

COMPETITION COMMISSION OF INDIA

Case No. 28/2012

4th October, 2012

Shivang Agarwal & Anr.

Informants

Vs.

Supertech Ltd. Noida

.....Opposite Party

ORDER UNDER SECTION 26(1) OF THE COMPETITION ACT, 2002

As per R. Prasad (Dissenting)

1. The present information was filed under section 19(1) of the Competition Act, 2002 ('the Act') by Shivang Agarwal and Shubham Agarwal (together referred to as 'the informants') against Supertech Ltd., Noida (opposite party). The informants submit that they booked one flat each measuring 930 sq. ft. @Rs. 2890/- per sq. ft., in Supertech Cape Town project in Sector 74, Noida on payment on Rs. 51,000/- through cheques dated 22.11.2010, respectively. The informants were allotted flat No. RO26CV21604 and RO26CV21605 respectively.
2. The informants further submitted that they were informed that no preferential location charges would be levied on flats on the 12th floor and above. The informants accordingly opted for the same. The informants had booked the flats on the 16th floor of the project. The opposite party raised demand letters on various dates for payment which included preferential location charges @ Rs. 50/- per sq.ft. in case of flat no. RO26CV21605, contrary to the stipulated terms and



conditions and canceled their bookings vide separate letter dated 20.10.2011 for non-payment.

3. The informants further submit that the demand letter sent by the opposite party was for Rs. 14,13,747/- for flat no. RO26CV21604 which is 50% of the total sale price (Rs. 14,00,947/- after deducting the amount already paid). According to the informants, cost of the flat comes to Rs. 28,27,494/- and the price per sq.ft. would be Rs. 3040/- on the basis of the demand raised. Similarly, the demand letter for flat no. RO26CV21605 was sent for an amount of Rs. 13,67,249/- (Rs. 13,53,252/- after deducting the amount already paid) which is also 50% of the total sale price. The rate per sq.ft. of the flat comes out to Rs. 2940/- whereas the agreed rate was Rs. 2890/- per sq. ft in case of both the flats. Therefore, the opposite party is arbitrarily deciding the price and raising demand contrary to the agreed terms.
4. The informants further submitted that they wrote letters and brought the discrepancies to the notice of the opposite party on various dates. However, the opposite party instead of correcting the error went to raise fresh demand letters without incorporating the necessary changes. The informants allege *inter alia* contravention of section 4 of the Act by the opposite party for the charging PLC when the terms clearly provide the reverse, charging whimsical price and arbitrarily canceling the booking of the informants.
5. The informants submitted additional information to substantiate their allegation of discrimination and unfair pricing policy of the opposite party. The informants submitted some more documents to support their case of discriminatory practices adopted by OP. The informant gave the instance of one Abhishek Agarwal who booked a flat in the same project and was not charged any PLC even though his flat was on the 8th Floor. The instance of one Veerbala Gupta and Madhuleema Gupta was also been cited who had been charged Rs. 2800/- per sq.ft. (on 17.02.2011) and Rs. 2825/- per sq.ft. (on 05.01.2011) respectively, whereas the



informants were charged Rs. 2890/- per sq.ft. eventhough they booked flats much before them.

6. The grievance of the informants apparently shows infringement of contractual terms ad idem. The informants allege contravention of section 4 of the Act without explaining whether the opposite party holds a dominant position in the relevant market. The informants were called on 10.07.2012 by the Commission to present his case. The informants submitted that the opposite party has conducted in an unbecoming manner and discriminated against them. It seems that the opposite party cancelled the booking for non-payment of the installments, whereas according to the informant, the opposite party did not correct the demand letter (excluding PLC charges), and brought the informant before the Commission.
7. 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.
8. 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 Taneja Developers and Infrastructure Ltd. (TDI) is operating like any other builders/developers. TDI 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 TDI, TDI automatically acquired dominance and by acquiring dominance the TDI 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.

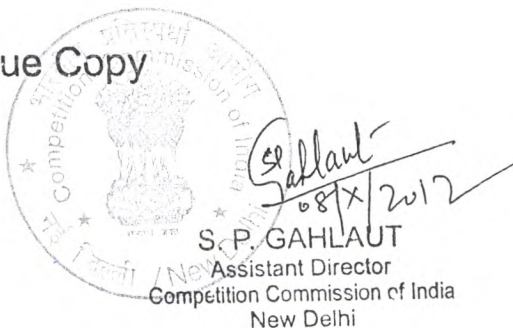
9. I have also held in the case of DLF that once the abuse of dominance is established and it is also established that the dominance came due to the agreements which the information providers had entered into with the OP, the question which arises is to whether the action of the OP creates an adverse 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.
10. 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.

11. 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.
12. Secretary is directed to inform all concerned accordingly.

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(R. Prasad)