

REAL ESTATE REGULATORY AUTHORITY

HIMACHAL PRADESH

Complaint No.HPRERA2023006/C

IN THE MATTERS OF:-

Mrs. Madhu Bala, Daughter of Sh. Gopal Krishan, resident of 10, Street no. 5A, Near Magnum opus coaching Centre, Namdev Nagar, Bathinda Punjab,151001

.....Complainant

Versus

Omaxe Limited, Shop no.19-B, First floor, Omaxe celebration mall, Sohna road, Gurgaon, Haryana and corporate office at 7, LSC, Kalkaji, New Delhi.

.....Respondent

Present:- Dr. Sandeep Sachdeva Ld. Advocate along with Ms Madhu Bala for Complainant
Sh. Shivank Singh Panta, Ld. Advocate for the respondent promoter, M/s Omaxe Ltd

Final date of hearing (through WebEx): 02.09.2023

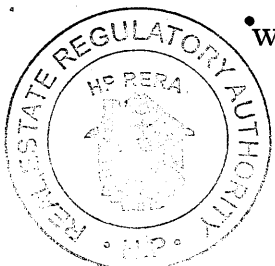
Date of pronouncement of order: 12.09.2023

Order

Coram:- Chairperson and Member

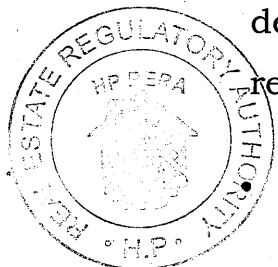
1. Facts of the case -

The complainant and respondent entered into an agreement for sale executed on 16th September 2019 (Annexure 1) for flat numbered as PWD/JACARANDA-C/509 on 5th floor. The allotment letter is at Annexure 2 with the complaint. The total sale consideration for the unit no. 509 was Rs 15,52,195/- which was to be paid to the respondent according to the



payment schedule C-1 and C-2 of the agreement for sale dated 16th September, 2019.

2. Another agreement for sale for second Flat was executed between Smt. Reetu, Mukesh Kumar and the respondent on 16th August 2019 (Annexure 4) for flat numbered as PWD/JACARANDA-C/413 on 4th floor in the same housing project. The allotment letter is at Annexure 5 respectively with the complaint. The total sale consideration for the unit no. 413 was Rs 10,75,957/- which was to be paid by the complainant according to the payment schedule C-1 and C-2 of the agreement for sale dated 16th August 2019.
3. The aforementioned Flat no. 413 was re allotted by the respondent company to the present complainant and all the rights and liabilities of Smt. Reetu and Mukesh Kumar were assigned by both of them in favour of Smt. Madhu Bala. This agreement endorsement form or re allotment letter bears signature of Reetu, Mukesh, Madhu Bala and the seal and signature of the respondent company. Therefore Smt. Madhu Bala shall be referred to herein as the complainant for the purpose of flat no. 413 as well along with the flat no. 509.
4. The complainant paid more than 90% of the price as per payment schedule for both the flats. The respondent was to hand over possession of the unit(s) to complainant on or before 20.10.2020. The complainant does not intend to withdraw from the project and claim interest for delayed possession under proviso of clause 9.2. (ii) of agreement qua both the flats. It was contended that there is inordinate delay in delivery of possession of both the flats. With these pleadings it was prayed that delayed possession interest may kindly be granted and the respondent may be directed to complete the remaining work and

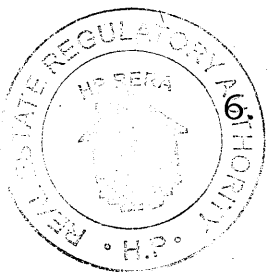


deliver the possession of the flat(s) in terms of agreement(s) for sale.

5. Reply

The specifications of the flats and the total price agreed upon as stated in the complaint have been admitted in reply. Further the transfer of flat from Smt. Reetu and Mukesh to Smt Madhu Bala was also admitted. The execution of both the agreement(s) have also been admitted. It was further the case of the respondent that qua flat no. 509 the due date of possession given in the agreement for sale was superseded by statement of payment annexure R-4 and the new date of possession was 16.09.2021 as per the aforesaid statement of payment appended with the reply. The total amount till date paid by the complainant against purchase of flat no. 509 was Rs 14,31,835/- where as no such total payment made against flat no. 413 has been mentioned by the respondent in his reply. The copy of payment schedule is appended with the respective agreement(s) for sale. With respect to Flat no. 509 it was pleaded that along with application form an amount of Rs 1,60,000/- was paid as booking amount receipt whereof has been issued at annexure A3 with the complaint / R-2 with the reply and the receipt qua the remaining amount is Rs 12,86,154 is annexure R- 11 with the reply. Further qua flat no. 413 the receipt of Rs 9,90,000/- is appended as A6 with the complaint. As decided between the complainant and the respondent company the respondent had been consistently paying the commitment charges @7,500/- per month each till 31.03.2023 in respect of both the cases. Therefore, it was contended that there is no occasion for the respondent company to pay the delayed possession interest as the same is not applicable in the present case.

Rejoinder



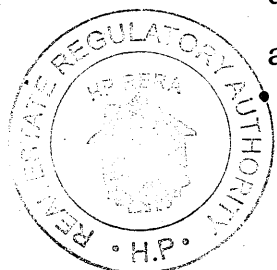
It is submitted that the remaining amount qua both the unit(s) is to be paid at the time of offer of possession as per rules and terms set in the agreement for sale. The agreement clearly provides for the date of possession in clause 7.2 of the agreement as 20.10.2020. The commitment charges as being paid by the respondent are not part of the agreement or any others documents. Hence, it cannot be assumed that these commitment charges are being paid qua interest for delayed possession or reimbursement to the complainant.

7. **During the course of hearings in this matter** the complainant has submitted an email and requested the Authority that she had received offer of possession qua flat no. 413 and on this basis she sought permission from the Authority to take the possession. The Authority vide its zimni order dated 14.06.2023 granted liberty to the complainant to take the possession of the apartment in accordance with the agreement for sale and intimate this Authority by way of a written application stating the status of possession.

8. In pursuance thereto an application was filed by the complainant stating therein that the complainant received offer of possession on dated 23.05.2023 for apartment No. 413. It was further stated that the complainant had made the balance payment of Rs. 95,000/- which was duly received by the respondent company. This fact has not been disputed on behalf of the respondent but it was submitted that possession was not handed over due to pending litigation between the parties.

9. **Arguments by complainant-**

It was argued that the complainant and respondent entered into an agreement for sale on 16th September, 2019 for flat no. 509 and agreement for sale dated 16th August, 2019 for flat 413. The

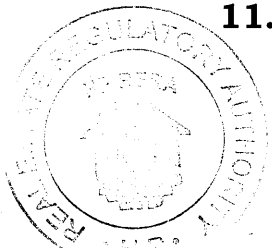


total payment made qua flat no. 509 was Rs 14,46,153/-. The total payment made qua flat no. 413 after adding the payment of Rs 95000/- made during the course of proceedings before this Authority is Rs 10,85,000/-. Qua the flat no. 509 the due date of possession was 20.10.2020 and qua the other flat no. 413 also the due date of possession was 20.10.2020 but the offer of possession qua Flat no. 413 was made on 23.05.2023 but the actual possession has still not been handed over by the respondent company due to the pendency of this litigation. Therefore it was argued that qua unit no. 509 more than 90% payment has been made and qua other Flat no. 413 full amount has been paid to the respondent. Since the possession of the unit(s) in question have not been handed over in time therefore the complainant is entitled to receive delayed possession charges. The agreement for sale requires the remaining sum to be paid at the time of offer of possession. It was further argued that the agreement and other documents do not mention the respondent's liability to pay commitment charges. Thus, these commitment charges cannot be considered as interest for delayed possession or refund to the complainant.

10. Arguments by respondent-

It was argued on behalf of the respondent that there is delay in payment of total sale consideration as per the payment schedule. It was further argued that the delay in delivery of possession was due to reasons beyond the control of the respondent. It was emphatically argued that the respondent company is already paying to the complainant commitment charges @ Rs 7500 per month for each Flat, therefore the respondent is not liable to pay any delayed possession interest separately.

11. CONCLUSION/ FINDINGS OF THE AUTHORITY:-

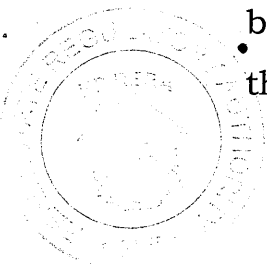


We have heard the arguments advanced by the Ld. Counsels for the Complainant & Respondent and also perused the record pertaining to the case. We have duly considered the entire submissions and contentions submitted before us during the course of arguments. This Authority is of the view that the issue that requires the consideration and adjudication, namely:-

a. Whether the complainant is entitled to delayed possession charges in terms of proviso to Section 18 (1) of RERD Act.

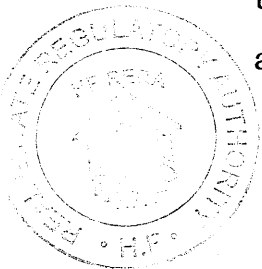
12. **Whether the complainant is entitled to delayed possession charges in terms of proviso to Section 18 (1) of the RERD Act.**

The present project is a RERA registered project. The Authority has gone through the record of the case and heard the arguments and is of the considered view that the complainant on 16th September 2019 was allotted a flat no. PWD JACARANDA – C/509 on the 5th Floor of the group housing project named as Omaxe Parkwood I for a total consideration of Rs.15,52,195/-. A sum of Rs.14,46,153/- has been paid to the respondent. The receipt qua the payment of the aforesaid amount is annexure A3 with the complaint / R-2 with the reply qua payment of Rs 1,60,000/- and qua Rs 12,86,154 is annexure R 11 with the reply. The receipts have been relied upon by the respondent and have never been disputed at any point of time and from the perusal of receipts it transpires that more than 90% of the amount has been paid. Further the receipts bear the stamps and logo of the respondent company. As per the payment schedule C-2 appended with the agreement for sale of Flat no. 509 an amount of Rs 1,50,719 was to be paid at the time of booking of the unit, Rs 12,81,115 was to be paid on 60 days of the booking and Rs 1,20,359 was to be paid at the time of offer

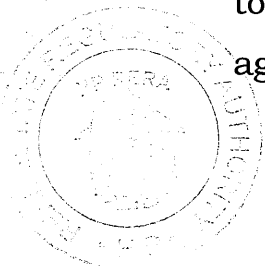


of possession. From the perusal of the receipts appended as annexure A-3, R-2 and R11 it is clear that an amount of Rs 14,46,153/- has been paid up to 25th October 2019 and sixty days were to expire on 16.11.2019. Therefore an amount more than the due amount as per payment schedule has been paid by the complainant. Further no protest on the delayed payment if any was ever raised by the respondent company before this complaint was filed by the complainant. Rest of the payment as per the payment plan had to be paid at the time of offer of possession. As per clause 7.2 of the agreement for sale dated 16th September, 2019 which is admitted by both the parties, it is mentioned that the respondents shall handover the possession on 20.10.2020 which is the due date of possession. Admittedly the possession has not been handed over till date. The defence of the respondent was that this due date of delivery of possession was superseded by annexure R-4 payment schedule where in the date of delivery of possession was mentioned as 16th September, 2021 instead of 20.10.2020. But this unilateral payment schedule is neither signed nor expressly acknowledged by the complainant and therefore cannot supersede the agreement for sale dated 16th September, 2019 which was signed and acknowledged by both the parties. Therefore the due date of delivery of possession was 20.10.2020.

13. With respect to **Flat no. 413** the complainant executed the agreement for sale with Smt. Reetu and Mukesh Kumar on 16th August 2019 for flat numbered PWD/JACARANDA-C/413 on 4th floor in the housing project. The allotment letter is at Annexure 5 respectively with the complaint. The total sale consideration for the unit no. 413 was Rs 10,75,957/- which was to be paid according to the payment schedule C-1 and C-2 of the

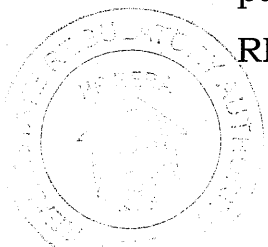


agreement for sale dated 16th August 2019. The aforementioned Flat no. 413 was re allotted by the respondent company to the present complainant and all the rights and liabilities of Smt. Reetu and Mukesh Kumar were assigned by both of them in favour of Smt. Madhu Bala. This agreement endorsement form or re allotment letter bears signature of Reetu, Mukesh, Madhu Bala and the seal and signature of the respondent company. Therefore the flat was legally transferred to Smt. Madhu Bala and she has every right to file the complaint with respect to the flat in question. A sum of Rs.9,90,000/- has been paid to the complainant vide receipt annexure A-6 dated 17 October, 2020. From the perusal of this receipt it is clear that all the payments were made on or before 31st July, 2019. These payment receipts have not disputed at any time. Further the receipts bear the stamps and logo of the respondent company. As per the payment schedule C-2 appended with the agreement for sale dated 16th August, 2019 an amount of Rs 1,53,095 was to be paid at the time of booking of the unit, Rs 8,44,412 was to be paid on 60 days of the booking and Rs 78,449 was to be paid at the time of offer of possession. From the perusal of the receipts appended as annexure C-3 it is clear that an amount of Rs 9,90,000/- has been paid up to 31st July, 2019 therefore an amount approximately close to the due amount as per payment schedule has been paid by the complainant. Further no protest on the delayed payment if any was ever raised by the respondent company before this complaint was filed by the complainant. A further payment of Rs 95,000/- was paid to the respondent after the offer of possession dated 23.5.2023 was made. Therefore the total amount of Rs 10,85,000/- has been paid to the respondent against total price of the apartment of Rs 10,75,957/-. As per



clause 7.2 of the agreement for sale dated 16st August, 2019 which is admitted by both the parties it is mentioned that the respondents shall handover the possession on 20.10.2020 which is the due date of possession whereas possession was admittedly offered on 23.05.2023. Therefore there is certainly gross and inordinate delay in handing over possession.

14. The defence of the respondent is that the OC and CC for the unit in question have been applied on 26 July, 2022 and the same are awaited. It was further the defence of the respondent that the complainant defaulted in making the remaining payments as per the payment plan and therefore the possession of the unit in question was not handed over. From the perusal of the record of the case it transpires that there is no delay in making the payments as per payment plan and therefore this defence of the respondent is liable to be rejected. The respondent has argued that, the promoter is paying the commitment charges, therefore delayed payment interest is not applicable in this case. From the perusal of the record, it is clear that commitment charges being paid by the respondent is not prescribed in the agreement for sale. Further, there is no provision about the payment of the commitment charges, even in the RERD Act. The Section 18 of the RERD Act provides for payment of delayed interest for every month of delay. This is a statutory levy to be paid by the promoter till handing over of possession and this cannot be substituted by any payment like commitment charges. The commitment charges being paid is neither part of the agreement for sale nor there is any such charge provided in the RERD Act. Therefore, payment or non payment of any commitment charges is not in the purview of the RERA and obviously it cannot substituted by the statutory levy



under section 18 of the Act. Section 18 (1) of the RERD Act, 2016 reads as under

Section 18 Return of amount and compensation.

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

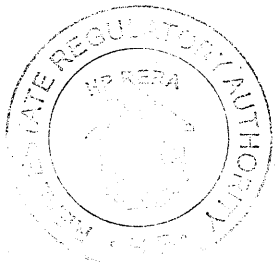
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

Further the Hon'ble Supreme Court in the case of **Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. and Ors** MANU/SC/1056/2021

*"22. If we take a conjoint reading of Sub-sections (1), (2) and (3) of Section 18 of the Act, the different contingencies spelt out therein, (A) the allottee can either seek refund of the amount by withdrawing from the project; (B) such refund could be made together with interest as may be prescribed; (C) in addition, can also claim compensation payable Under Sections 18(2) and 18(3) of the Act; (D) **the allottee has the liberty, if he does not intend to withdraw from the project, will be required to be paid interest by the promoter for every months' delay in***

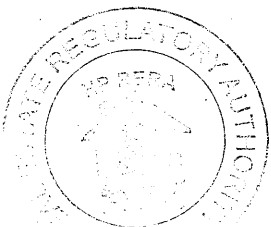


handing over possession at such rates as may be prescribed.

23. Correspondingly, Section 19 of the Act spells out "Rights and duties of allottees". Section 19(3) makes the allottee entitled to claim possession of the apartment, plot or building, as the case may be. Section 19(4) provides that if the promoter fails to comply or being unable to give possession of the apartment, plot or building in terms of the agreement, it makes the allottees entitled to claim the refund of amount paid along with interest and compensation in the manner prescribed under the Act.

24. **Section 19(4) is almost a mirror provision to Section 18(1) of the Act. Both these provisions recognize right of an allottee two distinct remedies, viz., refund of the amount together with interest or interest for delayed handing over of possession and compensation.**

25. **The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."**



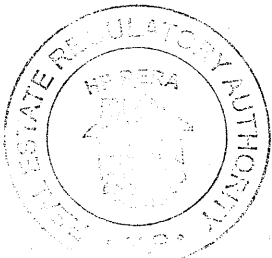
The ratio of the aforesaid judgment is that conjoint reading of Sub-sections (1), (2) and (3) of Section 18 of the RERD Act, 2016, is that the allottee has the liberty, if he does not intend to withdraw from the project to be paid interest by the promoter for every months' delay in handing over possession as may be prescribed. It was further held that that the right of the allottee to seek interest for delayed possession is unqualified and not dependent on any contingencies or stipulations thereof and is also regardless of unforeseen events or stay orders of the Court/Tribunal, which in either way is/are not attributable to the allottee. Further Clause (ii) of 9.2 of the agreement for sale executed interse the parties is as under:

14.2 In case of Default by Promoter under the conditions listed above, Allottee is entitled to the following:

(i) Stop making further payments to Promoter as demanded by the Promoter. If the Allottee stops making payments, the Promoter shall correct the situation by completing the construction milestones and only thereafter the Allottee be required to make the next payment without any interest; or

(ii) The Allottee shall have the option of terminating the Agreement in which case the Promoter shall be liable to refund the entire money paid by the Allottee under any head whatsoever towards the purchase of the apartment, along with interest at the rate prescribed in the Rules within sixty days of receiving the termination notice:

Provided that where an Allottee does not intend to withdraw from the project or terminate the Agreement, he shall be paid, by the promoter, interest at the rate prescribed in the Rules, for every month of delay till the handing over the possession of the [Apartment / Plot] which shall be paid by the promoter to the allottee within sixty days of it becoming due.



15. Therefore to conclude the respondent has failed to deliver the possession of the unit(s) within the time agreed upon and stipulated in the agreement for sale. As the possession of flat no. 509 has not been delivered even till today and the possession of Flat no. 413 was offered on 23.5.2023 therefore there has been inordinate delay in delivering the possession to the complainant from the due date of possession dated 20.10.2020 despite having received 90% of the total sale consideration of the project. Respondent by doing so have violated the provisions of Section 11(4)(a), 14, 17, 18 and 19 of the RERA Act, 2016. The complainant is seeking charges for delayed possession and the proviso to section 18 read with clause (ii) of 9.2 of the agreement for sale provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed. This analogy of the section has been upheld by the Hon'ble Supreme Court in the case New Tech Promoter. Further rate of interest has been prescribed as under:

Rule 15 of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017-

Interest payable by promoter and allottee-

The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest marginal cost of lending rate plus two percent as mentioned under Section 12, 18 and 19 of the Act:

Provided that in case the State Bank of India marginal cost of lending rate is not in use it would be replaced by such benchmark lending rates which the State Bank of India may fix, from time to time for lending to the general public.

Provided further if the allottee does not intend to withdraw from the project, he shall be paid by the promoter an



interest which shall be the State Bank of India highest marginal cost of lending rate

The legislature in its wisdom under rule 15 of the rules, has determined the prescribed rates of interest. The rate of interest so determined by the legislature, is reasonable and if said rule is followed to award interest, it will ensure uniform practice in all the cases. The definition of term 'interest' as defined under Section 2 (za) of the RERD Act, 2016 provides that rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

Section 2 (za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation.—For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

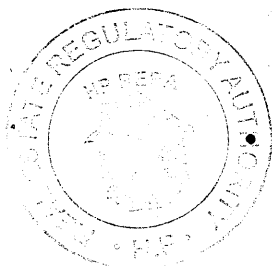
16. The SBI marginal cost of lending (in short MCLR) as on date of passing of this order is 8.7 % hence the rate of interest would be 8 % + 2 % i.e. 10.7% per annum. Therefore, interest on the delayed payment from the complainant shall be charged at 10.7%.



17. Relief-

Keeping in view the above mentioned facts, this Authority in exercise of power vested in it under various provisions of the Act, rules and regulations made there under, issues the following orders/directions:

- A. The Complaint is hereby allowed.
- B. The respondent is directed to pay the interest for delayed possession, at the SBI highest marginal cost of lending rate plus 2 % as prescribed under Rule 15 of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017 to the complainants with respect to **Flat no. 509**. The present highest MCLR of SBI is 8.7 % hence the rate of interest would be ~~8.7~~+2 % i.e. 10.7% per annum on the amount paid by the complainant i.e. Rs.14,46,153/- for every month of delay from the due date of possession i.e. 20.10.2020 till handing over the possession.
- C. The respondent is directed to pay the interest for delayed possession, at the SBI highest marginal cost of lending rate plus 2 % as prescribed under Rule 15 of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017 to the complainant with respect to **Flat no. 413**. The present highest MCLR of SBI is 8.7 % hence the rate of interest would be ~~8.7~~+2 % i.e. 10.7% per annum on the amount paid by the complainant i.e. Rs.9,90,000/- for every month of delay from the due date of possession i.e. 20.10.2020 till the date the offer of possession was made i.e. 23.05.2023.
- D. The arrears of interest on delayed possession accrued from 20.10.2020 till the date of passing of this order i.e. 12.09.2023 shall be paid to the complainant by respondent within 60 days from the date of passing of this order and thereafter in the



case of Flat no. 509 monthly payments of interest till handing of possession shall be paid before 10th of each subsequent month.

E. As the offer of possession has already been made qua Flat no. 413 on 23.05.2023 therefore the complainant shall take the possession of the apartment within 30 days of the passing of this order. The respondent is directed to hand over possession of the Flat no. 413 to the complainant within the time granted.

B. C. Badalia
B. C. Badalia
MEMBER

skant
Dr. Shrikant Baldi
CHAIRPERSON

