

**COMPETITION COMMISSION OF INDIA**

**[Case No. 29/2012]**

Date: 27.11.2012

DGCOM Buyers & Owners Association, Chennai    **Informant (IP)**

Vs.

(1) M/s DLF Ltd.	OP1
(2) M/s DLF Southern Homes Pvt. Ltd., Chennai	OP2

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

**As per R.Prasad (Minority)**

1) The informant in this case is an association of buyers and flat owners in a housing project of Op2. This housing project is situated at Old Mahabalipuram Road, IT Express Corridor, Chennai. The contention of the informant is that OP2 was a group company of OP1 and OP1 was having 51% share in OP2 and OP2 had entered housing market on OMR IT Corridor in December, 2007 / January, 2008 in the segment of 2/3 BHK with a basic price of Rs. 2800 per sq.ft. as against prevalent market rate of Rs. 3000-3300 per sq.ft. The project launched by OP2 was the first biggest project in the entire Chennai city as it offered approx. 3500 units in 42 towers of 19 floors each. It was proposed to be a gated township with an area of 58 acres.

2) It is alleged that after nearly 18 months booking of the flats, when the allottees had already paid crores of rupees, OP2 asked the allottees to sign an agreement which contained highly abusive clauses. The abusive sweep of agreement was so deeply entrenched that the buyers could not whisper a word proposing changes in the agreement and were forced to sign on the dotted lines or to lose hefty amount. OP2 rejected the representations against this one sided agreement and throttled the voice of the buyers by arrogating to itself unbridled discretion to change the lay out plan / building plan without consent of the allottees. Since the helpless allottees were on the receiving end of the abusive docket of OP2, their association has filed this information about abuse of its dominant position by OP2.

3) The informants in this case submitted the information on 25.05.2012 and the informants have alleged that OP1 and OP2 are dominant in the relevant market. It is alleged that informants have suffered abuse of dominance in the market of high end premium flat in Old Mahabalipuram Road, IT Express Corridor, Chennai by OP2. It is also alleged that the buyers agreements signed by the buyers are one sided and favourable to OP2. It is also alleged that OP2 has extracted undue sums of money from flat buyers under various excuses.

4) The informants have alleged that the relevant market is high rise premium apartments on OM Road, IT Express Corridor in Chennai. The relevant geographic market is stated as OMR-IT corridor in Chennai due to its exclusive and distinctive characteristics like pre-dominance of Information Technology and software professionals in the area located on the IT expressway in Chennai.

5) The informants have alleged abuse of dominance as follows:

- OP2 may change the layout of the building at its sole discretion.
- Allottees not permitted to carry out any investigation into title documents of OP2.
- OP2 will retain 10% of the price as earnest money for the entire duration of the apartment. This money will be forfeited if the allottee does not sign the agreement or if the allottees fails to fulfil its obligation as OP2 deems fit.
- Allottees have to immediately pay any additional amount charged by OP2 due to increase in super area decreases, OP2 will only adjust it in the last instalment.
- Common facilities, club houses etc. are sold to the allottees, but they don't get ownership of the said areas.
- OP2 reserved the right to merge the Gardencity project with any other project (thus denying the promised unique environment)
- Allottees may be refunded their payments with interest at 9% in case of alteration in the plan, however, allottees have to pay 18% interest on delayed payments.
- Construction is indicated to complete in 21 months from date of execution of the agreement, there is no obligation on OP2. It may pay a paltry Rs. 5 psf per month for the period of delay (which amounts to 2% per annum).

- OP2 has the sole right to mortgage or dispose of the land of the project, although the allottees have paid to purchase the said land.
- Allottees are liable to pay all taxes in connection with the construction/development of the apartment (thereby shifting taxes payable by OP2 on the allottees).
- For dispute resolution the arbitrator shall be appointed by OP2.
- After booking the apartment in March 2008 for Rs. 4 lakh, OP2 gave a provisional allotment after two months.
- OP2 demanded Rs.3 lakh payment in June 2008 even before the necessary approvals were in place.
- Contrary to the prevailing practice in the amrekt, in February 2009 OP2 refused to sell undivided share in land of the peroperty to the allottees.
- After 18 months of launch of the project and after collecting 35% of the price, OP2 gave the apartment buyers agreement for execution.
- In May 2009, OP2 divided the project into two phases.
- OP2 did not give possession of the apartment after 10 months delay from promised completion date.
- OP2 demanded money in the name of taxes which were actually payable by them and not by allottees.
- OP2 charged service tax from allottees although service tax not payable prior to 01/07/2010.
- In March 2012, OP2 reduced the promised club house area from 192000 sqft to 70000sqft.
- In March 2012, OP2 collected all money from allottee and then made him execute an 'indemnity-cum-undertaking' to absolve itself of all obligations.
- In April 2012, OP2 collected further sum for maintenance security from the allottees, yet have failed to execute the sale deed for the apartment.
- Even the compensation of Rs. 5 psf per month has not been paid to the allottee.

6) On of the facts of this case the issue has to be decided is whether it is a fit case for investigation under Section 26(1) of the Act. One issue is very clear and it is a fact that agreements were entered into by the buyers with OP2. The issue is whether these

agreements are anti-competitive or not. The agreements entered into by the buyers were an agreements entered into between a large economic power house and small buyers. The agreements were agreements of adhesion i.e. buyers have to sign the agreement as given by OP2. The issue to be decided as to whether the facts mentioned in 19(3) of the Act are applicable to the facts of the case. This needs to be examined. There is no creation of barriers to new entrants in the market and the action of OP2 does not lead to the exit of competitors out of the market. But once a buyer has signed the contract with the builder i.e. OP2 then there is a foreclosure of competition as the buyer cannot switch over to any other builder. If he switches over, he will lose his earnest money. Therefore, switching is extremely expensive and works against switching. There is a foreclosure of a competition by hindering the consumer from entering the market again. Moreover by entering into the agreement no benefits arise to the consumers and there is no improvement in the provision of service to the consumer. Therefore clauses (c) and (d) of Section 3 are attracted and therefore Section 3 appear to be contravened in this case.

7) It had now to be decided whether Section 4 of the Act is attracted or not. 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 issue 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 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 worse when the

customer signs the agreement with the builders/developers because till then he had already paid a substantial amount of money to the builders. Now, the question is that once the customer exercises his 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 a 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.

8) 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 Old Mahabalipuram Road or any other place, he must have considered these factors before exercising his choice and that is why the area becomes homogeneously distinct and easily distinguishable from other locations in and around Chennai. The next one is ‘transportation costs’. Anybody can understand why Old Mahabalipuram Road is more preferable to other areas in and around Chennai. 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 Old Mahabalipuram Road, 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 Old Mahabalipuram Road itself can be delineated as relevant geographical market in the present case.

9) Thus, the relevant market in this case, would be “Provision of services for the development and sale of residential flats in Old Mahabalipuram area near Chennai.” As I have already explained above that the entire Chennai 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 Old Mahabalipuram Road 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.

10) 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 the service provider. Also, due to the various obligations cast upon the

builder/developer under relevant Acts, rules and regulations of concerned regulatory bodies, OP2 has automatically acquired dominance in comparison to its competitors. After the consumer booked the space with OP2 and signed the agreement, OP2 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 OP2 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 58 acres of land at Old Mahabalipuram for development, which is single largest land holding by any company in that area. Thus, because of its size and resources, the OP2 commands a dominant position in the relevant market in comparison to its competitors.

- 11) There is another issue which requires discussion. This aspect is that of relevant market. Relevant market has been defined under Section 2(r) of the Act as a market to be determined with reference to relevant product market or relevant geographic market or with reference to both relevant product market or relevant geographic market. In accordance with the definition it is clear that the legislature intended that the relevant market could be defined with reference to the either of the markets i.e. the relevant product market or relevant geographic market. Section 2 (r) is a definition and is substantive law. On the other hand, Section 19 (5) states that while determining relevant market, the Commission shall give due regard to the relevant product market and the relevant geographic market. Section 19 (5) relates to the functioning of the Commission and it is a law of procedure. Section 2 (r) is a substantive law whereas Section 19 (5) is a law of procedure. It is settled proposition when substantive law is different from procedural law, it would be substantive law which would prevail. Normally in majority of the cases, both relevant product market and the relevant geographic market need to be considered. In some cases, only a discussion of either the relevant geographic market or the relevant market may be warranted.
- 12) Another aspect to be seen whether at the prime facie stage or the final orders is the applicability of Section 19(4) of the Act. OP1 is the largest real estate firm in India. Therefore its size and resources are extensive. As a result, its economic power compared

to its competitors is extensive. During the course of construction, the consumers are totally dependent on OP1 and OP2. OP1 and OP2 have acquired dominance the moment books a flat, pays earnest money and signs the agreement. Thus, as far as OP1 and OP2 are concerned, clauses (b), (d), (f) and (g) of Section 19(4) are attracted in this case. Thus, it is not necessary that OP1 and OP2 are dominant only in Old Mahabalipuram Road. The nationwide size and economic strength is sufficient to make it dominant in any area in India. Further if there are abusive clauses in the agreements in Gurgaon, they would be abusive if the same clauses exist in the agreement in Chennai. Therefore even after considered the factors mentioned in Section 19 (4) of the Act, of OP1 and OP2 appear to be dominant.

- 13) There is a feeling that the onus is on the informant to establish anticompetitive behaviour of OP3. The law casts no such duty on the informant. It is on the basis of information that Commission has to form a belief that the OP3 have indulged in anticompetitive behaviour. The Competition presupposes that the Commission would act in public interest by eliminating anticompetitive practices in the market. The law is not for promoting competition in the market only but it exists for promoting competition in the markets for the benefit of the consumers.
- 14) Therefore in my view it is a fit case for directing investigation under Section 26(1) by the DG.
- 15) The Secretary is directed to inform the all concerned accordingly.

sd/-  
(R.Prasad)  
Member