

## COMPETITION COMMISSION OF INDIA

[Case No. 15/2012]

Date: 04.07.2012

Owners and Occupants Welfare Association

..... Informant (IP)

(1) M/s DLF Commercial Developers Ltd.

(2) Delhi Development Authority

(3) M/s DLF Services Ltd.

....Opposite Parties

### Order under Section 26(1) of the Competition Act, 2002

#### As per R.Prasad (Dissenting)

- 1) The informant in this case is an association (herein after 'IP') of retail and commercial space allottees of the DLF towers Jasola constructed by M/s DLF Commercial Developers Ltd hereinafter known as OP1. The association is registered as a society under the Societies of Registration Act, 1860. The informant has levelled various allegations against the OP1 for abusing its dominance.

The facts of the case are as under:-

- (i) The OP1 had constructed commercial towers in District Centre, Jasola, New Delhi during the year 2005-06. One of the members of the I P signed buyer agreement in 2007 for purchase of commercial space in commercial towers of OP1. According to IP, the location of the building was so attractive that it attracted large number of visitors not only from Delhi but also from neighbouring areas. The towers being constructed by the DLF catered to the corporate, high-end professionals and other similarly placed clientele and thus, according to the Informant, it constituted a separate class.
- (ii) The informant, thereafter, has discussed the relevant product market and relevant geographic market in this particular case and has delineated relevant product market as "services provided by the developers for providing high end apartments for the customers" and relevant



geographic market as territory of south west Delhi more particularly Jasola District Centre. Informant has given several reasons for why Jasola was preferred as the favourite location by the corporate houses.

- (iii) After defining the relevant market, the Informant has tried to establish the dominance of the OP1 in that relevant market by giving several reasons for that. According to the IP, out of the total 27 acre land auctioned by the DDA in Jasola for development, the OP was allotted 3.18 acre of land which is single largest land holding by any company in that area. The IP also claimed that because of its size and resources, the OP1 commands a dominant position in the relevant market in comparison to its competitors.
- (iv) The informant, thereafter, has alleged abuse of dominant position by OP1 on several counts such as that OP1 was able to abuse its dominance due to extremely harsh, onerous and one sided terms and conditions of the buyer's agreement. Due to these terms and conditions OP1 has been taking undue and unfair advantage. Some of the terms of the agreement which are alleged to be abusive according to the IP are given below: –
- Clause 1.5 of the Buyers agreement does not contain the proportionate liability clause to fasten commensurate penalty on OP1 for breach of its obligation.
  - As per clause 23 of the agreement, though undivided common land underneath the building belongs to allottees, but still OP1 can raise finance/loan from any financial Institutional by way of mortgage/charge/securitization etc.
  - In terms of clause 13.3 of the agreement, OP1 has unilaterally reserved the right to cancel the agreement in the event that the intending allottees fail to execute the conveyance Deed and/or Deed of Apartment within a period of 60 days from the date of intimation of receipt of certificate of use and occupation of the building.
  - According to clause 3.5 read with clause 11.9 which deal with the corresponding remedy for the default of failure to deliver possession stipulates that if OP1 is unable to give possession within 36 months the agreement would render the DLF to refund the amount with simple interest @9% whereas if the agreement is terminated by the DLF then it would be liable to pay compensation



@ 25 per square feet for per month delay which works out to 1.87% per annum.

- Through Clause 10.2 of the agreement, the OP1 tried to escape its liabilities by providing various contingencies to the prejudice and detriment of the allottees.

(v) According to Informant, the OP1 had to initiate the proceedings for conversion of leasehold land to free hold land to lease hold land once consideration is received from all allottees. However, later OP1 changed its stand from receipt of full consideration to payment of respective pro-rata charges.

(vi) The issue to be decided is whether an investigation under section 26(1) of the Competition Act, 2002 can be directed. On nearly similar facts in the case of DLF (19/2012) an investigation by DG was directed. There is no reason for the commission to take a different stand. The majority view in this case is that it is not a fit case for investigation.

2. I have carefully considered the allegations made by the Informant as well as the terms and conditions of the agreement. Before considering abuse of dominance, the first condition is to identify the relevant market. Relevant market under section 4 is different from the Market under section 3 of the Act. Market is a wider term where large number of goods and services are transacted whereas relevant market is the market which has to be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Relevant product market means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of the characteristics of the products or services, their prices and intended use. The present case is the case of providing services to the customers (commercial space owners) and therefore the provisions of section 2(u) of the Act will apply in this case. The service starts right from the moment the buyer pays the booking amount till the expiry of the buyers' agreement. When a customer proposes to exercise its choice for purchasing a property, he goes to the market of builders/developers where he has got a variety of choices available with him. But once he makes a choice and decides a particular developer/builder he pays the



earnest money or advance for the purchase of that property. This money is quite substantial money and is not a paltry sum. The situation gets worsens when the customer signs the agreement with the builders/developers because till then it already pays a substantial amount of money to them. Now, the question is that once the customer exercises its choice and pays a hefty sum to the builder/developer can that choice be substitutable or interchangeable? The answer is big "No". That is why the US Supreme court in Kodak case has coined a terminology of "captive consumer". In the case of builder/developer the consumer becomes a captive consumer and cannot even think of substituting or interchanging the products or services because of high switching cost (by forfeiting earnest/advance money or even giving penalty). This is nothing but denial of market access to the customers by builders/developers who have indulged into similar kind of practices. This is a clear cut case of contravention of the provisions as defined under section 4 (2) (c) of the Competition Act.

3. As far as relevant geographic market is concerned, Section 2(s) says "the relevant market means a market comprising the area in which the conditions of competition for provision of services or the services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas." Further, section 19 (6) of the Act prescribes the factors for determining the "relevant geographical market." There are several factors given in this section and even one factor is sufficient to define a relevant geographical market. However, I will consider four factors, e.g., local specification requirements; transportation costs; consumer preferences and need for secure or regular or rapid after- sales services in order to define the geographical market in the present case. If we take local specification requirements as one of the factors, we find that a customer decides a place/location of the property before making a decision on the basis of several reasons such as affordability, the return on investment, the proximity, the environment, the connectivity and so on. So if the customer decides to go for Jasola and not for NOIDA or Gurgaon or any other places, he must have considered these factors before exercising his choice and that is why the area of Jasola which is in South Delhi becomes homogeneously distinct and easily distinguishable from other locations in and around Delhi. The next one is 'transportation costs'. Anybody can understand why Jasola is more preferable to NOIDA or Gurgaon or even North or West Delhi. Third one is consumer preferences. As I have explained above that if consumer



decides to go for a property be it residential or commercial, he keeps in his mind, the size of his pocket, the utility value of the property, its accessibility, viability etc., and this preference makes the goods or services distinctly homogeneous and it can be easily distinguished from the conditions prevailing in the neighbouring areas. Lastly, a consumer will always prefer to go for a builder who can give secure or regular or rapid after- sales services. Now coming to the present case, since there are number of builders/developers available in Jasola, the IP had a choice to go for any one. Some of the properties may be even cheaper than DLF but even then customer is going for DLF by paying more money. Then question is what forced the IP to opt for DLF and not others. The answer is simple. It is because that DLF was a known brand; it was expected to deliver a better product, better services both during and after sales and that too in time because of its financial strength, size and resources and its credibility. All these things make DLF a distinct builder/developer in comparison to other competitors. Thus, in my view Jasola itself can be delineated as relevant geographical market in the present case.

4. Thus, the relevant market in this case, would be "Provision of services for the development and sale of commercial space in Jasola area of Delhi." As I have already explained above that the entire Delhi or NCR cannot be treated as relevant market because the characteristics of the products or services, their prices and the intended use are not substitutable or interchangeable by the consumer not only in Jasola but anywhere else. Similarly, the areas in which the services are being provided are distinctly homogeneous and easily distinguishable from the conditions prevailing in the neighbouring areas. Homogeneity means uniformity of composition. The factors set out in section 19 (6) such as local specification requirements, transport costs and customer preference that would, where they are different, negate homogeneity in conditions of competition.
5. After defining the relevant market, the next issue is to establish whether DLF is a dominant player in that relevant market? As per explanations to Section 4 "dominant position" means a position of strength, enjoyed by an enterprises, in the relevant market, in India, which enables it to
  - (i) Operate independently of competitive forces prevailing in the relevant market; or



- (ii) Affect its competitor or consumers or the relevant market in its favour.

This dominance also has to be seen with reference to the factors mentioned in Section 19(4) of the Act. OP1 has acquired its dominant position for the provision of services to the consumer after the consumer booked the commercial space with it. Consumers are totally dependent on service provider. Also, due to the various obligations cast upon the builder/developer under relevant Acts, rules and regulations of concerned regulatory bodies, OP1 has automatically acquired dominance in comparison to its competitors. After the consumer booked the commercial space with OP1 and signed the agreement, OP1 has been able to affect its consumers in the relevant market in its favour. Since there is huge switching cost due to which the consumer cannot switch over to other competitors, the only player left in the market is OP1 itself and as a result the consumer not only become dependent on it but also become a captive consumer. The dominance of DLF is also established on the ground that it has acquired 3.18 acre of land out of the total 27 acre of land auctioned by the DDA in Jasola for development, which is single largest land holding by any company in that area. Thus, because of its size and resources, the OP1 commands a dominant position in the relevant market in comparison to its competitors.

6. Once the dominance of DLF is established in the relevant market, it has to be seen whether that dominance has been abused by the Ops. It has been alleged by the IP that extremely harsh, onerous and one sided terms and conditions were put into the buyer's agreement. Due to these terms and conditions OP1 has been taking undue and unfair advantage. Some of these terms and conditions of the agreement are given below: –

- Clause 1.5 of the Buyers agreement does not contain the proportionate liability clause to fasten commensurate penalty on OP1 for breach of its obligation.
- As per clause 23 of the agreement, though undivided common land underneath the building belongs to allottees, but still OP1 can raise finance/loan from any financial Institutional by way of mortgage/charge/securitization etc.
- In terms of clause 13.3 of the agreement, OP1 has unilaterally reserved the right to cancel the agreement in the event that the intending allottees fail to execute the conveyance Deed and/or Deed of Apartment within a period of 60



days from the date of intimation of receipt of certificate of use and occupation of the building.

- According to clause 3.5 read with clause 11.9 which deal with the corresponding remedy for the default of failure to deliver possession stipulates that if OP1 is unable to give possession within 36 months the agreement would render the DLF to refund the amount with simple interest @9% whereas if the agreement is terminated by the DLF then it would be liable to pay compensation @ 25 per square feet for per month delay which works out to 1.87% per annum.
- Through Clause 10.2 of the agreement, the OP1 tried to escape its liabilities by providing various contingencies to the prejudice and detriment of the allottees.
- The OP1 had to initiate the proceedings for conversion of leasehold land to free hold land once the consideration is received from all allottees. However, OP1 has changed its stand subsequently and insisted on payment of respective pro-rata charges.

All these conditions mentioned above are unfair and discriminatory as per the provisions of section 4 (2) (a) (i) & (ii) of the C. Act.

7. I would also like to highlight that in the Case No. 19/2010, DLF was found dominant and was penalized for nearly similar practices. So, if one entity has already been found dominant in one case and penalized for its abuse of dominance then how in another case it can be treated differently?
8. From the above discussion, I am of the opinion that there exists a prima facie case and the DG shall be directed to cause an investigation into the matter as the IP is totally at the mercy of the OP-1 and OP-3 and being fleeced by them by putting several unfair and discriminatory conditions and price in violation to the provisions of section 4 (2) (a) (i), (ii) and 4(c) of the Competition Act.
9. Secretary is directed to inform all concerned accordingly.

Certified True Copy



P. GAHLAUT  
ASSISTANT DIRECTOR  
Competition Commission of India  
New Delhi

*sel*  
(R.Prasad)  
Member