

COMPETITION COMMISSION OF INDIA

Case No. 43/2012

11.10.2012

Filed by: Shri A. K. Jain, Gurgaon, Haryana

Against: The Dwarkadhis Projects Pvt. Ltd., Delhi

Order under Section 26 (1) of Competition Act 2002

As per R.Prasad (Minority)

1. The present information was filed under Section 19(1) (a) of the Competition Act, 2002 (hereinafter referred to as "the Act") by Mr. A. K. Jain (hereinafter referred to as "Informant") against Dwarkadhis Projects (P) Ltd., Delhi (hereinafter referred to as "Opposite Party") alleging abuse of dominant position by the Opposite Party in contravention of section 4 of the Act.
2. As per the information, informant had purchased a dwelling unit in the group housing project namely "Aravali Heights at Sector-24, Dharuhera, District Rewari, Haryana" of OP who promised to complete the construction of the dwelling units within the stipulated time as per the rules of Haryana Government. However, despite expiry of 5 years and 8 months (against promised time of 3 years for completion of the project) and despite having collected 95% of the price without even getting the mandatory occupation/completion certificate from the Director General, Town and Country Planning, Haryana, OP sent a final demand letter dated 27/04/2012 seeking payment of Rs. 3,29,012/- as charges for conducting improvement work before handing over the possession. On 26/06/2012, OP also forwarded 'Buyer's Agreement' containing several unfair, objectionable and one-sided terms, for the signature of the informant.
3. It is alleged by the informant that OP abused its dominant position qua Informant by offering the possession of the unit only if he paid the illegal demand as raised and if he signed the buyer's agreement on the dotted lines as suggested by OP.
4. The Informant pleaded that the relevant market, in this case, was 'provision

of services of real estate in the Revenue Estate of Dharuhera in the State of Haryana' and OP was in a dominant position on the basis of factors like economic power of OP, sole dependence of informant (consumer) on OP and other factors mentioned in section 19(4). The clauses in the buyer's agreement, which were stated to be abusive related to (a) obtaining pre-consent of the allottee in favour of OP to subsequently change the layout/building plan at any time without consent from the allottee; (b) obtaining an unconditional undertaking from the allottee that the title deeds, plans and other documents were in order; (c) acquiring waiver of time-limit of completion of construction of the project and giving possession on account of undisclosed events of force majeure; (d) calculating super area at the sole discretion of OP; (e) acquiring the right to cancel the dwelling unit and sell it to some other party in case the possession was not taken by the allottee even after having paid the full amount; (f) authorizing OP to create all types of mortgages on the land and buildings under the project and; (g) appointment of sole arbitrator at OP's discretion. It was contended that aforesaid clauses were also discriminatory and unfair.

5. In the end, informant prayed that the buyer's agreement and the charges demanded by OP should be declared illegal and OP should be directed not to force him to sign its one-sided buyer's agreement, besides penalizing it for the delay in handing over the possession of the above-said residential unit.
6. 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.

7. 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 Dwarkadish Projects Pvt. Ltd. (OP) is operating like any other builders/developers. OP 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 OP, OP automatically acquired dominance and by acquiring dominance the OP 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.
8. 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.

9. 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.

10. 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.
11. Secretary is directed to inform all concerned accordingly.

S/d-
(R. Prasad)
Member