

**COMPETITION COMMISSION OF INDIA**

Dated 8/5/2012

**In re. Case No. 04/2012**

**Filed by:** Poonam Gupta

**Against:** Unitech Limited

**With**

**re. Case No. 05/2012**

**Filed by:** Rohit Gupta

**Against:** Unitech Limited

**Order under section 26(1) of the Competition Act, 2002**

**As Per R. Prasad (Dissenting)**

The above informants have booked their properties with M/s Unitech Limited (opposite party) at Greater Noida (U.P). The main grievance of the informants is that the opposite party failed to fulfill its obligation by not handing over the possession as promised in time and therefore, violated section 4 of the Competition Act, 2002 (the Act) by abusing its dominant position. Since both the information filed against the opposite party involve common facts and common issues, both these informations are dealt with together under Regulation 27 of the Competition Commission of India (General) Regulations, 2009.

2. In Case No. 04 of 2012, the informant has alleged that the opposite party was a leading real estate developer which developed a commercial complex known as "UNITECH HABITAT CORNER" on Plot No.9, Sector – Pi-II (Alistonia Estate), Greater Noida, District Gautam Budh Nagar, Uttar Pradesh. In the year 2007, the informant booked a commercial space/unit in the said project by depositing booking amount of Rs.1,45,350/-. Thereafter, the opposite party sent



two letters dated 09<sup>th</sup> May, 2007 and 18<sup>th</sup> May, 2007 to the informant and confirmed booking by allotting her Unit No. 125 on ground floor in the said complex with super area of 323 sq. feet and promised that the possession will be given to the informant by November, 2009.

3. The informant alleged that the opposite party imposed onerous terms and conditions in the agreement while allotting the unit as aforesaid, which according to her were one sided and loaded heavily in favour of the opposite party. The informant stated that, one such condition in the agreement was that, if the informant failed to make payment of installments in time, she was liable to pay 18% interest per annum compounded quarterly and whereas in case of delay in delivery of possession of the allotted unit, the opposite party would pay only an amount of Rs. 8 per sq. feet. This according to the informant was a meager amount and totally one sided. Thus, according to the informant, the opposite party discriminated and exploited the informant by imposing arbitrary terms and conditions in the agreement while booking the aforesaid unit. It was further stated that, the informant initially contemplated canceling the booking but on realizing that the entire booking amount would be forfeited by the opposite party, if she cancelled the booking, she was left with no option but to continue with her booking.
4. It has further been submitted that in the year 2009, the opposite party failed to deliver the possession of the aforesaid unit as promised. Aggrieved thereby, the informant made several representations to the opposite party but of no avail. Subsequently, the opposite party sent a demand letter on 04<sup>th</sup> April, 2009 to the informant asking her to pay the remaining installments. The grievance of the informant is that, in spite of sending various reminders for redressing the concerns raised by her, the opposite party mechanically insisted upon her to pay the remaining installments without addressing her grievances. Finally, the informant served a legal notice to opposite party on 06<sup>th</sup> September, 2011 and asked the opposite party to handover the possession and title by executing and registering the relevant conveyance deeds of the property



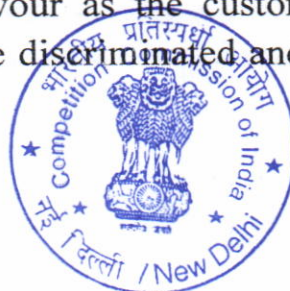
without charging interest for delayed payment and to provide the discount @10% on allotted shop to compensate the loss incurred by her due to drop in market value of the property and to pay compensation @ Rs.120 sq. feet for delay in delivery of possession from November, 2009 till the delivery of possession.

5. The opposite party did not give response to aforesaid legal notice. The informant thus, filed this information before the Commission for appropriate action against the opposite party in accordance with the provisions of the Act. She alleged violation of section 4 of the Act. The informant prayed that investigation be conducted into the activities of the respondent and about abuse of dominant position and also sought other reliefs viz. directing the opposite party to provide discount @ 20% on the allotted unit to compensate the loss and to direct the opposite party to waive the interest for delayed payment of 13<sup>th</sup> and 14<sup>th</sup> installments for the aforesaid unit.
6. In Case No.5 of 2012, the informant had booked a residential unit with the opposite party in the residential project known as 'UNITECH HABITAT' developed on Plot No.9, Sector - Pi-II (Alistonia Estate), Greater Noida, District Gautam Budh Nagar, Uttar Pradesh. As per the information, he paid Rs. 5,00,000/- to book the apartment in the above named project in the year 2006 and consequently, was allotted apartment no. 501, Floor 5, HBTN Tower -7, Unitech Habitat with a super area of 1693 sq. ft *vide* the allotment letter on 12th October 2006. The rest of the grievances of the informant in this case are identical to that of informant in Case No.4 of 2012.
7. The informants have, therefore, alleged that the OP has abused its dominant position on following counts:-
  - (i) It has failed to fulfill its commitment to deliver the said properties in time as promised in the agreements.
  - (ii) The various clauses in the agreements were unfair and



discriminatory as they were loaded in favour of the OP. For example, the rate of interest charged by the OP and the rate of interest paid by it to the Informants and so on.

8. I have carefully considered the above allegations and am of the view that prima facie it is a case of abuse of dominance. I have already held in the case of DLF that when a buyer decides to buy a flat or property he has the choice of going to a large number of builders for this purpose and by and large there is a competition in the market. But when a consumer makes a choice and enters into an agreement with a builder he falls into his trap as there is information asymmetry in this market and also because all the elements of the agreement are neither understood by the consumer nor explained by the builder about its consequences. As a result if a consumer wants to switch over to another builder because of unfair and discriminatory clauses in the agreement, he cannot as he has to pay high switching cost. I have also held that the builders/developers automatically acquire dominance the moment agreement is signed with the consumers.
9. My view was based on the US Supreme Court's decision in the case of Eastman Kodak where a concept of 'aftermarket abuse' was given. According to the US Supreme Court, there were two markets i.e. a primary market where the OP may not be a significant player and the secondary market where the OP becomes a dominant player by virtue of signing agreement with consumers for sale of the property or after sales or service. In the present case also there are two markets. The first market is the market of real estate where Unitech is operating like any other builders/developers. Unitech may or may not be a dominant player in that market which is a subject matter of investigation, but when the Informants entered into agreements with Unitech, Unitech automatically acquired dominance and by acquiring dominance the Unitech was in a position to affects its competitors or consumers or the relevant market in its favour as the customer becomes a 'captured customer' and he could be discriminated and abused at the will of the



builder. Considering these facts, there is material to hold that prima facie there is contravention of the provisions of Section 4(2)(a)(i) & (ii) of the Act.

10. I have also held in the case of DLF that once the abuse of dominance is established and it is also established that the dominance came due to the agreements which the information providers had entered into with the OP, the question which arises is to whether the action of the OP creates an adverse effect on competition in India. In my view, whenever there is an abuse of dominance due to unfair conditions in the agreements, it creates an adverse effect on competition in India. Further in this case, the contracts entered into by the information providers were contracts of adhesion and the agreements entered were between a very big economic player and small time buyers. In fact the agreements were signed in the format given by the OP and the consumers had paid substantial sums of money to the OP. Thus if a buyer wanted to shift to another builder, he would have lost substantial amount of money. In such a case where the number of buyers was limited, a new entrant in the building market would have got no buyer even if the new builder was more innovative or had better products. Thus, the high switching cost would foreclose the market for a new builder. The agreements entered into by the OP and the prospective buyers, therefore, created an adverse effect on competition in India. The agreements therefore contravene Section 3(1) of the Act read with Section 3(2) of the Act.
11. Again in the case of M/s Tulip Infratech Pvt. Ltd. (case no.59 of 2011) the Commission has held vide its Order u/s 26(1) of the Competition Act, dated 15.12.2011 that "certain practices carried on by real estate developers building residential apartment complexes, including such practices as alleged in the information are being commonly carried on by many real estate developers or builders of residential apartment complexes in India. It seems that in particular two broad practices viz., (a) the practice of having a potential buyer sign an agreement which is not the final agreement, however, it locks them and their initial



investment with the builder without having been presented the complete terms and conditions of sale of apartment in a fair and transparent manner; and (b) the practice of making changes to the terms and conditions, facilities, structure of apartment/project after the customers are locked in, are being carried on by most of such real estate developers and builders of residential apartment complexes in India. Allegations of misrepresentation and consequential actions may relate to breach of contract in individual cases, however, the manner in which such practices are carried on across the board, is indicative of absence of independent actions of the developers. Hence it is necessary to consider whether such practices would be subscribed to/ carried on by the real estate developers or builders of residential apartment complexes, if they were in fact operating in a competitive manner. On a preliminary consideration, it appears difficult that such practices could be present across the board and be carried on commonly by the real estate developers in a competitive market. Prima facie it also appears that these practices carried on by the real estate developers or builders of residential apartment complexes are indirectly determining the sale prices in the market of the services relating to real estate providing by them and also potentially limits the provision of such services. Thus, in view of the above and on a careful perusal of the informations/ complaints, the various practices adopted by the builders as assailed in the informations/ complaints prima facie appear to be anti-competitive.

12. Thus, I am of the opinion that there exists a prima facie case to direct the Director General (DG) to cause an investigation to be made into the matter.
13. Secretary is directed to inform all concerned accordingly.



Sd/-  
Member (R)