

# NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NEW DELHI

RESERVED ON: 24.11.2021 PRONOUNCED ON: 25.01.2022

## CONSUMER COMPLAINT NO. 763 OF 2020

WITH

(IA NOS.4648, 4649 of 2020, 6085, 6219 of 2021 & 7273 of 2020, For C/delay, Directions, Early hearing, C/delay in filing reply)

- 1.Madhusudhan Reddy R. and J. Shanthamma R/o Villa No.A-16, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066
- 2.Gurumurthy Thiagarajan and Anita Rao R/o Villa No.D-1-002, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore 560066
- 3. Harinder Singh and Praseetha Kazhungil Kumarsingh R/o Villa No.D-1-101, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066
- 4.Hitler Raj Vudali and Nagaraju Vudali R/o Villa No.D1-302, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066
- 5 Hardik Patel and Gati Hingrajia R/o Villa No D2-001, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066



6.P.G.Thyagarajan and Susheela Thyagarajan R/o Villa No.D2-302, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066

7. Madhusudhanan Dharumaraj and Hema Pasupathy R/o Villa No.C5-002, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066

8 Venkatesh Subramanian and Shuba Narayan R/o Villa No.C4-201, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066

9 Vipin Radhakrishnan and Shilpa Mohanan R/o Villa No.C6-202, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066

10.Gopalakrishnan Krishnan and Vidula Iyer R/o Villa No.C8-002, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066

11 Sridhar Chowdary M & Suneetha M R/o Villa No.A-16, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066

6.P.G.Thyagarajan and Susheela Thyagarajan R/o Villa No.A-07, VDB Willow Farm Nallurahalli Main Road, Whitefield Bangalore – 560066

....Complainants



#### Versus-

1.VDB Whitefield Development Pvt.Ltd.
Through Mr.Koshy Varghese, Managing Director
REgd.office at 3<sup>rd</sup> floor, # 42 Castle Street
Ashok Nagar, Bangalore – 560025

2. Value Designbuild Pvt Ltd.
Through Koshy Varghese, MD
3<sup>rd</sup> floor, # 42 Castle Street
Ashok Nagar, Bangalore – 560025

3. VDB Property Ventures Pvt.Ltd.
Through Mr.Koshy Varghese, Managing Director
REgd office at 3<sup>rd</sup> floor, # 42 Castle Street
Ashok Nagar, Bangalore – 560025

......Opposite Parties

## **BEFORE:**

## HON'BLE DR. S.M. KANTIKAR, PRESIDING MEMBER HON'BLE MR. BINOY KUMAR, MEMBER

For the Complainants

Mr. Chandrachur Bhattacharyya, Advocate with

Mr. Manoj Kumar Dubey, Advocate

For the Opposite Party.

Mrs. Prabha Swami, Advocate with

Mr. Nikhil Swami, and Ms.Divya Swami, Adv.

## **ORDER**

#### Binoy Kumar, MEMBER

1 The present Consumer Complaint has been filed under Section 21(a)(i) read with Section 12(1)(c) and Section 13 (6) of the Consumer Protection Act,1986 (in short "the Act") read with Order 1 Rule 8 of the Code of Civil

Cisputes Regresson

Procedure, 1908, by Mr. Madhusudhan Reddy on behalf of 11 Complainants who have been allotted flats in the project of Opposite Parties M/s. VDB Whitefield Development Private Ltd. and Ors., (hereinafter referred to as Opposite Parties) for delay in offer of legal possession of the flats. Identical relief of seeking possession along with delay compensation including the Occupancy Certificate and Refund of Advance Maintenance charges collected by Opposite Parties have been sought.

- 2. The facts leading upto the present Complaint are that the Complainants had applied for allotment of flats in the Project of the Opposite Party, namely, "VDB WILLOW FARM" located at Corporation Khatha No. 177/21, Earlier Survey Nos. 50/1A1, 50/1A2 and 53/1, Situated at Nallurahalli, Krishnarajapura Hobli, Bengaluru (hereinafter referred to as the Project). The project consists of total 70 Units and the Opposite Parties started advertising the project from 23.09.2011.
- 3. The Complainant submitted that, the Opposite Party No. 1 M/s. VDB Whitefield Development Private Ltd. is a Company engaged in the business of Infrastructure and real estate development and with whom the construction agreement and the sale agreement has been executed by the Complainants. The Opposite Party No. 2 i.e. Value Designbuild Pvt. Ltd., is the Parent Company. Opposite Party No. 1 & 3 are the subsidiary company of the Opposite Party No.



- 2. Opposite Party No. 3 is the company which will receive the maintenance amount payable by the Complainants.
- The Complainants averred that, they booked their residential flats on various dates between 2012 to 2016 and allotted incomplete possession of the apartments without obtaining "Occupancy Certificate" and the promised amenities. The Complainants executed a construction agreement and an agreement of sale with the Opposite Party. Amongst 11 Complainant, We will discuss the case of Mr. Gurumurthy Thiagarajan & Anita Rao for brevity. They entered into Construction Agreement & Agreement of Sale (hereinafter to be referred as the Agreement) executed on 29.09.2012 with Opposite Party.
- 5. The Complainant Mr. Gurumurthy Thiagarajan & Anita Rao made a total payment of Rs. 1,74,41,753/- against the sale price of Rs. 1,64,63000/- in this agreement. The mode of the payment as per the Agreement was Construction-Linked. As per Clause 11.1 of the Agreement dated 29.09.2012, the completion of construction and the possession of the flat was promised by July, 2014 with a grace period of further 6 months. The Complainants have cited Clause 11.1 of the Construction Agreement which reads as follows:

"The developer based on its present plans and estimates and subject to all just exceptions contemplates to complete the construction of the Schedule 'C' Property and agree to deliver the Schedule 'C' Property within July 2014 with a grace period



of **Six Months**. This Developer shall deliver the Schedule 'C' Property to the Allottee/s only after the same is ready for occupation and subject to payment of all the amount due under this Agreement.

- 6. The Complainants averred that, the Opposite Party has failed to get the Occupancy Certificate till date and the amenities and facilities have still not provided though they have received possession. The project is still incomplete.
- 7. The Complainant also stated that Inspite of no Ōccupancy Certificate, the builder has started levying maintenance charges on the Complainants. Clause 14.4 of the construction agreement reads as follows:-

"It is hereby agreed by the Allottee/s that from the date the Schedule 'C' Property is completed and ready for occupation for which a notice has been received by him/her/them from the Developer whether possession is taken by him/her/them or not, he/she/they shall pay regularly every month on or before the 5<sup>th</sup> day of each month to the Developer until the formation of owners' association/society the proportionate share in all outgoings on general expenses in respect of the property such as insurance, municipal taxes or other electric and water charges, maintenance and management of "VDB Willow Farm", common lights, sanitation and its repairs, salary to



watchman, sweepers, club-house maintenance and all other costs and .
expenses connected with "VDB Willow Farm"...

8. The Complainants have also submitted, the Opposite Parties have charged as advance maintenance charges of Rs. 75 per sq. ft. for 2 years from each of the buyers during the final settlement of accounts and after that, the Opposite Parties have already collected additional Rs. 2.6 per sq. ft. per month from March 2020 onwards and is now demanding Rs. 5 per Sq. Ft. pm from each of the buyers who have finished 2 years from the date of offer of incomplete possession, as maintenance charges. Clause 14.5 of the Agreement regarding reads as follows:-

The Alliotee/s shall deposit with the Developer the sum of Rs. 75- per Sq. Ft (Rupees Seventy Five Only) towards maintenance of the common areas of "VDB Willow Farm". On formation of the owner association/society, the balance amount if any remaining shall be transferred by the Developer to the owners association/society. The Allottee/s further agree/s to pay additional deposit to the Developer in case the deposit paid had been exhausted and/or not sufficient to meet the outgoing.

9. The Complainants averred that till the time the Occupancy Certificate is obtained, the maintenance of the project is to be undertaken at the cost and expenses of the Opposite Parties. Further, many of the facilities and amenities



which were promised by the Opposite parties in agreement and brochure have not been provided by the Opposite Parties till date. The Complainants cited a judgement of this Commission; in *Kamal Kishore & Anr. Versus M/s.*Supertech Limited, Consumer Case No. 1009 of 2016, wherein is was held inter-alia, as:-

".....10. It would thus seen that maintenance charges are required to be paid by the allottee from the date of issue of letter of offer of possession. As stated earlier, the possession in my view could not have been offered to the allottee without completing the construction of the villa in all respects and obtaining the requisite occupancy certificate. Offering possession without obtaining occupancy certificate is meaningless since the allottee is not permitted in law to occupy the house which does not have the requisite occupancy certificate. Therefore, the maintenance charges, in my opinion, would be payable only from the date on which the possession is offered to the complainants after obtaining the requisite occupancy certificate and provided the construction of the villa complete in all respects at that time....".

- 10. Thus, aggrieved by the delay in getting legal possession of their flats the Complainants have filed this Complaint before this Commission with the following prayer:-
  - A. Direct opposite parties to hand over to the complainants and other unit / flat owners with same interest the legal



- possession of the fully constructed and completed flats along with the occupancy certificate and all other promised facilities and amenities which were promised by the opposite party.
- B. Direct the opposite parties to pay to all the complainants/unit owners and other unit owners with same interest, compensation for the entire period of delay @ 12 % interest per annum on the amount deposited by the complainants with the opposite party till the time actual legal possession including the occupancy certificate is obtained by the opposite party and provided to the complainants.
- C. Direct the opposite parties to provide to the complainants and other flat / unit owners with same interest each of the facilities and amenities which were promised in the agreement.
- D. Direct the opposite parties to pay to the complainants and other flat / unit owners with same interest additional compensation @ 12% interest per annum on the amount deposited for the delay in provision of the promised facilities and amenities. Or in the alternative, in case of non-provision of the promised amenities and facilities, direct opposite parties to pay to the complainants and other flat owners with same interest a sum of Rs. 20,00,000/- each for the non provision of the promised amenities.
- E. Direct the opposite parties to refund to the complainants and other unit/ flat owners with same interest the advance maintenance sum for 2 years collected @ Rs 75 per sq ft along with 12 percent interest.



- F. Direct the opposite parties to refund to the complainants and other flat / unit owners with same interest with 12 % interest any other maintenance sum collected by the opposite party over and above the "advance maintenance sum for 2 years collected @ Rs 75 per sq. ft.
- G. Direct the opposite parties to pay to the complainants and other flat owners with same interest a compensation of Rs. 10,00,000/- each by way of compensation for mental harassment and agony.
- H. Direct the opposite parties to undertake the maintenance of the project at its cost till the time the occupancy certificate is obtained.
- I. Award cost of the complaint to the complainants and other unit / flat owners with same interest.
- J. Pass any such further order or orders which this Hon'ble Commission deems fit and proper in the facts and circumstances of the present case.
- 11. The Opposite Parties have filed their written version and stated that, a substantial portion of the construction was completed on May 2017 and they applied for the Occupancy Certificate ("O.C") on 15.05.2017. The Opposite Parties submitted that the project was delayed due to the changing market conditions, escalation costs, the COVID-19 pandemic and the fact that a portion of the land in question was tied up in a partition suit filed by the family of the owners of the lands. The Opposite Parties had kept the Complainants informed



of the position as is evident by the various emails. These factors contributed to the delay in getting the Occupancy Certificate.

12. The Opposite Parties further averred that, on completion of construction of the units, the Complainants began to put pressure to give them physical possession of their units. Complainants pressurized the Opposite Parties to execute sale deeds in their favour. Thereafter, Opposite Parties informed and advised to the complainants to await the Occupancy Certificate ("O.C") and the installation of permanent electricity connection by BESCOM prior to taking possession. Despite this advice they took possession of their flats. One of the Complainant took possession just before the Complaint was filed. The following table indicates the date on which Complainant took possession of flat.

SI. No.	Unit No	Client Name	Unit Type	Agreement Date	Sale Deed Register ed	Client Staying at Project	Project Handed over date
5.	D1-002	Gurumurthy Thiagarajan & Anita Rao	Simplex	23.03.2012	Yes	Yes.	04.08.2018

13. The Opposite Parties averred that, in terms of the Agreements, for the delay in possession, the Complainants were duly paid the stipulated Delay Penalty on dated 02.12.2020.



- 14. The Opposite Parties stated that, they had received only the cumulative advance maintenance charges of Rs. 32,66,025/- @ 75 Sq. Ft. as far back between 2017 to 2019. The Opposite Parties have incurred the total maintenance costs of Rs. 2,37,16,000/- till date and it has thus become financially unviable for them to continue paying these charges. Several Clauses of the construction agreement entered into between the Complainants and Opposite Parties make the payment of the maintenance charges very clear. The advance maintenance charges were paid only for the first two years.
- 15. The Opposite Parties further submitted that, some of the work has come to a standstill due to the COVID-19 pandemic and was beyond their control. It is submitted that all the facilities have been provided for in the units where the Complainants are staying and is being well maintained.

In view of the aforesaid facts the Opposite Parties prayed to this Commission to dismiss this Complaint with Cost.

- We have heard the learned Counsel for both the Parties and have gone through the Complaint and material available on record and Written Submission filed by the Opposite Party.
- 17. Though, details of 11 Complainants regarding their units, payments, Agreement, dates, etc. have been listed by the Complainants in their



Complaint, we will show in a chart for brevity the details of the Unit of Mr. Gurumurthy Thiagarajan & Anita Rao, who is at top of this list:-

Serial No.	Namç	Unit Details	Agreement of Construction / sale	Promised date of possession	Total Price of Unit as per agreement	Price Actually paid to the Opposite Party
	Mr. Gurumurthy Thiagarajan & Anita Rao	Unit No. D1-002	29.09.2012	Jan 2015 (Including the Grace Period)	Rs.1,64,63,000/-	Rs.1,74,41,753/-

- 18. In the Written submission of the Opposite Parties, there is a chart of the allottees where the Complainants took possession of their respective units / flats, it is seen that in few cases like Complainant No. 2 Mr. Gurumurthy Thiagarajan & Anita Rao, the Agreement were signed on dated 23.03.2012 and the possession handed over on dated 04.08.2018. This clearly shows the inordinate delay on the part of the Opposite Party even in signing of the Agreement.
- on the part of the Opposite Parties in completing the construction. It is a fact that all the Complainants had signed the Agreement between the years 2012-2016. Also, all the Complainants have paid substantial amount of total consideration of their respective flats. As per the Agreement clause 11.1, the



date of completion of the flat should have been within appx. 22 months from the date of construction. Taking into account the 6 months grace period, the total period for completion of the unit should have been 28 months but even beyond this extended period, the Opposite Parties failed to construct the project and has not obtained Occupancy Certificate till date.

As per the Agreement of Complainant No. 2 Gurumurthy Thiagarajan & 20. Anita Rao dated 29.09.2012, the Complainant was to get possession of the Flat within 28 months (including grace period of six months) i.e. on 29.01.2015. The Opposite Party has applied for the Occupancy Certificate vide letter dated 15.05.2017 but has not obtained Occupancy Certificate till date which clearly means that the Construction is not complete in all respect. In the written version of the Opposite Parties, it is clearly admitted that the "OPs reasonably and realistically expect to complete the project by October 2021." They have admitted that certain amenities are not provided/completed including lifts in most towers. The Complainants have paid substantial amount. There has been a delay in giving legal possession of about 6 years and the Opposite Parties have not given any reasonable justification for the delay. Therefore, we are of the considered view that the Complainants are entitled to get fair delay compensation. Further, not obtaining Occupancy Certificate till date is a serious deficiency of service:



21. It would be worthwhile to quote a few landmark judgments of the Hon'ble Supreme Court in the matters relating to unreasonable delay on the part of the builder in giving possession to the buyers/allottees. Attention is drawn to the judgment of the Hon'ble Supreme Court in *Wg. Cdr. Arifur Rahman Khan v. DLF Southern Homes Pvt. Ltd., (2020) 16 SCC 512 decided on 24.08.2020* is relevant. The Hon'ble Supreme Court has observed as hereunder:

"A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. The expression service " in Section 2 (1) (o) means a service of any description which is made available to potential users including the provision of facilities in connection with (among other things) Under Section 14(1)(e), housing construction. jurisdiction of the consumer forum extends to directing the opposite party inter alia to remove the deficiency in the service in question. Intrinsic to the jurisdiction which has been conferred to direct the removal of a deficiency in service is the provision of compensation as a measure of restitution to a flat buyer for the delay which has been occasioned by the developer beyond the period within which possession was to be handed over to the purchaser. Flat purchasers suffer agony and harassment, as a result of the default of the developer. Flat purchasers make legitimate assessments in regard to the future course of their lives based on the flat which has been purchased being available for use and occupation. These legitimate expectations are belied when the



developer as in the present case is guilty of a delay of years in the fulfilment of a contractual obligation.

For the above reasons, we have come to the conclusion that the dismissal of the complaint by the NCDRC was erroneous. The flat buyers are entitled to compensation for delayed handing over of possession and for the failure of the developer to fulfil the representations made to flat buyers in regard to the provision of amenities......"

In another case of <u>Amitava Shankar Guha v. Emaar MGF Land</u>

<u>Ltd., 2019 SCC</u> Online NCDRC 429 decided on 23.04.2019, this

Commission has observed that:

"In terms of Section 14(1)(e) of the Consumer Protection Act, if this Commission is satisfied that any of the allegations contained in the complaint about the services of the opposite party are proved it is required to issue an order to the opposite party directing it to remove the deficiencies in the services in question. In terms of Section 14 (1)(d) of the Act this Commission is also required to pass an order directing the opposite party to pay compensation to the complainants for any loss or injury suffered by them due to the negligence of the opposite party. If the builder, whose services are engaged by a buyer for construction of a residential house for him fails to complete the construction and deliver its possession on or before the date committed by him for the purpose, such an act on the part of the builder would be an act of negligence, causing loss or injury to the flat buyer. The term 'negligence' has not been defined in the Consumer Protection Act but as per its dictionary meaning, it is the failure to give enough care or attention especially when such an act has serious results for another person (Oxford Advanced Learner's



Dictionary, New 8th Edition). As per Black's Law Dictionary IX Edition, negligence includes the failure to exercise the standard of care that a reasonably prudent person would have exercised in a In the absence of force-majeure circumstances, a similar situation. prudent builder in place of the opposite party would have been in a position to construct the flats and offer their possession to the complainants on or before the date committed for this purpose or at best within the grace period available under the BBA. By not delivering on the commitment made by it with respect to the delivery of the possession of the flats booked by the complainants, the opposite party certainly committed an act of negligence and since the said act of negligence has resulted in loss or injury to the complainants who have been deprived f the user of the flats booked by them, compensation in terms of Seciton14(1)(d) of the Consumer Protection Act can be awarded to the complainants, against the opposite party.

- On the issue of what would constitute a reasonable rate of interest in the present times, attention is drawn to the Order of Hon'ble Supreme Court in the case of <u>Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Anr. in Civil Appeal No. 5785 of 2019</u>, decided on 11.01.2021 while dealing with the question of awarding compensation for delay in handing over the possession has held as under:-
  - "(i) We are of the view that allottees at Serial Nos.1 and 2 in Chart A are obligated to take possession of the apartments, since the construction was completed, and possession offered on 28.6.2019, after the issuance of Occupation



Certificate on 31.5.2019. The Developer is however obligated to pay delay compensation for the period of delay which has occurred from 27.11.2018 till the date of offer of possession was made to the allottees."

In its Order, it further held that'-

"We have considered the rival submissions made by both the parties. The Delay Compensation specified in the Apartment Buyer's Agreement of Rs. 7.5 per sq. ft. which translates to 0.9% to 1% p.a. on the amount deposited by the Apartment Buyer cannot be accepted as being adequate compensation for the delay in the construction of the project. At the same time, we cannot accept the claim of the Apartment Buyers for payment of compound interest @ 20% p.a., which has no nexus with the commercial realities of the prevailing market. We have also taken into consideration that in Subodh Pawar v. IREO Grace, this Court recorded the statement of the Counsel for the Developer that the amount would be refunded with Interest @ 10% p.a. A similar order was passed in the case of IREO v. Surendra Arora. However, the Order in these cases were passed prior to the out-break of the pandemic. We are cognizant of the prevailing market conditions as a result of Covid-19 Pandemic, which have greatly impacted the construction industry. 53 In these circumstances, it is necessary to balance the competing interest of both parties. We think it would be in the interests of justice and fair play that the amount deposited by the Apartment Buyers is refunded with Interest @ 9% S.I. per annum from 27.11.2018 till the date of payment of the entire amount."



On the issue of importance of obtaining Occupancy Certificate which the Opposite Parties have not obtained till date. Attention is drawn to the recent Order of Hon'ble Supreme Court in Samruddhi Co-Operative Housing Society Ltd. Vs. Mumbai Mahalaxmi Construction Pvt. Ltd. in Civil Appeal 4000 of 2019, decided on 11<sup>th</sup> of January, 2022, wherein, it was held as under:-

"In the present case, the respondent was responsible for transferring the title to the flats to the society along with the occupancy certificate. The failure of the respondent to obtain the occupation certificate is a deficiency in service for which the respondent is liable. Thus, the members of the appellant society are well within their rights as 'consumers' to pray for compensation as a recompense for the consequent liability (such as payment of higher taxes and water charges by the owners) arising from the lack of an occupancy certificate".

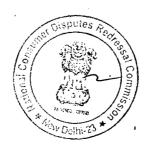
- 25. As per the principle laid down by the Hon'ble Supreme Court, a delay compensation of 9% is reasonable and justified in case of unreasonable delay.
- 26. Regarding the issue of maintenance charges, it is fact that, the Complainants have taken physical possession of their respective units. It would be logical that, there would be expense on the maintenance of certain common



services. It is also a fact that, the Occupancy Certificate has not been obtained yet. It means that the project is not yet fully complete and that not all services promised are being provided. As per the Order of this Commission in *Kamal Kishore & Anr. Versus M/s. Supertech Limited (Supra)*, No maintenance charge should be levied before obtaining the Occupancy Certificate. In this case, even of some of the allottees including the Complainants, have taken possession of their respective Units, it would be considered as paper possession only. So, the question of charging maintenance charge is in our considered view not proper and therefore should not have been collected and should not be collected till receipt of the Occupancy Certificate. The Complainants will be liable to pay maintenance charge only after the Occupancy Certificate is received.

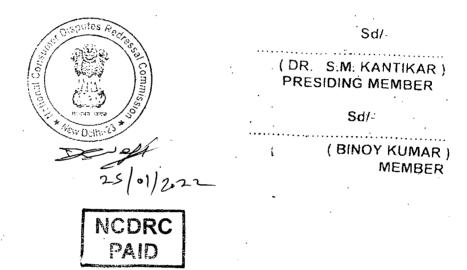
- 27. In view of the discussion above, the Consumer Complaint is partly allowed.

  The Opposite Parties are directed to:
  - (1) Complete the construction of the flats allotted to the Complainants in all respects, duly obtaining the requisite Occupancy certificate at its own cost and responsibility and offer and give legal possession of the respective Flats to the Complainants within 3 months of the receipt of this Order.
  - (2) Pay delay Compensation to the Complainants @ 9 % per annum from proposed date of possession, which would include grace period as per their respective agreement on the amount deposited, till obtaining Occupancy Certificate within a period



of six weeks. In case of delay beyond this period, the delay compensation will be @ 12% per annum.

(3) Not to collect any maintenance charge till the receipt of Occupancy Certificate. The advance maintenance charge as given in clause 14.5 of the Construction Agreement and any other maintenance charges so far collected should be adjusted towards the maintenance charge to be paid by the Complainants post receipt of Occupancy Certificate.



Ak/