



COMPETITION COMMISSION OF INDIA

Case Nos. 21, 22 & 23 of 2014

In Re:

Smt. Konika Mukherjee & Anr. (Case No. 21 of 2014)

Smt. Priti Kashyap & Anr. (Case No. 22 of 2014)

Smt. Saroj Sharma & Anr. (Case No. 23 of 2014)

....Informants

And

Himalaya Realestate Pvt. Ltd. & Anr.

....Opposite Party

7365, Prem Nagar, (Shakti Nagar), Delhi – 110007

CORAM

Mr. Ashok Chawla

Chairperson

Mr. Anurag Goel

Member

Mr. S.L.Bunker

Member

Mr. Sudhir Mittal

Member

Mr. Augustine Peter

(Member)

Present: Shri J.M. Kalia, Aadil Ali and Eti Sinha (Advocates of the informants)

Order under Section 26(2) of the Competition Act, 2002

The present information(s) relate to same allegations against the OP filed by 3 different set of informants u/s 19(1) (a) of the Act. Briefly, the case pertains to alleged abuse of dominant position under section 4 of the Act by



OP with respect to its residential project in Greater Noida, UP. Since the matters pertain to same allegations, they are hereby clubbed and disposed off through a common order.

2. Briefly, OP, a real estate company incorporated under the Companies Act, floated a brochures for offering booking of flats in its residential project namely Himalaya Pride in Greater Noida West, UP ('the Project'), comprising of 2/3 bedroom apartments. Through the brochure circulated by OP, flats of four different super areas in Tower A & B were offered in the said Project. Relying on the representations made by OP in its various advertisements, the informants booked a flat each in OP's Project by opting construction linked plan ('CLP') on 28.09.2012 through an application cum registration form.
3. The informants submitted that at the time of booking, it was represented that there would be 14 floors in each tower 'A' & 'B' and accordingly a CLP was designed to ensure payment by informants spread evenly throughout the construction of the towers. It was also mentioned in the brochure (application cum registration form) that 18% interest would be charged on delayed payment on part of the allottees. However, it was submitted, that subsequently the informants received another application-cum-registration form dated 04.03.2013 from the OP containing detailed terms and conditions which were inconsistent with the earlier application cum registration form dated 28.09.2012.
4. It was also contended that a fresh price-list and brochure pertaining to the same project was released by OP whereby not only the price was hiked but also the floors in the tower 'A' & 'B' were increased from the earlier 14 floors to 19 floors. However, the CLP remained the same meaning thereby that though the Informants would pay the entire amount up to the construction of 14 floors; the OP will continue to construct the towers even thereafter up to 19 floors. The informant is primarily aggrieved by change in the terms of allotment through application cum registration form dated 04.03.2013,



whereby the number of floors was increased from 14 to 19, the interest rate payable by the informant for delay in payment was increased from 18% to 24% per annum, the floors originally allotted to informants were changed, the floor plan was unilaterally changed etc. As per the informants, they adhered to the schedule and paid almost 50% of the total cost of the flat at the time of filing of the information.

5. Based on these allegations, the Informants prayed the Commission to direct an enquiry against OP for alleged abuse of dominant position under section 4(2)(a)(i) for imposition of unfair and arbitrary clauses of the application-cum registration form dated 04.03.2013.
6. The Commission has perused the material placed on record and heard the counsel of the informant at length. It was urged by the counsel of the informant that the interpretation given to the word 'dominance' by the Commission in earlier orders has not been in accordance with the law. While dealing with the definition of the term 'Dominance' as provided under explanation to section 4 of the Act, the counsel advocated that whenever an enterprise indulges in an exploitative conduct and is affecting its customers, it amounts to an abuse of dominant position. It was further contended that in cases where an agreement has already been entered into between a customer and provider of goods/services (real estate developer in this case), the latter becomes dominant by virtue of the locked in position of the former. The counsel of the informant cited the supplementary order in Case No. 19/2010 (Belaire Owners' Association vs DLF Limited, HUDA & Ors.) to support this contention. It was argued every consumer has to be taken independently to test the position of the enterprise in the market. In such cases section 19(4) of the Act is irrelevant as the exploitative (abusive) conduct has to be seen *qua* a consumer.
7. The Commission has considered the arguments made by the counsel of the informant. The informant is primarily aggrieved by abuse of dominant



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position by the OPs. The allegation pertaining to abuse of dominant position covered under section 4 of the Act requires determination of relevant market. Although the informants have alleged abuse of dominant position by OPs, relevant market has not been proposed. It is apparent that the informants were interested in buying an apartment in Gurgaon and for this reason they approached the OP to book an apartment each in OP's project. Therefore, the relevant product market in the present case appears to be market for *'development and sale of residential apartments'*.

8. With regard to the relevant geographic market, it may be noted that the conditions of competition in Noida and Greater Noida seem homogeneous. The consumer can substitute between these geographic areas owing to their close proximity, which however may not be feasible with regard to areas outside Noida and Greater Noida. Therefore, the relevant geographic market in the present case would be 'Noida and Greater Noida'. Consequently, the relevant market in the present case would be the market for *"development and sale of residential apartments in Noida and Greater Noida."*
9. The Informants alleged that OP abused its dominant position by replacing the original application-cum registration form dated 28.09.2012 by the new application-cum registration form dated 04.03.2013 which contained unfair and onerous terms and conditions. Since the case under section 4 of the Act depends primarily on the position of the OP i.e. whether the OP held a dominant position or not, the relevant market needs to be analysed to assess OP's dominance/position. The contention of the informant's counsel with regard to assessment of dominance of an enterprise in case of exploitative abuses seems misconceived. The factors stated under section 19(4) of the Act needs to be considered while assessing dominance of an enterprise. Such an analysis cannot be avoided as contended by the informant's counsel. The dominance of an enterprise is always seen with regard to the state of competition in its own relevant market and not with regard to the individual consumer it is dealing. As per OP's own website, it had only one residential



project in the relevant market. The informants did not submit any information on the presence of other players in the relevant market in which OP was operating. However, as per the information available in public domain, there are many other real estate developers such as Supertech, Amrapali Group, K.V. Developers, Nirala Group, Earth Infrastructure Group etc. which are operating in the relevant market. Further the size and resources of OP does not seem to be much in comparison to these other players in the relevant market. Also there seems to be no entry barriers or any dependence of buyers on OP for any reason whatsoever. Therefore, *prima facie*, it does not appear that OP held a dominant position in the relevant market.

10. Since OP, *prima facie*, does not appear to be in a dominant position in the relevant market, there seems to be no question of abuse of its dominant position within the meaning of the provisions of Section 4 of the Act.
11. For the reasons stated above, the case deserves to be closed down under section 26(2) of the Act. The Secretary is directed to send a copy of the order to all concerned.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Anurag Goel)
Member

Sd/-
(S.L. Bunker)
Member

Sd/-
(Sudhir Mittal)
Member

Sd/-
(Augustine Peter)
Member

New Delhi
Dated: 02/07/2014