COMPETITION COMMISSION OF INDIA

Case No. 99 of 2014

***In Re*:**

Naveen Kataria
No. 2, Link Road,
Jangpura Extn.,
New Delhi. **…Informant**

And

Jaiprakash Associates Limited
G Block, Surajpur,
Kasna Road, Greater Noida,
Uttar Pradesh. **…Opposite Party**

CORAM

Ashok Kumar Gupta
Chairperson

U. C. Nahta
Member

Sangeeta Verma
Member

Appearances: For Informant – None

For OP and its individuals – Advocates

Karan Singh Chandhiok; Vikram Sobti; Mehul Parti; Rakshit Sharma; and Mohith Gauri

Authorised Representatives of Jaiprakash Associates Limited

R. L. Batta, Joint President (Legal) and Tarun Sharma, Manager (Legal)

Order under Section 27 of the Competition Act, 2002

1. The present information has been filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the "**Act**") by Mrs. Naveen Kataria (hereinafter, the "**Informant**") against Jaiprakash Associates Limited (hereinafter, the "**Opposite Party/ OP**") alleging, contravention of the provisions of Section 4 of the Act.

Facts:

2. The Informant is a buyer/ allottee of a Villa (Unit No. 5/9) developed by the Opposite Party at Jaypee Greens, G Block, Surajpur Kasna Road, Greater Noida, Uttar Pradesh.

3. The Opposite Party is a company engaged in the business of real estate development and has developed real estate projects in Sectors 128, 129, 131, 133, 134, and 151 under the names of Wish Town, Jaypee Greens, in Noida and Greater Noida. OP has also developed independent houses, villas, town houses and apartments spread over 452 acres of land, in the name of Jaypee Greens, Greater Noida.

4. It has been stated that the Informant had booked a villa on 19.01.2011 admeasuring 655 sq. yds. in the said project developed by the Opposite Party, having a super area of 5700 sq. ft. along with a basement measuring 500 sq. ft. for a consideration of Rs. 4,05,00,000/- (Rupees Four Crore and Five Lac). The Informant had paid 95% of the total consideration *i.e.*, Rs. 3,84,75,000/-

(Rupees Three Crore Eight Four Lac Seventy Five Thousand) to the Opposite Party before the specified timeline.

5. The Informant has stated that in the Provisional Allotment Letter (**PAL**) dated 02.03.2011, the Opposite Party failed to mention about the provisions such as complimentary golf membership, total area of the plot, and additional basement area of 500 sq. ft. The Informant has further stated that it was informed by OP that additional construction beyond the agreed area would be charged @ Rs. 7105/- per sq. ft. The Informant, *vide* letter dated 25.04.2011, pointed out those deficiencies to the Opposite Party and contested that the cost of additional construction could not be more than Rs. 1000/- per sq. ft. After repeated reminders, the Opposite Party informed the Informant that additional construction would be charged @ Rs. 5000/- per sq. ft.

6. The Informant again *vide* e-mail dated 20.5.2011 requested the Opposite Party not to consider 500 sq. ft. of basement area, as a part of the agreed super area and not to charge Rs. 5000/- per sq. ft. for any additional construction beyond the agreed area, as the cost of constructing the shell and core was barely Rs. 1000/- per sq. ft. The Opposite Party, *vide* e-mail dated 21.05.2011, replied that '*with your captioned unit of standard villa of 655 sq. yds. comes along with a basement of 500 sq. ft. The Provisional Letter of Allotment is a standardized text and does not separately mention the basement area which is in-built in the transaction as per the sale brochure*'. However, the Opposite Party did not resolve the issue pertaining to charging @ Rs. 5000/- per sq. ft. for the additional construction.

7. It has been alleged that the due date for completion and handing over the possession of the plot and construction thereon as per terms and conditions laid down, was 18 months from the date of signing of the plan with ninety days of grace period. The Informant has further stated that, the period expired on 22.02.2013 and the Informant received the letter for possession on 09.11.2013 *i.e.*, after a delay of eight months and 17 (seventeen) days.

8. It has been averred that the Opposite Party levied an extra charge of Rs. 25,00,000/- (twenty five lacs) along with applicable service tax for 500 sq. ft. representing the area of basement at Rs. 5000/- per sq. ft. It has also been alleged that the Opposite Party charged an extra sum of Rs. 4,22,200/- (Rs. 4000/- per sq. ft. for 105.55 sq. ft.), representing the cost of construction of additional area. As per the Informant, despite sending numerous letters and meeting almost all the senior officers of the Opposite Party, it neither carried out any revision in the possession letter till the date of filing of the information nor did it reply to any of the letters of the Informant as well as to the legal notice.

9. The Informant has also alleged that the terms and conditions in the PAL were unfair, one sided and loaded in favour of the Opposite Party.

10. Based on the above, the Informant alleged that the conduct of the Opposite Party was abusive, in terms of the provisions of Section 4 of the Act and accordingly, prayed that the Commission issue a direction for investigating the matter.

Directions to the DG:

11. The Commission, after considering the entire material available on record, *vide* its order dated 21.05.2015 passed under Section 26 (1) of the Act, directed the Director General (DG) to cause an investigation into the matter and submit a report. The DG, after receiving the directions from the Commission, investigated the matter and submitted the investigation report on 01.08.2016 ("Main Investigation Report").

Summary of the DG Report:

12. It was noted by DG that the Commission in its order, passed under Section 26(1) of the Act, had defined the relevant product market as '*the market for the provision of services of development and sale of residential units*'. However, the DG had not agreed with the above mentioned relevant product market and proposed integrated township as a distinct product.

13. The DG stated that an integrated township and standalone residential apartments were two distinct products and were not similar enough for buyers to switch from one another. It has further been stated by the DG that an integrated township is a mix of residential and commercial space along with well-developed infrastructure and other recreational amenities and facilities within its marked areas. Standalone residential apartments do not offer facilities like schools, hospitals, shopping malls, golf courses, parks, entertainment centres, convention centres, gym *etc*. which are generally included in an integrated township. These distinguishing and intrinsic characteristics of integrated township make the properties located in such townships a '*distinct relevant product*', not substitutable with plots or residential units in other standalone residential projects/ towers.

14. Accordingly, the DG was of the view that the '*market for provision of services for development and sale of residential properties (including flats, villas, plots) in integrated townships*' was a separate relevant product market.

15. After having concluded that the market for provision of services for development and sale of residential properties (including flats, villas, plots) in integrated townships is a distinct relevant product market, the DG analysed as to whether OP's project in issue was an integrated township or not. Based on the information gathered during the course of the investigation, the DG noted that the project developed by the OP could not be compared with the projects of other developers in view of its size and scale, facilities, usage and other features of an integrated township. It has been stated that the projects of other players depend upon the infrastructure created by Noida/ Greater Noida authorities whereas in this case, the entire infrastructure pertaining to roads, sewerage, parks, electricity, water etc. have been created by the OP only though within the overall framework stipulated by the concerned authorities. The OP has the liberty to plan its whole township in terms of location of plots, villas, row houses, multi-storey flats, internal roads, electricity, water, sewerage, parks, golf-course, club-house, commercial portion *etc*. Thus,

based on the investigation, the DG came to the finding that the project of the OP was in the nature of an integrated township.

16. With respect to the relevant geographic market, it was first noted by the DG that the instant case referred to the residential units developed at Noida and Greater Noida regions. It was further noted that a customer who has decided to buy a residential unit at Noida or Greater Noida as per his/her needs, requirements and willingness or otherwise, would not opt for any other location. Residential units located in Noida and Greater Noida are distinctively homogeneous and the preference given by a customer to Noida and Greater Noida for his/her own reasons made them distinguishable from the neighbouring areas. It has also been stated by the DG that residential units located in those areas could not be interchangeable with other areas. The rules and regulations applicable in Noida and Greater Noida for development of housing complexes are different from other locations such as Ghaziabad, Gurgaon, Delhi, *etc*. In the case of Noida and Greater Noida, most of the housing complexes are built on the land acquired by the builder on leasehold basis unlike the neighbouring areas/ cities mentioned above. In view of the above analysis, the DG concluded that the relevant geographic market would be that of Noida and Greater Noida. Accordingly, the relevant market has been defined by DG as the '*market for provision of services of development and sale of residential properties (including flats, villas and plots) in integrated township in Noida and Greater Noida*'. Subsequently, the DG examined the dominance of the OP in the said relevant market.

17. For assessment of dominance, the DG stated that during the earlier investigation against the same OP in previous cases *i.e.* Case Nos. 72 of 2011; 16, 34 & 53 of 2012; and 45 of 2013, information and data with respect to integrated townships for the relevant period 2009-10 to 2011-12 was obtained from different parties. The instant case also relates to the same relevant period, therefore, the information and data obtained from different real estate players during the course of investigation in earlier cases has been referred

to, considered and relied upon for the purpose of analysis to avoid duplicity of work and to save time in investigation.

18. It has further been gathered by the DG that the OP had huge tract of land of more than 1500 acres for development of residential projects in Noida and Greater Noida. None of the other competitors had even 1/3rd area of land as compared to the OP. The area of land sanctioned for residential use itself was about 740 acres which made its position incomparable with any other player in the relevant market. The Wish Town project was developed on a distinguishable contiguous parcel of land located at sectors 128, 129, 131, 133 and 134 in Noida. One of the project of OP's in Noida itself has a size of more than 1000 acres. Thus, the size of project of the OP made its position very strong in the market. It has been stated that the size and scale of the Wish Town developed by the OP could not be compared with any other real estate developer. The OP develops whole township making its product altogether different with independent planning, creation of infrastructure like roads, parks, lakes, play grounds, schools, colleges, hospital, clubs, resorts, commercial centres.

19. With regard to the market share of the players in the relevant market, it has been stated that the OP had the maximum market share in terms of number of dwelling units developed/ sold in the relevant market. None of the other developers of integrated township had even half of the units as that of the OP. Regarding the size and resources of the OP, it has been stated that considering the total assets, net worth, total land bank, and advantage of having its own cement manufacturing plants indicate that OP has much larger resources than any of its competitors in Noida and Greater Noida.

20. In view of the foregoing, the DG opined that the OP was dominant in the *market for provisions of services for the development and sale of residential properties (including flats, villas and plots) in integrated township in Noida and Greater Noida regions.*

Consideration of the DG report by the Commission:

21. The Commission, after considering the investigation reports submitted by the DG in its ordinary meeting held on 05.10.2016, noted that the DG, while defining the relevant product market, had not considered the subject matter of the case *i.e.*, villa bought by the Informant separately. The report had included flats, plots, and villas in the same category and failed to take into account the differences in the characteristics between flats and villas thereby, erring in defining the relevant market. The Commission was of opinion that the provision of the services of development and sale of residential villas was a distinct product compared to the services of development and sale of residential units/ apartments in terms of end use. Villas are large luxurious houses, having own garden, swimming pool, fountain *etc.* are more private and elegant; allow buyers to decide on their own discretion about the floor plan, number of floors, structure, and other specifics of dwelling units subject to applicable regulations. Thus, from the consumer's perspective, a residential villa or an apartment or a plot are not substitutable with one another. Hence, villas and other residential units such as apartments and plots could not be considered in the same category as has been done by the DG. Therefore, the Commission deemed it appropriate that the matter be further investigated and be assessed on the relevant market for *provision of services of development and sale of residential villas in integrated townships in Noida and Greater Noida*.

22. Further, with regard to the assessment of dominance, it was noted by the Commission that the DG had gathered that in the relevant geographic market, apart from the OP, only Unitech Ltd. and Omaxe Ltd. had developed integrated townships. Therefore, the comparison of market shares and other aspects were done only with those players. However, it was observed that the said assessment was done with reference to all the residential properties in integrated townships and was not confined to villas in integrated townships developed in the relevant geographic market.

23. Resultantly, the Commission was of opinion that before proceeding further in the matter, it would be appropriate to direct the DG in terms of the provisions contained in Regulation 20(6) of the Competition Commission of India (General) Regulations, 2009 to conduct further investigation in light of the observations made hereinabove. Accordingly, the DG was directed to make further investigation and submit a supplementary report. The DG submitted the supplementary investigation report ('Supplementary Report') on 31.03.2017.

Findings in Supplementary Report by DG:

24. In the Supplementary Report, the DG delved more into the relevant market and dominance of the OP. The DG assessed the issue as to whether residential properties such as multi-storey apartments, villas, estate homes and town homes situated in an integrated township were interchangeable and substitutable with each other. It has been noted by the DG that the buyers of multi-storey apartments have undivided share in the common plot and the prices of those multi-storey apartments were also on the lower side as compared to villas. Other factors such as immediate neighbourhood, community living, separate security arrangement etc. are not available to the occupants of independent units such as villa/ town homes/estate homes and the independent houses built on the relevant plots. It has been stated that a multi-storey apartment in an integrated township is unique and different from other types of residential properties in an integrated township. On the other hand, residential units such as villas/town homes/estate homes in an integrated township are not interchangeable and substitutable with multi-storey apartments due to the differences in price, intended use and characteristics such as exclusivity/privacy flexibility of internal layout, *etc*.

25. The DG was also of the view that the independent residential units such as villas, estate homes, town houses in one integrated township could only be substituted with villas, estate homes, and town houses in another integrated township. The independent residential units mentioned above can be clubbed

together as the basic characteristics and intended use of these are the same and they mainly differ in size only.

26. Considering the above factors, the DG concluded that the relevant product market would be *'the market for the provision of development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships'*, while the relevant geographic market would be Noida *and Greater Noida.* Therefore, the relevant market was defined by DG in the supplementary report as the *'market for the provision of development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships in Noida and Greater Noida'.*

27. The DG, while determining the dominant position of the OP in the relevant market for the relevant period of 2009-10, 2010-11 and 2011-12, analysed the market share, size and the resources of the OP and its competitors. It was concluded that the OP was dominant in the relevant market defined *supra* having 100% market share. The DG also pointed out that the supplementary report has found no new facts in respect of allegation levelled by the Informant against the OP as far as abuse of dominance was concerned and the findings contained in Chapter 6 of the DG's original report would continue to remain unchanged and valid. Based on the above, the DG opined that the OP has violated the provisions of Section 4(2)(a)(i) of the Act by inserting one sided, unfair, arbitrary and anti-competitive clauses in the Standard Terms and Conditions of the Provisional Allotment Letter and has abused its dominant position in the relevant market.

Replies/ Objections/ Submissions of the OP

28. The OP filed its submissions to the Commission on 11.02.2019.

29. It was submitted that the observation recorded by the Commission in the Sunil Bansal Cases (previous Jaypee cases *i.e.*, Case No. 72 of 2011; 16, 34 & 53 of 2012; and 45 of 2013) in its order dated 26.10.2015 operated as a bar for

the present case under the doctrine of constructive *res judicata*. This was more so in light of the fact that no new material was brought on record and the DG also relied on the investigation in the above mentioned cases.

30. It was argued that the definition of '*goods*' as provided under the Act refers to the Sale of Goods Act, 1930, expressly excludes immovable property from its ambit. Therefore, the sale of residential unit in the instant case would not amount to sale of goods. It was further argued that the transaction pertained strictly to sale of the residential unit by the OP and did not in any manner contemplate the provision of services as between the OP and the prospective allottees.

31. It was pointed out that the issues raised in the Information arose out of a contract that was entered into between the parties. Any claim whatsoever should be made under the Indian Contract Act, 1872, as may be applicable.

32. It was also submitted that the matter should have been dealt with before the sectoral regulator, *i.e*. Real Estate Regulatory Authority (RERA) constituted under the Real Estate (Regulation and Development) Act, 2016.

33. The OP informed that it has resolved the dispute with the Informant and an affidavit has been submitted by the Informant to the Commission on 01.02.2019. It was stated in the affidavit that the issues involved were in the nature of contractual and/or consumer disputes, and the same were about breach(s) of contract and/or deficiency of service(s).

34. It was submitted that the order passed by the Commission on 05.10.2016 for further investigation was erroneous since it directed the DG to cause further investigation into the matter. It was argued that the combined reading of Section 26(7) with Section 26(5) provided that *'further investigation'* could only be directed by the Commission only in cases where the investigation report of the DG Office recommended no contravention of the provisions of the Act. In the present case, however, the Investigation Report of the DG submitted under Section 26(3) recommended a contravention of Section 4 of

the Act, yet the Commission erroneously passed the order under Regulation 20(6) of the General Regulations without following the procedure laid down under Section 26 of the Act. It was further argued that the DG report in the instant matter was biased since the same was prepared by the same investigating officer who worked in the previous Jaypee Cases.

35. The OP submitted that Noida Industrial Development Authority (NIDA) and Greater Noida Industrial Development Authority (GNIDA) envisage development of their regions as a township. That all development undertaken in Noida and Greater Noida were in accordance with the master plan that conceived creating a 'self-contained entity' and ensuring that all facilities related to residence, work and entertainment were provided within Noida and Greater Noida. It was further submitted that the amenities/facilities offered by the OP were not for the exclusive use of the residents of the OP projects, and could be used by anyone. Also, amenities offered in the OP's projects were the result of requirements of local land laws and other obligations, such as the Concession Agreement and the lease deeds with the State of Uttar Pradesh.

36. Disagreeing with the delineation of the relevant product market, the OP argued that even residential complexes and group housing societies have the same amenities and facilities which make it substitutable and interchangeable with integrated township. It was contented that it could not be said to be a separate relevant product market. It was reiterated that there were various builders in the region of Noida and Greater Noida that were developing their projects with similar features as have been described by DG for integrated township, but have not named the projects as integrated township.

37. With regard to the relevant geographic market, the OP contended that a prospective buyer who desires to make an investment for resale and value appreciation, housing purposes as well as for renting purposes, would consider residential units of different locations in the neighbouring areas of National Capital Region (NCR). It was submitted that the properties in Noida

and Greater Noida were comparable with properties in NCR including Gurgaon, Faridabad, Ghaziabad, *etc*. It was also argued that residential properties in Delhi are also taken into consideration due to locational advantage before making investments. Furthermore, it was stated that distant areas like Manesar or Alwar or Bhiwadi or Kundli *etc*. where residential properties are available at a lower price would be considered by a prospective buyer. The OP also cited the convenience of improved connectivity on account of Metro and other infrastructure facilities as reasons for customers to actively consider various locations in NCR for investment or residential purposes.

38. It was argued that the DG arbitrarily arrived at a conclusion that the OP was dominant merely on the basis of three factors mentioned in the Supplementary Report *viz.*, the market share; land bank and resources and vertical integration *vis-à-vis* the cement manufacturing capabilities of Jaiprakash Group. It was contended that the OP was not offering unique facilities/ amenities like education, healthcare, recreation, shopping malls, golf course *etc*. to any of its customers which could not be enjoyed by the other residents of residential projects in Noida and Greater Noida. The existence of such facilities/ amenities for other projects also indicated that there could not be any dependence of customers in respect of facilities/ amenities being provided by the OP and that there exists level playing field amongst the players. It was submitted that the DG had not provided any data to show that the project of the OP could not be compared to other developers. It was also pointed out that the DG failed to take into consideration the nature of development being undertaken by the OP. It was submitted that the land bank was riddled with obligations and that the entire land bank was not meant for residential purposes only.

39. The OP argued that the conclusion on market share was grossly misleading as they failed to take into account the figures pertaining to residential townships as provided by Noida and Greater Noida authorities; That its calculation was only limited to JAL, Omaxe and Unitech. It was stated that

the OP could not be dominant in the relevant market in the presence of larger players like Noida Authority and Greater Noida Authority and considering the fact that it was a new entrant in the real estate market. Therefore, it was submitted that the findings of the DG on the dominance of OP was erroneous.

40. Lastly, the OP stated that it was a new entrant in the real estate sector and only adopted those terms and conditions in the Agreements that were prevalent in the market. It was also argued that the OP could not be held liable for merely adopting the existing terms prevailing at the time of entry. It also argued that the DG has erred in concluding that the OP's conduct was unfair and discriminatory and that the same would not amount to abuse within the meaning of the provisions of Section 4 of the Act.

Analysis:

41. On a careful perusal of the information, reports of the DG, submissions filed made by the Opposite Party and other material available on record, the following issues arise for consideration and determination in the matter:

a) What is the relevant market in the present case?
b) Is the OP dominant in the relevant market?
c) Being dominant, whether the OP has violated the provisions of Section 4 of the Act.

42. Before adverting to the merits of the case, it would be appropriate to deal with the various preliminary issues raised by the counsel appearing for the OP.

43. The Informant *vide* an application dated 04.02.2019 informed that she no longer wished to pursue the instant case, since all the pending disputes with the OP have been settled. It has been further submitted that the disputes were in the nature of contractual/ consumer disputes and therefore, the Informant requested to recall the order dated 21.05.2015 of the Commission passed under Section 26(1) of the Act. The Commission *vide* its order dated 14.02.2019 observed that the scheme of the Act and the Regulations made

thereunder do not provide for withdrawal of the information filed under Section 19 of the Act. Accordingly, the said request was declined and the same was communicated to the Informant. Further, it is to be noted that the Commission is a market regulator established to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto and thus, does not decide *lis* between parties.

44. The OP also contended that the matter should have been dealt with under RERA and claims/remedy be made under the Contract Act. It may be noted that availability of remedies before other fora do not oust the jurisdiction of the Commission as it is the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets. Moreover, the jurisdiction of the Commission to deal with matters involving competition concerns are not confined to certain sectors or category of cases. Parties are at liberty to approach RERA or any other authority as per law but matters of competition concerns are to be dealt under the Act only. Moreover, by virtue of the provisions contained in Section 62 of the Act, the provisions of this Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.

45. Further, the argument of the OP that the Commission has no jurisdiction on the ground that sale of residential unit would not amount to sale of goods, is already misplaced. A plain reading of Section 2(u) of the Act makes it abundantly clear that the activity undertaken by the OP *i.e.* construction of residential units intended for sale to the potential consumers after developing the land, will fall under the definition of 'service' under the Act.

Section 2 (u) reads as under:

> '*service means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters*

such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising'.

46. Thus, from the above, it can be seen that under the provisions of the Act, the term 'service' has been defined as service of any description and includes provision of services in connection with business of any industrial or commercial matters such as real estate. The intent of the legislature is, therefore, to include service of any description including for real estate as clearly provided in this definition.

47. The Commission notes that similar argument was also taken in previous cases *i.e*. Case Nos. 72 of 2011; 16, 34 & 53 of 2012; and 45 of 2013 wherein the Commission was categorical in stating that housing activities undertaken by development authorities are services and are covered within the definition of 'service' under Section 2(u) of the Act. In this regard, the relevant extract of the decision of the Hon'ble Supreme Court in *Lucknow Development Authority v. M.K. Gupta*, MANU/SC/0178/1994, relied upon by the Commission, which is reproduced below:

'…*Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or a contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or a contractor. The one is contractual service and other is statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of Immovable property as argued but deficiency in rendering of service of particular standard, quality or grade…*'.

48. The Hon'ble Supreme Court in the aforesaid case further observed that a person, who applies for allotment of a building site or for a flat constructed by a development authority or enters into an agreement with a builder or a contractor, is a potential user and such nature of transaction is covered under the definition of '*service of any description*'.

49. Accordingly, the Commission is of the considered opinion that real estate/ construction services are squarely covered within the definition of the term '*service*' as defined in Section 2(u) of the Act and the contention of the OP challenging jurisdiction of the Commission on this ground, is rejected.

50. Another objection raised by the OP was that the Commission's order dated 05.01.2016 directing the DG for further investigation was erroneous. It was submitted that combined reading of Section 26(7) of the Act and Section 26(5) provides that '*further investigation*' can be directed by the Commission only in cases where the investigation report of the DG recommended no contravention of the provisions of the Act, which is not the case here as the DG had concluded in the instant case that there was contravention of the provisions of Section 4 of the Act.

51. In this regard, the Commission observes that it has directed the DG to conduct further investigation under Regulation 20(6) of the Competition Commission of India (General) Regulations, 2009. Therefore, the aforesaid contention of OP does not hold good.

52. Lastly, the OP argued that the previous order of the Commission under Section 26(6) in Case Nos. 72 of 2011; 16, 34 & 53 of 2012; and 45 of 2013, wherein it was also the Opposite Party, would operate as a bar for the present case under the doctrine of *res judicata.* This argument of the OP is misplaced. The OP has failed to take into account the earlier cases which were related to residential apartments whereas the instant case relates to *independent residential units such as villas, estate homes, town homes and row-houses.* These are two distinct relevant markets and cannot be considered and clubbed

under one category. The analysis on the distinction between these two markets is detailed in later part of this order.

53. In view of the foregoing, the Commission is of the opinion that none of the preliminary contentions raised by the OP is found sustainable. Accordingly, the Commission holds that it has necessary jurisdiction to examine the issues, on merits.

Issue (a): Relevant Market

54. **DG's Finding:** The DG, in the main investigation report delineated the relevant product market as, '*the provision of services for development and sale of residential properties (including flats, villas, plots) in integrated townships.*' In the supplementary investigation report, the relevant product market has been delineated as '*Independent residential units such as villas, estate homes, town homes and row–houses in integrated township*' was taken as a separate relevant product market. As far as the relevant geographic market is concerned, in both the reports, the DG noted that the conditions of competition prevailing in Noida and Greater Noida are distinguishable from those prevailing in Delhi and Gurgaon. In view of the same, the DG concluded in the supplementary report that the relevant market was the '*Provision of services for development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships in Noida and Greater Noida*.'

55. **OP's Submission:** The OP submitted that the DG's findings on the relevant market were based on conjectures, surmises and subjective opinion. It was averred that what was being offered for sale in the instant case were apartments and/or residential units and/or plots and not integrated townships. It was also argued that the DG failed to highlight that there was no statutory definition of integrated township in real estate projects being developed in Noida and Greater Noida and that the same was not covered by any comprehensive or uniform regulatory regime in India. It was stressed that even residential complexes and group housing societies will have the same

amenities and facilities which will make them substitutable and interchangeable with integrated township and this completely negates the finding of the DG that there exists a separate relevant product market in the nature of integrated townships.

56. The OP argued that the State of UP does not have any law, rule, regulation, notification and/or policy which provides a comprehensive definition of the term 'Integrated Township'. To develop an integrated township, the primary prerequisite was to obtain a license from the relevant authority which was never obtained as it never fulfilled any criteria to develop an 'Integrated Township'. With respect to the relevant geographic market, it was contended that a prospective buyer would consider residential units in different locations of the NCR for better returns and that properties in Noida and greater Noida are comparable with properties in NCR including Gurgaon, Faridabad, Ghaziabad, *etc.*

Determination of Issue (a): Relevant Market:

57. Before delving into the delineation of the relevant market in the instant case, it is important to appreciate the concept of an integrated township to see if it needs to be differentiated from other markets or not.

58. Integrated townships in the real estate parlance refer to real estate developments/ units that are self-sustained having a number of facilities therein, *viz.*, residential, commercial, retail and educational, in sharp contrast to the traditional housing colonies. The housing projects within an integrated township maybe of different kinds including row houses, villas, bungalows and apartments. Such integrated townships are designed to be self-contained having all or most of the modern civic amenities required by the inhabitants such as power, water, roads, garbage management, hospital, school, parks, swimming pools, recreation centres, gyms, outdoor games venues, restaurants, hotels, shopping centres, cinema halls, auditorium, higher learning institute, transport facilities *etc.*, thereby reducing dependence on the Government for these amenities. The concept of integrated township as a

model for real estate development is fast catching up amongst real estate developers and, in itself, may reflect the concept of 'little city'.

59. The development of integrated township has emerged as a growing trend and has also started getting recognition as a separate format for housing project in several states. This format is even acknowledged by the Governments in their housing policies, rules, *etc*. One such instance is that of the Housing and Urban Planning Development of the State of UP which, on 04.03.2014, notified applicability of '*Revised Integrated Township Policy- 2014*' (License based scheme).

60. Another recognition is that of the National Urban Housing Policy 2007, wherein it has been highlighted that 'since 50 percent of India's population is forecasted to live in urban areas by 2041, it is necessary to develop new integrated townships' The Government of India, Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, *vide* Press Note No. 3 (2002 series) also issued Guidelines for Foreign Direct Investment (FDI) in development of integrated township including housing and building material. At the state level, the Government of Rajasthan came up with a policy for integrated township Schemes on 29.03.2007. Further, in August 2007, the Government of Gujarat announced Gujarat Integrated Township Policy 2007, which aimed at development of integrated townships through private and market initiatives/ operations.

61. From the above, it is amply clear that the concept of integrated township is known to have existed and guidelines or policies on the same have been issued by various government/ statutory authorities from time to time. It is important to note here that had this concept been considered to be the same as any other housing project, various governments would not have issued separate guidelines or policies.

62. It is thus, noted that integrated townships enjoy certain distinct benefits which are not generally found in other housing projects. They are located away from the centres of cities, largely in the peripheries, and are like '*a city within city*'.

Every possible facility needed for a reasonable urban life is available close by. Though, they are developed in the outskirt of the cities, their proximities to the cities along with several other benefits make them different from other housing projects which are developed in and around the cities. For instance, in the case of projects of OP, it was found that following amenities and infrastructure have been created by the OP in its integrated townships at Noida and Greater Noida.

Amenities developed at Jaypee Greens, Greater Noida

a) 18-hole Greg Norman Championship Golf Course spread over 193 acres being the longest in India
b) 9-hole Graham Cook designed chip and putt golf course
c) Golf Academy
d) Integrated Sports Complex
e) Dedicated sports Academy for Cricket, Swimming, Tennis *etc*.
f) 60 acres Natural Reserve Park
g) 170 rooms Golf and Spa Resorts in collaboration with world class 'Six senses Resorts and Spa'
h) Jaypee Public School
i) Town centre for retail, entertainment and recreational facilities with retail shops, cafes, restaurant, boutiques *etc*.
j) Estate homes, villas, and town homes as well as residential apartments
k) Multiple Clubs with facilities of swimming, gym, steam and sauna *etc*.

Amenities developed at Jaypee Greens Wish Town, Noida

a) Jaypee Hospital in Sector 128
b) Jaypee Institute of Information Technology in Sector 128
c) Jaypee Public School.
d) Jaypee Spa and Resorts
e) Wish Point a commercial complex in Sector 134 having 350 retail shops, food & beverage outlets and office space.

f) Lakes and water bodies- Two golf courses one with 18 holes and another with 9 holes designed by Graham Cook & Associates, Canada

g) Exclusive club spread over 50,000 square feet with all ultra-modern and luxurious facilities.

63. From the above, it can be seen that purchasing a property in an integrated township does not end with just residential spaces. It comes with physical and social infrastructure too. The physical infrastructure of an integrated township may include internal roads, lighting, open spaces, landscaping etc. Social infrastructure would be schools and colleges, hospitals, malls and other shopping areas, clubs, multiplexes etc. All the advantages of a city life are offered at one location and all facilities are available in close proximity. On the other hand, standalone units do not provide such infrastructure and they are largely dependent on government and/ or private agencies for such facilities.

64. Thus, residential units in an integrated township are not substitutable with residential units in a cooperative society, or a group housing scheme or any other residential unit built in a standalone/housing project as such residential projects do not include all the facilities that an integrated township offers. In such a scenario, a consumer who opts to buy a residential unit in an integrated township will not prefer a residential unit elsewhere. The distinguishing and intrinsic characteristics of integrated township discussed above definitely makes the residential units located in such townships a product market which is not substitutable with residential units in other standalone residential projects/ societies/ group housings *etc*. It may be noted that the Act provides for three basic factors to be looked into while arriving at the relevant product market - price, characteristic and intended uses. Thus, characteristics of residential units in integrated townships differ from residential units elsewhere significantly. Not only are the characteristics different but the preference of the consumers opting for residential units in integrated township differ from residential units elsewhere. The concept of 'integrated township' with independent residential units provides a distinct facility to the

consumers and therefore, it is not, in any manner, a substitute for apartments/ residential units in group housing societies. Resultantly, independent dwelling units in integrated townships constitute a distinct relevant product and are not substitutable for consumers to switch over from one to another.

65. The next question that arises is whether multi-storey apartments, villas/estate homes/ town homes and residential plots situated in an integrated township are substitutable and interchangeable with each other or not.

66. In this regard, it is observed that multi-storey apartments are those buildings with certain number of flats in several floors at different levels. An apartment/ flat is generally a self-contained housing unit that occupies only part of a single storey/floor in a residential tower, There is not much privacy for the consumer of a multi-storey apartment and the resident has to share common areas such as entrance, corridors *etc*. with other residents occupying other apartments on the same floor or located in other floors within in the same multi-storey building/ residential tower. Further, the resident do not have any flexibility or choice to make any changes in the internal lay-out plan and specifications that is offered to it by the developer/ builder and the possibility of making an extension is significantly limited. Apartments generally have very close proximity to neighbours, for instance sharing a wall with another apartment owner or overlooking the balcony of another apartment in the building. Living in close proximities along with other families can get noisy and disturbing at times. Re-work/re-modelling of an apartment requires not just permission from the developers but also compliance with the building codes. Furthermore, the price of a multi-storey apartment is generally lower than that of independent residential properties like villas/ town homes/ row houses *etc*. available in an integrated township. Thus, a multi-storeyed apartment is clearly distinct from other types of residential properties in integrated townships.

67. Next, regarding the product, '*Residential Plot*', the Commission observes from the DG report that the residential plot can be interpreted as a small piece

of land that has been marked or measured for the purpose of building a residential unit. It is bare piece of land without any construction on it and it is upto the consumer to make choice on the internal lay-out plan and specification of the residential unit that he desires to build on that bare piece of land. Further, it was observed by the DG that a residential plot in an integrated township is quite different from other types of residential properties in the integrated township. This is because the consumer of a residential plot gets piece of land from the developer/ builder without any construction on this plot by the developer/ builder. His ownership is absolute and clearly defined. Therefore, it is clear that a residential plot in an integrated township is quite unique and different from other types of residential properties in an integrated township.

68. The Commission agrees with the observation of the DG that there are distinguishable features of an independent residential unit which are as under: (i) these are composite residential units built on a separate plot of land and, therefore, provide privacy and exclusivity to the occupants. The occupant does not have to share its common area such as entrance, corridors, *etc.* with other occupants in the same integrated townships; (ii) these units are large, elegant and luxurious and may have their own gardens, fountain, *etc*; (iii) the builder/ developer delivers a ready built unit to the consumer as per the agreed internal lay-out plan and specifications of the unit; and (iv) the price of the independent units is higher as compared to multi-storey apartments in an integrated township.

69. From the above, the Commission is of the view that there is no commonality or convergence between multi-storey apartments and plots or independent residential units situated in the integrated township. Residential plots offer more freedom when it comes to making modifications/re-modelling and the same can be done with the current trends and styles. However, there is restriction on such modification for residents in multi storey apartments. Not only to plots or independent residential units offer more space and freedom, they have their own open space thus providing privacy and exclusivity. It is

also observed that independent residential units in an integrated township are limited in number, therefore, such products are considered to be premium products and their pricing is on much higher side.

70. Further, the Commission notes that the OP during investigation has stated in its reply before the DG that villas, estates homes and town homes developed and sold by it in its integrated projects in Noida/ Greater Noida are independent units/ independent options. In fact, the OP has itself clubbed together villas, estate homes and town houses under the category, 'independent options'. In these circumstances, the Commission holds that residential units such as villas, estate homes, town homes, row-houses in an integrated township can only be substituted with similar residential units that provide almost equal benefits and advantages, in another integrated township only.

71. In view of the above, the Commission holds that independent residential units such as villas, estate homes, town home, and row-houses in an integrated township have unique characteristics and features and are an altogether different product, distinct and separate from other residential properties such as multi-storey apartments. Therefore, the relevant product market in the instant case will be the '*market for the provision of services for development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships*'.

Relevant Geographic Market:

72. With regard to the relevant geographic market, the DG, in its reports dated 01.08.2016 and 31.03.2017 delineated Noida and Greater Noida region as the relevant geographic market. It was noted by the DG that the fact that any customer, who has decided to buy a residential unit at Noida or Greater Noida as per his/ her needs, requirements and willingness or otherwise, shall not opt for any other location. Also, the market conditions in these areas are homogeneous in nature. It was also observed by the DG that the rules and regulations applicable in Noida and Greater Noida for development of

housing complexes are different from other locations such as Ghaziabad, Gurgaon, Delhi, *etc*. In case of Noida and Greater Noida, most of the housing complexes are built on the land acquired by the builder on leasehold basis unlike the other locations mentioned above. Accordingly, the DG concluded that the relevant geographic market in the instant case would be that of Noida and Greater Noida.

73. On the contrary, the learned counsel appearing on behalf of the OP vehemently contended that the entire NCR region should be considered as the relevant geographic market. It was further argued that Delhi region should also fall in the same category of relevant geographic area.

74. The Commission observes that conditions for supply of real estate development services in Noida and Greater Noida are clearly distinguishable from the conditions prevalent in other NCR regions such as Faridabad, Bhiwadi, Alwar, Manesar, Kundli, *etc*. which were suggested as substitutable by the OP and also from other neighbouring areas such as Delhi on the basis of factors such as applicable rules and regulations, regulatory authorities, price, *etc*.

75. Further, the Commission notes that from the consumers' perspective, a buyer's locational preference for Noida/ Greater Noida would be greater when compared with distant places like Alwar, Manesar, Bhiwadi or Kundli even if property rates are different between these areas and Noida/ Greater Noida or on the basis of improved connectivity. Also, Delhi region cannot be considered in the same category of relevant geographic area as there are considerable price differences in the properties located in Noida/ Greater Noida and Delhi. It is also important to note that the Commission, in several cases against DLF Ltd., has categorically specified Gurgaon as a separate geographic market and has negated the submissions of the parties that neighbouring regions such as Delhi, Manesar, Noida, *etc*. could also be considered as part of the relevant market in those cases. It was observed that the geographic region of Gurgaon has gained relevance owing to its unique

circumstances and proximity to Delhi, Airports, golf courses, world class malls *etc*. During the years, it has evolved a distinct brand image as a destination for upwardly mobile families. Similarly, in many cases against real estates companies operating in Noida, Gurgaon has not been considered or included as part of the relevant geographic market.

76. The Commission agrees with the DG's delineation of geographic area of Noida and Greater Noida as they have a brand image of their own. Their close proximity to Delhi and Metro Stations, preference by Multi-National Companies, big commercial and institutional centres, shopping malls, well developed infrastructure, wide roads *etc.* are many of the other reasons Noida and Greater Noida have become the hub for realty sector. They have also benefitted from the fact that Delhi is getting congested and lacking in space.

77. Thus, the Commission is of the opinion that in the present case, the relevant geographic market is '*Noida and Greater Noida regions*'.

78. Accordingly, the relevant market in the present case is '*the market for provision of services for development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships in Noida and Greater Noida regions.*'

Issue (b): Dominance

DG Findings

79. In the main investigation report, the DG defined the relevant market as '*provision of services for the development and sale of residential properties (including flats, villas, plots) in integrated townships in Noida and Greater Noida*'. The DG, during the course of investigation, found that Unitech and Omaxe have also developed integrated townships in the relevant geographic market. Therefore, the question as to whether the OP was dominant in the relevant market was analysed primarily on the following factors: (a) analysis of total assets and net worth of the OP and its competitors; (b) comparisons

of the land bank of the OP and main competitors in the said market; and (c) comparison of assets and liabilities. The DG in the first report opined that the OP was in a dominant position. It was found that the OP has huge tract of land in Noida and Greater Noida with more than 1500 acres for development of residential projects in Noida and Greater Noida and none of the other competitors has even 1/3rd of the said land area. Furthermore, the OP has the maximum market share in respect of number of independent residential units sold in terms of sale value of around Rs. 850/- crore in the relevant market. It was stated that the size and resources of OPs total assets, net worth, total land bank and advantage of having a cement manufacturing plant made the position of OP a dominant entity with the ability to act independent of market forces and competition. Hence, the DG concluded that the OP was dominant in the relevant market of '*provision of services for the development and sale of residential properties (including flats, villas, plots) in integrated townships in NOIDA and Greater NOIDA*'.

80. Based on the order dated 05.10.2016 of the Commission directing the DG for further investigation, a fresh analysis was undertaken by the DG on delineation of relevant market and determination of dominance in the said relevant market. While proceeding towards inquiry into dominance in the supplementary report, the DG looked into the market share of the OP in the newly delineated relevant market *viz.* 'p*rovision of services for development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships in Noida and Greater Noida*'. The DG also looked into the details of total number of independent residential units such as villas, estate homes, town homes, row-houses launched and sold by OP and others in integrated township projects in Noida and Greater Noida during the relevant period of FY 2009-10 to 2011-12. The DG called for information from 28 real estate developers in Noida and Greater Noida. Based on the analysis of the size and resources of the OP and other players in terms of its total assets, net worth, land bank and cement manufacturing plants, the DG concluded that the OP has a dominant position in the aforesaid relevant market.

81. **OP's submission**: It was contended by the OP that the flawed conclusions on the relevant market in the DG reports affected determination of dominance as well. It was argued that the OP has never been a real estate player, rather it has been an infrastructure provider, engaging in developing projects such as Yamuna expressway, golf course for Greater Noida, *etc*. The OP also submitted that the development of residential units was only an ancillary business activity of the OP. It was further contended that all residential units like apartments, plots, villas, *etc*. were substitutable with each other and the DG has failed to assess the dominance of the OP in the relevant market of residential units.

Determination of Issue (b): Dominance

82. At the outset, the Commission notes that Section 19 (4) of the Act provides that while inquiring whether an enterprise enjoys a dominant position or not in the relevant market under Section 4, the Commission shall have due regard to all or any of the factors provided therein. The factors are: the market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, economic power of the enterprise, dependence of consumers on the enterprise, monopoly or dominant position acquired by virtue of a statute or by virtue of being a government company or a public sector undertaking, entry barriers, countervailing buyer power, social obligation and social cost; relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition and any other factor which the Commission may consider relevant for the inquiry. Thus, the Act provides flexibility to the Commission to look into factors that are not covered explicitly in Section 19(4) of the Act, but are relevant for determining dominance in the relevant market. The Commission has to assess various relevant factors in an objective manner and has to determine the position of dominance of the OP in the relevant market. The objective is to identify the ability of the enterprise concerned to operate independently of the competitive forces prevailing in the relevant market or to affect its competitors or

consumers or the relevant market in its favour. The importance attached to the various factors by the Commission would differ depending on the facts of each case and also depending on specificity of each information and the sector of economic activity involved.

83. On examination of the data that forms part of the DG record, it is observed that the OP has the largest market share in terms of number of units launched/ sold in the relevant market of independent residential units, such as, villas, estate homes, town homes and row-house in integrated township in Noida and Greater Noida during the relevant period of FY 2009-10 to 2011-12.

Table 1

S. No.	Group	2009-10		2010-11		2011-12		Total	
		No. of units launched	No. of units sold	No. of units launched	No. of units sold	No. of units launched	No. of units sold	No. of units sold	% of total units sold
1	**OP**	0	39	180	167	0	49	255	**100.0**
2	**Unitech**	0	0	0	0	0	0	0	**0.0**
3	**Omaxe**	0	0	0	0	0	0	0	**0.0**
	Total		**39**		**167**		**49**	**255**	**100.0**

84. It is seen from the above table that during the relevant period, the OP had launched 180 independent residential units during the FY 2010-11 whereas none of its competitors had launched any independent residential units during the relevant period in their integrated townships in Noida and Greater Noida. Further, the OP had also sold from its inventory of independent residential units in 2009-10 and 2011-12, whereas there were no sales by its competitors.

85. Furthermore, the total number of independent residential units sold by the OP in its integrated township projects in Noida and Greater Noida were 255 whereas none of its competitors in the relevant market namely Unitech Ltd. and Omaxe Ltd. sold any independent residential unit during the aforesaid period in their respective integrated townships in Noida and Greater Noida.

86. Furthermore, the comparative relevant data in respect of the total sale value of the independent residential units sold by the OP and its competitors namely Unitech Ltd. and Omaxe Ltd. in their respective integrated township projects in Noida/ Greater Noida during the relevant period is tabulated below:

Table 2

S. No.	Group	Value in Rs. Crore				As a % of total sales
		2009-10	2010-11	2011-12	Total	
1	**OP**	117.72	548.16	163.07	828.95	**100.0**
2	**Unitech**	0.00	0.00	0.00	0.00	**0.0**
3	**Omaxe**	0.00	0.00	0.00	0.00	**0.0**
Total		**117.72**	**548.16**	**163.07**	**828.95**	**100.0**

87. It is seen from the above table that during the relevant period the total sale value in respect of independent residential units sold by the OP in its integrated township project in Noida/ Greater Noida was Rs. 828.95 crore. On the other hand, none of its competitors in the relevant market namely Unitech and Omaxe had not sold any independent residential unit during the aforesaid period in their integrated townships in Noida/ Greater Noida. As noted earlier, OP had sold around 255 independent residential units between 2009-10 to 2011-12 whereas none of its competitors sold any independent residential unit during the same period in their respective integrated township located in Noida/ Greater Noida. This clearly indicates the market power of the OP *vis-a-vis* competitors in the relevant market defined *supra*.

88. Having done the analysis on the basis of market share of the enterprise in the relevant market, it is important now to examine the dominance of the OP on the basis of size and resources of the enterprise as provided under Section 19(4) of the Act.

89. In the real estate sector, land reserves/ land bank represents the size and extent of resources of an enterprise and reflects the ability of the enterprise to act

independently in the relevant market. Financial assets, coupled with land resources, add to the muscle of the enterprise and determines its ability to undertake new projects in the real estate sector. The details of total land bank of the Jaypee Group in Nodia and Greater Noida region, obtained by the DG during the course of investigation, also clearly suggested that the strength of OP in the relevant market.

Table 3

Financial Year	Jaypee Group Total Land Bank (in acre)	Jaypee Group Value of Land Bank (in crore)
2009-10	10503.09	3061.58
2010-11	13646.89	4048.19
2011-12	13725.11	4167.27

90. From the above table, it is clear that Jaypee Group had large land reserves in Noida and Greater Noida which could be used for residential development. In terms of value also, Jaypee Group has significant land bank in Noida and Greater Noida region.

91. The details of total assets and net worth of the Jaypee Group for the relevant period 2009-10 to 2011-12 are tabulated below:

Table 4

(in Rs. Crore)

Financial Year	Jaypee Group Total Assets	Jaypee Group Net Worth
2009-10	52055.89	8540.27
2010-11	66982.71	10779.11
2011-12	79276.24	11478.03

92. From the above, it is clear that the Jaypee Group not only has significant land reserve in Noida and Greater Noida but also has significant total assets and net worth.

93. On the basis of the factors discussed above *i.e.*, market share, financial resources, land resources available at its disposal or through its group companies, vertical integration, the Commission is in agreement with the conclusion drawn by the DG that the OP clearly enjoyed a dominant position in the defined relevant market during 2009-10, 2010-11 and 2011-12. Having established the dominance of the OP in the relevant market, the Commission now proceeds to look at the behaviour of the OP which is alleged to be abusive under Section 4 of the Act.

Issue (c): Abuse

94. Before analysing various clauses/ terms/ conditions which were alleged to be abusive, the Commission notes that the DG has undertaken a detailed analysis of the various allegations and stated his findings thereon. In this regard, the Commission is of the opinion that so far as the clauses/ terms and conditions which were neither found to be abusive nor revealing any competition issue by the DG, and which the Informant also has not controverted it is unnecessary to dwell any further herein. As such, the analysis below is confined to various conducts of OP which were found to be abusive by the DG in contravention of the provisions of Section 4 of the Act.

Clause 2.4: Additional constructions and amending/ altering the layout plans

95. It was alleged by the Informant that Clause 2.4 is unfair and one-sided. For ready reference, the same is reproduced below:

> *"Clause 2.4 -Nothing herein shall be construed to provide the Applicant/ Allottee with any right, whether before or after taking possession of the Said Premises or at any time thereafter, to prevent the Company from (i) constructing or continuing with the construction of the other building(s) or other structures in the area adjoining the Said Premises; (ii) putting up additional constructions at Jaypee Greens; (iii) amending/ altering the Plans herein".*

96. While examining this clause, the DG noted that the allottee had booked a villa keeping in mind the location, open space surrounding the villa, availability of sun light and air, greenery, *etc*. It was concluded by the DG that preventing the allottee from raising any objection to alteration by the OP in the layout plan including extra structure which could adversely affect the allottee before the possession or even after possession, is certainly one-sided and an unfair condition imposed upon the buyers.

97. Countering the finding of the DG, the OP submitted that it reserved the right to make changes to the construction/ alter the plans, which is in line with the industry practice. Moreover, due to compliance with the relevant laws and rules/ departmental guidelines, the OP is generally required to carry out changes in its construction plans to seek necessary approvals.

98. Having perused the clause and the submissions of the OP, the Commission notes that clause 2.4 of the PAL allows the OP to construct or continue to construct other buildings, adjoining areas and alter the plans.

99. It is observed that this clause takes away the rights of allottees at all the stages *i.e.*, before or after taking possession, to prevent the OP from amending/ altering the plans, putting-up additional constructions and constructing other buildings or other structures in the area adjoining the said premises.

100. The Commission agrees with the DG that it cannot be denied that an allottee books a property keeping in mind its location, open space surrounding the property, availability of sunlight/ air/ greenery *etc*. Thus, putting such a clause in the PAL which gives unilateral powers to the builder to effect such changes without even consulting, much less seeking concurrence of, the allottees, is unfair and one-sided, in violation of the provision of Section 4(2)(a)(i) of the Act.

Clause 5.6: Charging interest on delayed payments

101. The Informant alleged that clause 5.6 was one-sided and anti-competitive as it enabled the OP to charge interest on delayed payments by the allottees. The relevant excerpts are as follows:

> *"Clause 5.6: …The allottee shall be liable to make payment of interest at the rate of 18% per annum on the outstanding amounts of consideration and other dues from the date(s) upto their payment or cancellation of the Provisional Allotment. The payment made by the Allottee shall first be adjusted against the interest and/or any penalty, if any, due from the Allottee to the Company under the terms herein and the balance available, if any, shall be appropriated against the instalment(s) due from the Allottee under the Standard Terms & Conditions and the Provisional Allotment*."

102. The DG found that the OP was charging interest @ 18% per annum on the outstanding amount due/ receivable from the allottees. However, Clause 6.8 provides that in case the consideration amount is decreased due to alterations, excess amount, if any, paid by the applicant shall be refunded by the OP without any interest. Further, Clause 7.2 provides that in case of delay in handing over possession of the premises, consideration for delay will be Rs. 5/- per sq. ft. (Rs. 54/- per sq. mtr.) per month of super area of the said premises. In the present case, based on the actual super area of the villa booked which is about 6305 sq. ft., the compensation for delay works out to be Rs. 31,525/- per month. The same was nominal when compared to the interest rate charged from the Informant, even after considering the new revised rate of penal charges of 12% p.a. introduced by the OP. Therefore, the DG found clause 5.6 to be unfair and one-sided.

103. In this regard, the OP submitted that it charges certain rate of interest in case of default by a buyer, which is reflective of the lending rates at which banks and other financial institutions lend to corporates. Though the clause states that the OP would charge 12% interest, however, on consideration of the request from the allotee(s), the amount of interest, in certain cases has been

waived/ reduced on cogent reasons. Moreover, the OP submitted that it has unilaterally amended its standard terms and conditions so that a simple interest of 12% per annum only would be charged, which the OP believes to be a fair representation of lending rates available in the market. In case allottees request for cancellation of allotment, the OP refunds the entire amount paid by the customer/allottee in lieu of the allotment along with 12% simple interest per annum.

104. The Commission agrees with the finding of the DG that the interest rate imposed on the allottee under clause 5.6 of the PAL is one-sided and unfair since the interest rate chargeable from the allottee in case of delay in making payments was much more than interest payable by the OP for delay on account of handing over of possession to the allottee. The claim of the OP that it has reduced the interest rate payable by allottee to 12% p.a. in case of default and is in line with the industry practice cannot be considered as a fair imposition of the clause because not only does a substantial difference exist between the penalty levied on the allottees and penalty paid by the OP in case of default but the clause is still in favour of the OP. The Commission is convinced that the clause is heavily in favour of the OP and is unfair whereby the OP gets away with a lighter penalty in case of its default but the allottees end up paying a huge penalty amount in case of a default by them.

Clause 6.9: Right to raise finance from any bank/ financial institution/ body corporate

105. The Informant has alleged that clause 6.9 gives sole discretion to the OP to create equitable mortgage or charge or hypothecation on the leased land and the construction made thereon. The relevant excerpts are as follows:

> *"Clause 6.9 The Applicant understands that the Company have the right to raise finance from any bank/financial institution/body Corporate and for this purpose it can create equitable mortgage or charge or hypothecation on the leased land and the construction thereon in process or on the completed construction, in favour of one or more such institutions. However,*

the company will ensure that any such charge, if created, is vacated before execution of the indenture of Conveyance of the said premises in favour of the applicant/allottee."

106. The DG found that in the event of the OP availing loan for development of the said project, the above mentioned clause provides for creating equitable mortgage or charge or hypothecation on the project land and the construction thereon to the OP, either before or after the completion of the construction. Thus, the DG has concluded that the clause is arbitrary in nature.

107. In this regard, the OP has submitted that the project is always built in different phases and the constant flow of funds is of paramount importance to ensure timely and effective delivery to the buyers. It is further submitted that if the right to raise finance by the OP is foreclosed, it would not be possible to complete the construction of the project in a timely manner. Thus, in the event that OP requires finance to complete the project, it can approach and raise money from the banks, financial institutions/ body corporates amongst others. The OP has also submitted that the said charge or interest is completely vacated before giving possession to the consumers/buyers.

108. The Commission notes that the instant impugned clause confers on the OP the right and sole discretion to create an equitable mortgage or charge or hypothecation on the leased land and construction thereon in process or on the completed construction in favour of one or more lending institutions even after a substantial amount has been paid by the allottees. In this regard, it is observed that as the allottees pay a substantial amount after booking units in the project, the OP ought to inform the allottees and also seek their views before such charge is created by it. In the absence of such mechanism, the Commission is of the view that such clause, which gives unilateral power of creating a charge or interest on the property without any say of the allottee, is unfair and arbitrary.

Clause 7: Obligations of the Company

109. The Informant has alleged that the OP can delay the project without any obligation towards the allottees under clauses 7.1 and 7.2 of the PAL. The relevant extracts are reproduced herein below:

> *"Clause 7.1 The Company shall make best effort to deliver possession of the Said Premises to the Applicant within the period more specifically described in the Provisional Allotment Letter with a further grace period of 90(ninety days). If the completion of the said premises is delayed by reason of non-availability or scarcity of steel and/or cement and/or other building materials and/or water supply and/ or electric power and/or slow down, strike and/or due to a dispute with the construction agency employed by the company, lock out or civil commotion or any militant action or by reason of war; or enemy action, or earthquake or any act of god or if non delivery of possession is result of any law or as a result of any restriction imposed by a government authority or delay in the sanction of building/zoning plans/ grant of completion/ occupation certificate by any government authority or for any other reason beyond the control of the company (hereinafter referred to as 'Force Majeure Events' and each individual event referred to as 'Force Majeure Event') the company shall be entitled to a reasonable extension of time for delivery of possession of the said premises*
>
> *Clause 7.2 Nothing contained herein shall be construed to give rise to any right to a claim by way of compensation/ damage/loss of profit or consequential losses against the Company on account of delay in handing over possession for any of the aforesaid conditions beyond the control of the Company. If, however, the Company fails to deliver possession of the said premises within the stipulated period of 90 (ninety) days thereafter, the Applicant shall be entitled to compensation for delay thereafter @Rs. 5/- per sq. ft. (Rs.54/-per sq.mtr.) per month for the Super area of the Said Premises (Compensation). The time consumed by the occurrences of Force majeure events shall be excluded while computing the time delay for the delivery of possession of the Said Premises."*

110. In this regard, the DG stated that non-availability or scarcity of steel and/or cement and/or other building materials and/or water supply and/or electric power and/or slow down, strike and/or dispute with the construction agency employed by the company cannot be covered under *force majeure*. Moreover, Clause 7.2 ensures that the OP pays no compensation for damage or loss to the buyers for delay in handing over possession on account of any of the conditions included in *force majeure*. Though, this clause further says that the allottees are entitled to compensation for delay thereafter @ Rs 5/- per sq. ft. per month for the super area, the time consumed by the occurrences of *force majeure* event is excluded from computing the time of delay. Further, the company reserves its right to be the sole judge for determining whether the act is covered under force majeure or not. To add to the miseries of the buyers, the OP has introduced the exclusion clause stating that if there is any default in making timely payment of any instalment by the allottees, no compensation shall be payable by the OP, even for delay on the part of the OP. The DG, therefore, was of the view that this clause is one-sided, unfair and anti-competitive.

111. The OP, in this regard has submitted that the delay in construction cannot be considered as a deliberate wilful action on the part of the builder and there is no doubt that the builder would suffer to a greater extent by not handing over possession besides running the risk of the buyers not being inclined to invest in the developer's subsequent projects leading to reputational loss for the developer. The OP has also stressed that on account of delay beyond the proposed period, a specific right was given to the allottees to cancel the agreement and to claim refund of the entire amount without deduction of the earnest money and that the company is refunding the amount to the allottees with simple interest @ 12% per annum which is reflected in clause 9.1.5 of the new application form. Further, the OP contended that subsequently a practice has evolved in the industry to provide for compensation for delay in possession at the rate of Rs 5/- per sq. ft. per month.

112. The Commission notes that '*force majeure*' is a common clause in any contract that essentially frees both parties from liability or obligation when an extra ordinary event or circumstances beyond the control of the parties take place. *Force Majeure* includes events such as flood, earthquake, war etc., that are unforeseeable and unavoidable and beyond the control of the contracting parties. The Commission agrees with the DG that by no stretch of imagination non-availability or scarcity of steel and/or cement and/or other building materials and/or water supply and/or electric power and/or slow down can be given the colour of *force-majeure*. The Commission is also in agreement with the DG that clause 7.2 ensures that the OP does not pay any compensation/ damage to the allottees in case of the above mentioned events even when they are actually not within the meaning of the term '*force majeure*'. The OP has provided for waiving off of its liability of paying compensation on delayed delivery of possession by including such factors in the clause. Furthermore, the argument that compensation of Rs. 5/- per sq. ft. per month is an industry practice does not hold good. On the face of it, such meagre compensation is grossly inadequate besides being unfair. Any fair compensation has to be linked to the value of the transacted product/service rather than being a fixed sum irrespective of changes in value per unit. Besides, it is the responsibility of the OP to get all approvals before launching the scheme and before collecting money. The Commission, therefore, is of the opinion that these clauses are heavily tilted in favour of the OP and completely unfair and one-sided.

113. It has further been alleged that clause 7.6 which provides for extension of construction period on account of *force majeure* is unfair and one-sided. The relevant extract is reproduced herein below:

> "Clause *7.6 ....is hereby clarified that that the total construction period as stipulated in clause 7.1 herein shall stand automatically extended , without any further act or deed on the part of the Company, by the period during which the force majeure event occurs. Provided that the Company shall be the sole judge of the existence of a force majeure event, which judgment shall not be unreasonably exercised...."*

114. The DG noted that such conditions imposed on the buyers are clearly unfair and one-sided. The OP has covered itself on every possible account from liability in case of delay and there are no possibilities of paying anything except the nominal compensation. The OP argues that any dispute that arises will be referred to an arbitrator. Further, it submits that clause 7.6 provides for the safeguard that the discretion of declaring a *force majeure* should not be unreasonably exercised.

115. The Commission has perused the aforesaid clause and is of the opinion that the clause is wide ranging and includes within its sweep a condition which is clearly unfair and one sided. Making the OP itself as a 'sole judge' to decide whether any event is *force majeure* or not, the OP has virtually denied the Informant its right to have its say against any arbitrary decision of the OP.

Clause 8.1: Miscellaneous obligations/ holding charges

116. It was alleged that clause 8.1 deals with the holding charges. According to this clause, OP is entitled to collect holding charges from applicant who could not take possession within a set period of notice of possession, in one sided. The relevant extract is herein below:

> *"Clause 8.1 ...Within thirty days of the date of dispatch of the Notice of Possession the Applicant shall be liable to take physical possession of the said premises on the terms mentioned herein. If for any reason, the applicant fails or neglects or delays or is not ready or willing to take possession of the said premises, the applicant shall be deemed to have taken possession of the said premises at the expiry of thirty days from, the date of dispatch of the Notice of Possession by the company. In this event the said Premises shall be at the risk and cost of the applicant and the applicant shall be further liable to pay holding charges @ Rs. 5 per sq. ft. (Rs. 5- per sq. ft. (Rs. 54/- per sq. mtr) per month for the Super Area of the said premises the holding charges Notwithstanding anything stated hereinabove upon expiry of a period of 90 days from the date of dispatch of the Notice of possession, the company shall, in addition to the right to levy*

holding charges as stated hereinabove, be entitled at its sole discretion to cancel the provisional allotment and refund the payments received from the applicant in accordance with the terms of these standard terms & conditions. The applicant agrees not to question the decision of the Company in postponing the cancelation beyond 90 days from the date of dispatch of the Notice of possession..."

117. The DG observed that the OP, even after receiving substantial amount of sale consideration, pays only Rs. 5 per sq. ft. per month for the super area allotted as late possession charges whereas as per clause 8.1, if the buyers take possession after 30 days from the date of dispatch of the notice of possession, OP collects holding charge at the same rate of Rs. 5 per sq. ft. per month for the super area allotted. Further, OP has retained unilateral power to cancel the provisional allotment in case possession is not taken within 90 days of the despatch of the notice of possession to the allottee. The DG has also noticed that while the OP is charging interest @ 18% /12% on late payment of instalments, there is no provision of payment of interest on the amount paid by the allottees for any delay by the OP in issuing of letter of possession. The DG has also pointed out that the OP has the sole discretion to cancel the provisional allotment in case possession is not taken within 90 days of issue of possession letter. Thus, the DG has concluded that this clause is arbitrary, one sided and unfair, hence is anti-competitive.

118. The OP submitted that clause 8.1 is solely meant to incentivise and ensure that the allottee makes timely payments and does not default in making payments of the amounts due. The OP also pointed out that imposition of holding charges is necessary as the OP cannot develop the project at the behest of the allottees. If the same is not done by the OP, the allottees may take advantage of the same and this may lead to delay in the completion of the project which in turn may harm all allottees, including those that have fully complied with their obligations.

119. In this regard, the Commission notes that the above clause provides that upon expiry of a period of 90 days from the date of despatch of the notice of

possession, the OP, in addition to reserving the right to levy holding charges, also has the right to cancel the provisional allotment and refund the payments received from the applicant. The Commission observes that the OP has retained unilateral power to cancel the provisional allotment and the allottee has no option but to accept the unilateral decision of the OP. The inclusion of such clause in terms and conditions of the PAL by the OP, a dominant player in the relevant market is one sided, arbitrary and anti-competitive.

Clause 10.9: dispute resolution by arbitration

120. It is alleged that the clause 10.9 provides that in the event of any disputes/ claim and/ or difference, the matter shall be referred to sole arbitration of a person not below the rank of General Manager of the OP. The relevant extract is reproduced herein below:

> *"Clause 10.9 Dispute Resolution: Any and all disputes arising out of or in connection with or in relation hereto shall so far as possible, in the first instance, be amicably settled between the company and the Applicant. In the event of disputes, claim and/or differences not being amicably resolved such disputes shall be referred to sole arbitration of a person not below the rank of General Manager nominated for the purpose by Chairman of the company. The proceedings of the Arbitration shall be conducted in accordance with the provisions of the arbitration & conciliation Act, 1996, as amended from time to time, or any rules mode there under. The applicant hereby gives his consent to the appointment of the sole arbitrator as specified herein above and waives any objections that he may have to such appointment or to the award that may be given by the arbitrator. The venue of the arbitration shall be New Delhi, India."*

121. The DG observed that the OP has unfairly retained the right of arbitration with itself and the arbitrator shall also be an employee of the OP itself. The said clause also compels the allottees to waive any objection to such appointment of arbitrator and also to the award given by such arbitrator who is an employer of the OP.

122. The OP has submitted that the purpose of incorporating this clause in the standard terms and conditions is to ensure that disputes, if any, are expeditiously dealt with in an amicable atmosphere through much sought after alternative dispute resolution mechanisms, like conciliation and arbitration. This works for benefit of both the parties to the dispute as unnecessary hassles of cumbersome and long litigation are avoided.

123. In this regard, the Commission observes that the clauses pertaining to arbitration and conciliation in contracts encourage alternative dispute settlement mechanism which is the need of the hour keeping in mind the backlog and pendency of cases with civil courts. The OP has, no doubt, taken a step in this regard by incorporating this clause in the contract to ensure that disputes, if any, are settled expeditiously and amicably. However, one of the facets of justice is the presence of an impartial arbitrator and the same has not been provided for by the OP. The conduct of the OP in appointing the arbitrator itself, that too the one related to the OP, and mandating that the allottees should waive the right to object to the above said appointment, is totally unfair and one sided. The OP, by doing this, is closing doors for the allottees to make use of the mechanism of alternative dispute settlement, something which is not warranted.

124. From the above discussion, it is clear that the terms and conditions in the PAL are unfair and one sided and are couched in a manner so as to unilaterally favour the OP and be unfavourable to the consumers. The OP is observed to have grossly neglected the principle of equity. Moreover, the allotment letter executed by the OP is vague and does not confer any substantive rights on the buyers. Based on the investigation, it is evident that the standard terms and conditions mentioned in the application form are totally one-sided and the buyers have virtually no right against the OP. Moreover, time and again, the OP has described the present dispute as a contractual one. The entire *modus operandi* of the OP, such as collecting money from the buyers without delivering the residential/dwelling unit on time, adding additional construction and amending /altering the layout plans, imposition of various

charges, unfettered right to raise finance from any bank/financial institution/body corporate *etc*., is nothing but an imposition of unfair conditions on the buyers by the OP and the same is a reflection of exercise of position of dominance by the OP in the relevant market.

ORDER

125. In view of the above discussion, the Commission is of the considered opinion that the OP enjoys an undisputed dominant position in the relevant market of *'provision of services for development and sale of independent residential/dwelling units in Integrated Townships in the territory of Noida and Greater Noida'*. Further, the Commission holds the OP to be in contravention of the provisions of Section 4(2)(a)(i) of the Act for imposing unfair/ discriminatory conditions, as detailed in this order.

126. Such imposition of unfair and discriminatory condition by the OP who was dominant player in the relevant market at the relevant time has serious adverse effects on the market and on their consumers. In the instant case, the adverse effects are clearly evident. Customers have suffered due to lower common areas than what was envisaged; they were made to pay much more than what was originally agreed to; timely completion of the project was not achieved resulting in substantial consumer harm; the OP perpetrated undesirable industry practices causing substantial harm to the competition and to consumers, ignoring its responsibility as a dominant player to set fair standards of industrial practices for other players in the market to emulate. Therefore, the Commission finds it a fit case for imposition of penalty in terms of the provisions contained in Section 27 of the Act which shall not only reflect the seriousness of the contravention committed by the OP, but also expected to act as a deterrent for the OP and other players in the real estate sector so as to result in a check on the anticompetitive practices perpetrated in the sector under the guise of standard industry practice.

127. The Commission observes that there are severe aggravating factors in the case in hand. To the dismay of the Commission, the OP has defended its conduct

in the name of *'industry practice'*, while as a dominant enterprise, it is expected to have set an exemplary trend for other players in the industry to emulate. The OP, armed with command over land banks far above its competitors, with substantial financial resources and enjoying vertical integration, possess tremendous potential to expand its real estate business in the relevant market in the coming years. It is therefore important to put a break on its practices which while benefitting itself, cause severe harm to competition and consumers in the relevant market. The OP has also submitted that it is a new entrant in the real estate market and has entered the market only in 2003. The hollowness of such arguments are evident given that the real estate sector is nothing new in the country and that the learning curve is not that steep for an industrial house of the strength and resources of the OP to take refuge under the plea of experience falling short of a decade. On the other hand, if such a player, calling itself a 'new entrant' in the market, can thrust one sided and abusive contract terms on the customers, hampering competition in its very initial years, then if left unchecked it can go ahead and perpetrate undesirable standards that have been infesting the industry so far, as also set newer and even more undesirable standards for other players in the market to follow. On the other hand, being a 'new comer' the OP should have endeavoured to set fair standards for the rest of the industry to follow and built a reputation for itself on this basis. The OP has collected several thousands of crores of rupees from the consumers on the pretext of offering them residential / dwelling units in 'Integrated Townships' and cannot now be allowed to turn around and say that it is a 'marketing gimmick' when it is subjected to the scrutiny by this Commission.

128. Considering the totality of the facts and the circumstances of the present case including the aggravating and mitigating factors, as discussed above, the Commission decides to impose penalty calculated @ 5% of the relevant turnover earned by the OP from the relevant market delineated *supra*. *i.e.*, turnover from sale of independent residential units in integrated township located in Noida and Greater Noida during the financial years from 2009-10 to 2011-12.

Table 5

(in Rs. crore)

Details of turnover earned from the relevant market during			**Average turnover for three years**	**@ 5% of Average turnover**
2009-10	**2010-11**	**2011-12**		
117.72	548.16	163.07	276.31	13.82

129. In view of the aforesaid findings, it is ordered as follows: the OP is directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act and is also directed to pay penalty as mentioned in Table 5 within a period of 60 days from the date of receipt of this order.

130. Secretary is directed to communicate to the parties, accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(U. C. Nahta)
Member

Sd/-
(Sangeeta Verma)
Member

Date: 09.08.2019
Place: New Delhi