

# **COMPETITION COMMISSION OF INDIA**

**[Case No. 31/2012]**

Date: 03.01.2013

Sanjay Kumar Gupta

.... **Informant (IP)**

Vs.

M/s DLF Ltd. Anr.

.... **Opposite Parties**

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

I do not agree with the majority order for the reasons given below. The facts of the case are not required to be discussed again as they have already been discussed in the majority order.

2. The main reason for closing the case is that there were more than twenty real estate developers in Kolkata which showed that the market was fragmented. It was also found that the opposite party had merely two residential and one SEZ Project in Kolkata. On this basis it was held that the O.P. could not be regarded as a dominant player in Kolkata.

3. I have a different view on the subject. According to the Competition Act dominant position means a position of strength, enjoyed by an enterprise in the relevant market in India which enables it to (i) operate independently of competitive forces prevailing in the relevant market. (ii) affect its competitors or consumers or the relevant market in its favour. The issue in this case is the cancellation of allotment of two flats at Rajarhat, Kolkata. The details are discussed in the majority order. The O.P. was rendering a service to the informant as defined in Section 2(u) of the Act.

4. The informant, thereafter, has alleged abuse of dominant position by OP on several counts in a way that the OP 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 OP was taking undue and unfair advantage.

5. 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.

6. While analysing this case, it has to be held that this is a case of service in accordance with Section 2(u) of the Act. The service starts right from the moment, the buyers, pays the booking amount till the expiry of the period of the maintenance obligations enumerated in the main buyers' agreement as well as in the tri-partite agreement between builders, buyers and nominated maintenance agency. When a consumer proposes to purchase a property he enters into a competitive market where he has a choice of going to any builder. But once he makes a choice and goes to a developer / builder by paying the earnest money for the purchase of a property he becomes a captured consumer because if he switches to any other developer, he loses the earnest money. Thus, there are two markets – the first market is when the consumer wants to purchase the property and the second market is when he has made the choice.

7. 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 worsens when the customer signs the agreement with the builders/developers because till then he has already paid a substantial amount of money to the builder. 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 denial of market access to the customers by builders/developers who have indulged into similar kind of practices. This appears to be a clear 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 Rajarhat, Kolkata and not for any other place, he must have considered these factors before exercising his choice and that is why the area of Rajarhat, Kolkata which is becomes homogeneously distinct and easily distinguishable from other locations in and around Kolkata. The next one is ‘transportation costs’. Anybody can understand why Rajarhat, Kolkata is more preferable. 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 Rajarhat, Kolkata 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 the project in Rajarhat, Kolkata 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 commercial space in the project at Rajarhat, Kolkata." As I have already explained above that the entire Kolkata 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 Rajarhat 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. OP 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, OP has automatically acquired dominance in comparison to its competitors. After the consumer booked the commercial space with OP and signed the agreement, OP 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 OP itself and as a result the consumer not only becomes dependent on it but also becomes a captive consumer. Thus, because of its size and resources, the OP commands a dominant position in the relevant market in comparison to its competitors.

11. Once the dominance of DLF is established in the relevant market, it has to be seen whether that dominance has been abused by the OP. 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 OP has been taking undue and unfair advantage.

12. 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?

13. 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 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.

Sd/-  
(R.Prasad)  
Member