till date of offer of possession as directed by Supreme Court in* ***Wg. Cdr. Arifur Rahman Khan Vs. DLF Southern Homes Pvt. Ltd., (2020) 16 SCC 512.****"*
>
> **(quoted verbatim from paperbook)**

23. We are, however, unable to accept this reasoning. So far as start of the running time for quantifying delayed payment of compensation from March 2013 is concerned, we find that the builder themselves had modified the relevant clause by their letter dated 26th March 2009, amending the starting date for computing delayed payment of compensation from end of three years from the date of Agreement to three years from the date of booking. Thus, the date of booking in the case of the allottee being March 2008, the State Commission had rightly directed payment of delayed compensation from March 2011.

24. Mr. Mishra has urged that the entire responsibility for delivery of possession of the flat should not fall on his clients as the allottee himself could have applied before the adjudicatory forum for possession thereof subject to outcome of the case.

But this argument in our view is fallacious. The dispute between the parties primarily arose as the builder denied substantial benefits to the allottee for nine days' delay in clearing instalment. This allegation of delay has been rejected by the Consumer Fora and their concurrent finding is that no proper demand was made for payment of such instalment. Mr. Mishra has, in his submissions, emphasised on the "offer for possession" letter dated 10th June 2013 and his submission is that obligation to pay delayed payment compensation cannot go beyond that date. The builder's case is that they cannot be held responsible if the allottee does not take possession of the flat, when offered. A copy of this letter has been annexed at page 235 of the builder's paperbook. On a plain reading of this letter, we find that the builder offered physical possession only on remitting of payments as per statement of accounts, which was for a sum of Rs.9,00,382/- and on furnishing an undertaking. The National Commission found that the statement of account dated 10th June 2013 and demand on that basis was illegal. As the offer for possession was conditional on settling of accounts and, as the accounts reflected illegal demand, the builder cannot argue that there was a valid offer for possession under

the letter dated 10th June 2013. In this background, in the event the allottee wanted proper adjudication of his rights and liabilities before asking for interim possession of the flat which would have had carried with it unspecified obligations, no fault can be found in such conduct of the allotee.

25. Reliance has been placed on the judgments of two coordinate Benches of this Court in the cases of **DLF Homes Panchkula Pvt. Ltd. vs D.S. Dhanda and Ors.** [(2020) 16 SCC 318] and **DLF Home Developers Ltd. And Another vs Capital Greens Flat Buyers Association & Ors.** [(2020] SCC Online SC 1125] in support of the argument of the builder that "Delay Compensation" could be awarded only upto the date of offer of possession. But in this case, we have already held that there was no valid offer for possession. In the case reported in [(2020) 16 SCC 318], interest was directed to be paid by way of compensation on deposited amount from the promised date of possession to the actual date of handing over possession, and the coordinate Bench directed, inter-alia, payment of interest at the rate of 9% per annum for a period of two months from the date of offer for possession. In the case of **Capital Greens Flat**

Buyers Association (supra), interest was awarded as compensation for delay in delivery of possession. The latter judgment was delivered in the special circumstances of that case. We accept the argument advanced on behalf of the builder that time for payment of compensation for delayed payment shall stop running from the date of offer for possession. But in this case, there was no valid offer for possession. Mr. Mishra also sought to bring to our notice the proposals made in course of mediation proceeding. But mediation obviously failed between the parties and we cannot refer to what transpired during the process of mediation while adjudicating the right of the parties in an appeal.

26. The ratio of the judgment in the case of **Wing Commander Arifur Rahman Khan and Aleya Sultana and Others vs DLF Southern Homes Pvt. Ltd. and Others** [(2020) 16 SCC 512] does not apply in the facts of the present case. The aforesaid decision was rendered in a context in which a coordinate Bench of this Court found the Agreement involved in that case was lopsided, giving unjustified advantage to the

builder. The relevant paragraph from the judgment is reproduced below:-

> ***"25.*** *The only issue which then falls for determination is whether the flat buyers in these circumstances are constrained by the stipulation contained in Clause 14 of ABA providing compensation for delay @ Rs 5 per square feet per month. In assessing the legal position, it is necessary to record that the ABA is clearly one-sided. Where a flat purchaser pays the instalments that are due in terms of the agreement with a delay, Clause 39(a) stipulates that the developer would "at its sole option and discretion" waive a breach by the allottee of failing to make payments in accordance with the schedule, subject to the condition that the allottee would be charged interest @ 15 per cent per month for the first ninety days and thereafter at an additional penal interest of 3% p.a. In other words, a delay on the part of the flat buyer attracts interest @ 18% p.a. beyond ninety days. On the other hand, where a developer delays in handing over possession the flat buyer is restricted to receiving interest at Rs 5 per square feet per month under Clause 14 (which in the submission of Mr Prashant Bhushan works out to 1-1.5% interest p.a.). Would the condition which has been prescribed in Clause 14 continue to bind the flat purchaser indefinitely irrespective of the length of the delay? The agreement stipulates thirty-six months as the date for the handing over of possession. Evidently, the terms of the agreement have been drafted by the developer. They do not maintain a level platform as between the developer and purchaser. The stringency of the terms which bind the purchaser are not mirrored by the obligations for meeting timelines by the developer. The agreement does not reflect an even bargain."*

27. So far as the present appeals are concerned, the quantum of delayed compensation has been enhanced by the

builder themselves, along with provision for enhancement with respect to the delay in payment if made by the allottee in taking possession. In such circumstances, we do not think the National Commission ought to have had deviated from the modified contractual terms contained in the communication dated 26th March 2009 and replace the said terms with 6% interest per annum from July 2013 till the date of fresh offer of possession was made. In our opinion, on the point of payment of delayed compensation, the State Commission's view was the right view.

28. Now comes the question as to which date shall be treated to be the date for fresh offer of possession. Both the fora have directed the builder to issue fresh offer of possession as per the dates specified in the order. The directions of the State and National Commissions were not to operate with retrospective effect, from 10th June 2013. The argument of the builder is that a possession offer letter was issued on that date. This letter showed certain sum of balance and also included certain demands on account of cost of increase in apartment size area, further EDC and IDC charges, stamp duty charges, etc. Some

rebates were also denied to the allottee on account of delay in payment of instalment by nine days, which we have discussed in the preceding paragraphs of this judgment. In an application dated 15th November 2018, which was filed on 7th January 2019 before the State Commission, the builder admitted their fault in not providing any compensation for delayed payment in the aforesaid letter of 10th June 2013 and prayed that the complainant (i.e., the allottee) be directed to pay excess amount as specified in the said application and take possession of the apartment. The State Commission found that, as per the said application, the builders had admitted wrong calculation in settling the credits in the account of the allottee. In fact, the builders then had given the credit for a sum of Rs.2,40,210/- and issued a cheque for the said sum, which the allottee did not encash. Such conduct on the part of the allottee was justified as the dispute was still pending before the State Commission. The State Commission found deficiency of service on the part of the builder by sending wrong statement of accounts along with the letter of possession and as per the finding of the State Commission, the allottee was deprived in taking possession of the flat, which was offered, because of

these factors. The National Commission did not take a contrary view and in fact came to a finding that the statement of account dated 10th June 2013 and demand on that basis was illegal. These findings arrived by the two fora were on appreciation of evidence and we do not find any perversity in such finding. So, the letter of 10th June 2013 cannot be treated as a valid offer letter.

29. (i) We, accordingly, hold the finding of the National Commission as also the State Commission that the allottee would be required to pay maintenance charges as erroneous and that part of the findings of the two Commissions are set aside.

(ii) The entity to whom such charge is due has not raised any claim. In such circumstances, direction to the allottee to pay maintenance charges was not warranted as the entity entitled to receive such charges is not a party to these proceedings. Such directions assume the character of declaration of liability or obligation of the allottee in absence of the admitted claimant, who had not brought any action or staked their claim in any other manner through

these proceedings. Such declaratory relief cannot be given in vacuum.

(iii) We sustain the order of the National Commission as also the State Commission that fresh offer of possession ought to be issued. We extend the time for issuing such offer of possession by a period of eight weeks from this date. Execution of Deed shall be effected within the aforesaid period.

(iv) We modify the direction of National Commission relating to payment of delayed compensation and while restoring the directions of the State Commission, we direct that delayed compensation be paid at the rate of Rs.10 per square feet per month for the entire period from March 2011 till the date on which the fresh offer of possession is issued.

(v) The delayed possession compensation shall be paid to the allottee after adjusting the delayed compensation already paid. The early payment rebate of Rs.95,136/- shall also be adjusted, as has been directed by the National

Commission. The said sum was mentioned in the statement of account dated 10th June 2013.

(vi) We retain the order as to costs to be paid to the allottee quantified by the National Commission as Rs.50,000/-.

30. Both the appeals are disposed of in the above terms. We, however, make it clear that in this judgment, we have addressed only the two questions on which leave is granted. Rest of the findings or directions of the National Commission shall remain undisturbed.

31. Connected applications, if any, shall stand disposed of, without any order as to costs.

......, J.
(DINESH MAHESHWARI)

......, J.
(ANIRUDDHA BOSE)

NEW DELHI;
11th JULY 2022