

COMPETITION COMMISSION OF INDIA

[Case No. 50/2012]

Date: 13.12.2012

Shri Kaushal K. Rana
38, Top Floor, Uday Park, New Delhi

.....Informant

Vs.

DLF Commercial Complexes Ltd.
1-E, Jhandewalan Extension, Naaz Cinema Complex,
New Delhi – 110 055....Opposite Parties

....Opposite Party (OP)

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

As per R.Prasad (Dissenting)

1. The present information has been filed by Shri Kaushal K. Rana ('the informant') under section 19(1)(a) of the Competition Act, 2002 ('the Act') against DLF Commercial Complexes Ltd. ('the OP') alleging *inter-alia* contravention of Section 4 of the Act.
2. The informant herein claimed to be a businessman and Director of M/s Kaushal Infra project Industries (India) Ltd. He being in need of office space at the proposed building of the OP namely DLF Tower, Shivaji Marg, Najafgarh Road, West Delhi, in March, 2008. The opposite party allegedly invited applications for selling off the office space in the said building without seeking the requisite approvals of the competent authorities under the Municipal Act and Building Bye-laws. Several representations and promises were made by the OP through their Commercial Office Space Buyer's Agreement (the 'agreement'), including completion and possession of the complex within 36 months from the date of execution of the agreement. The informant acted on those representations and deposited the amount of Rs. 7,50,000 as booking amount for provisional allotment of the said office space. Thereafter, the opposite party kept asking the instalments from the informant by sending demand notices. However, when the informant went at site of the proposed building in November, 2008, he found no sign of construction as against the promises made by the opposite party.
3. The informant alleged that the agreement entered into between him and the OP was a standard agreement applicable to all dealings made by opposite party for its multiple projects and its clauses were arbitrary, unfair and onerous on the other party. He further

stated that there was no escape from this one-sided agreement except by way of opting for OP's re-trading scheme introduced in 2009. However, the informant was not allowed to avail that scheme as he had paid less than 35% of the total amount of the agreement which was the eligibility condition to exercise the scheme. The informant therefore alleged that the OP, being a dominant enterprise abused its dominant position by making him sign such one-sided agreement which included clauses like cancellation of allotment on failure of the buyer to accept the terms of the agreement within 30 days, forfeiture of earnest money, 'time as essence' of contract applicable only on buyer, obligation to pay and not to OP's obligation to execute its part of the contract, high interest rate on buyers' failure to pay the instalment within stipulated time but no interest on OP's cancellation of contract and refund of money. Further the information stated that the OP delayed the project using its dominant position and caused colossal losses to the informant. The informant approached the Commission to get an inquiry instituted into the agreement executed by the OP with the allottees which allegedly contravened the provisions of Sec 4(2) of the Act.

4. 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 gets worsens when the customer signs the agreement with the builders/developers because till then it already pays a substantial amount of money to them. Now, the question is that once the customer exercises its 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 is a clear cut case of contravention of the provisions as defined under section 4 (2) (c) of the Competition Act.

5. 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 Jasola and not for NOIDA or Gurgaon or any other places, he must have considered these factors before exercising his choice and that is why the area of Jasola which is in South Delhi becomes homogeneously distinct and easily distinguishable from other locations in and around Delhi. The next one is ‘transportation costs’. Anybody can understand why Jasola is more preferable to NOIDA or Gurgaon or even North or West Delhi. 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 that area, 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 Najafgarh itself can be delineated as relevant geographical market in the present case.

6. Thus, the relevant market in this case, would be “Provision of services for the development and sale of commercial space in Najafgarh area of Delhi.” As I have already explained above that the entire Delhi or NCR 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 Najafgarh 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.
7. 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 service provider. Also, due to the various obligations cast upon the builder/developer under relevant Acts, rules and regulations of concerned regulatory bodies, OP1 has automatically acquired dominance in comparison to its competitors. After the consumer booked the commercial space with OP1 and signed the agreement, OP1 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 OP1 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 because of its size and resources, the OP1 commands a dominant position in the relevant market in comparison to its competitors.

8. Once the dominance of DLF is established in the relevant market, it has to be seen whether that dominance has been abused by the Ops. 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 OP1 has been taking undue and unfair advantage.

Clause 1.5 of the Buyers agreement does not contain the proportionate liability clause to fasten commensurate penalty on OP1 for breach of its obligation.

All these conditions mentioned above are unfair and discriminatory as per the provisions of section 4 (2) (a) (i) & (ii) of the C. Act.

9. 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?

10. 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-1 and OP-3 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.

11. Secretary is directed to inform all concerned accordingly.

Sd/-
(R.Prasad)
Member