COMPETITION COMMISSION OF INDIA

Case No. 86 of 2016

In Re:

Shri Satyendra Singh
11A, Gali No. 21-B,
Molarband Extension,
Badarpur, New Delhi **Informant**

And

Ghaziabad Development Authority (GDA)
Vikas Path, Hapur Road,
Near Old Bus Stand,
Ghaziabad, Uttar Pradesh **Opposite Party**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. U. C. Nahta
Member

Justice G. P. Mittal
Member

Appearances:

For the Informant: *Shri Satyendra Singh, Informant in-person and Shri Dinesh Kumar, Advocate.*

For the Opposite Party: *Shri Raman Yadav, Advocate; Shri S. S. Verma, Superintending Engineer, GDA; Shri Vinay Jain, Executive Engineer, GDA; Shri Prashant Gautam, Assistant Engineer, GDA; and Shri Sunil Kumar, Law Officer, GDA.*

For Shri Vijay Kumar Yadav: *Shri Raman Yadav, Advocate*

For Shri Ravindra Godbole: *Shri Raman Yadav, Advocate*

Order under Section 27 of the Competition Act, 2002

1. Shri Satyendra Singh **(**hereinafter, '**Informant**'**)** filed information in the present matter under Section 19(1)(a) of the Competition Act, 2002 **(**hereinafter, the '**Act**'**)** against Ghaziabad Development Authority **(**hereinafter, '**OP**'/ '**GDA**'**)** alleging contravention of the provisions of Section 4 of the Act.

2. A succinct narration of the facts of the matter, as culled out from the information, is given below:

2.1 The Informant was stated to be an allottee of a low cost residential flat under the Pratap Vihar residential housing scheme announced by the OP in 2008 for the Economically Weaker Sections (**EWS**) [hereinafter, '**Scheme**'] in Pratap Vihar, Ghaziabad, Uttar Pradesh. The OP is a statutory body created under the provisions of Section 4 of the Urban Planning and Development Act, 1973 of Uttar Pradesh and has been, *inter alia,* engaged in the activity of development and sale of real estate in Ghaziabad district of Uttar Pradesh.

2.2 As per the information, upon payment of Rs. 20,000/- as registration fee, the Informant applied for allotment of a flat under the Scheme. On being successful in the lottery draw conducted by the OP, the Informant was allotted a flat

bearing number H-2/311. In pursuance of the same, an allotment letter dated 04.05.2009 was issued in favour of the Informant mentioning the final price of the flat as Rs. 2,00,000/-. In that letter, other conditions of allotment such as payment of Rs. 20,000/- by 31.05.2009, payment plan for balance amount of Rs. 1,60,000/-, penal interest in case of delay in payment of balance amount, date of giving possession of the allotted flat *etc*. were also mentioned.

2.3 It is averred that, *vide* its letter dated 27.11.2015, the OP intimated to all the allottees that at the time of registration for flats under the Scheme, the estimated price of each flat was informed to be Rs. 2,00,000/-; however, based on the real construction cost of the project, the price of each flat is now estimated as Rs. 7,00,000/- approximately. *Vide* the said letter, the OP asked all the allottees of the Scheme to give their consent in writing to the increased price of the flat within fifteen days from the sending of the letter, failing which their allotment would stand cancelled.

2.4 The Informant alleged that the OP arbitrarily increased the sale price of the flat from Rs. 2,00,000/- to Rs. 7,00,000/- without any enabling provision to that effect in the Brochure of the Scheme or in the allotment letter dated 04.05.2009 issued by the OP. It was averred that the OP, by raising the sale price of the flat, has indulged in unfair and arbitrary practices and has misused its dominant position even after knowing that the allottees of the Scheme belong to EWS of the society and they were not in a position to challenge the OP for its unfair and arbitrary conduct.

2.5 Based on the above, the Informant alleged that the OP has abused its dominant position in contravention of the provisions of Section 4(2)(a) of the Act. Accordingly, the Informant prayed the Commission to direct the Director General (hereinafter, the '**DG**') to cause an investigation into the matter.

DG's Investigation

3. The Commission after forming a *prima facie* view, *vide* its order dated 02.02.2017 passed under Section 26(1) of the Act, directed the DG to cause an investigation into the matter and submit an investigation report on the same. Pursuant to the directions of the Commission, the office of the DG conducted an investigation into the matter and submitted the investigation report to the Commission on 04.09.2017 in terms of the provisions of Section 26(3) of the Act. A brief of the findings as recorded in the DG's investigation report is as under:

3.1 In consonance with the facts of the matter, the office of the DG has investigated the matter focusing on the alleged contravention of the provisions of Section 4 of the Act by the OP.

3.2 For examination of the matter in terms of the provisions of Section 4 of the Act the DG delineated the relevant market as the '*market for provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections in the district of Ghaziabad'.*

3.3 While defining the relevant product market as 'market for provision of services for development and sale of low cost residential flats under affordable housing schemes for EWS', the DG distinguished between affordable flats allotted under EWS schemes and flats allotted under non-EWS schemes by the OP such as flats for Low Income Group (LIG) and Middle Income Group (MIG). It is noted in the DG's report that the price of flats allotted under EWS schemes by the OP are low due to cross-subsidisation as against the flats under LIG and MIG categories. It is also noted that the procedure for allotment of flats by GDA is different and is based on draw of lots whereas in case of private developers the buyer of a flat has liberty to select a flat of his choice. Further, certain eligibility criteria are prescribed for allotment of flats under housing schemes of GDA whereas private developers do not specify any eligibility criteria for sale of their flats. Moreover, unlike allottees of MIG and LIG flats, allottees of EWS flats

are restricted from transferring the flats allotted to them for a certain period of time. The DG has thus, contended that low cost residential flats under an affordable housing scheme for EWS are not substitutable with any other type of residential flats available to the end users.

3.4 Further, while determining the relevant geographic market as 'the district of Ghaziabad' in Uttar Pradesh, the DG noted that an EWS person has meagre resources and therefore, her/ his choice/ selection of flat in a particular scheme/ locality would be restricted in terms of price of the flat, distance and travel cost from work place, *etc.* The DG also noted that there exist regulatory barriers in determining the relevant geographic market in the matter as in terms of the provisions of Section 4 of the Urban Planning and Development Act, 1973 of Uttar Pradesh, the services of GDA are restricted to the territory of Ghaziabad district only.

3.5 On dominance of the OP, the DG reported that during 2008 and 2009, there were only two entities offering flats under EWS schemes *i.e.* GDA and Uttar Pradesh Avas Evam Vikas Parishad (UPAVP). Ansal API was the third enterprise which entered into the relevant market only in 2011. It was noted that, in terms of the total number of EWS flats offered, during 2008-2015 GDA was having 77.42% market share. Apart from this, on the basis of size and resources, GDA enjoying exclusive power to undertake development work in Ghaziabad, the DG has reported that the consumers in the relevant market were predominantly dependent upon GDA. After analyzing the factors enumerated under Section 19(4) of the Act the DG has concluded that GDA is in a dominant position in the relevant market as noted in para 3.2 *supra*.

3.6 It has been contended by the DG that GDA has abused its dominant position by imposing unfair conditions and price on the allottees of the Scheme in contravention of the provisions of Section 4(2)(a)(i) and (ii) of the Act, respectively. It was noted by the DG that in the absence of any enabling stipulation or clause in the allotment letter or Brochure the conduct of GDA in

revising the price from Rs. 2,00,000/- to Rs. 7,00,000/- could not be said to be fair especially when no new facilities were being provided. It was also reported by the DG that the condition requiring the allottees to pay interest @ 10.5% per annum in case of delay in payment without any corresponding financial liability on GDA to compensate the allottees in case of delay in delivery the possession of the flats is one-sided and unfair.

3.7 With a view to determine liability under Section 48(1) and (2) of the Act, the DG also identified eleven individual officers of the OP who were in-charge of and responsible for the conduct of the affairs of the OP at the time of contravention of the provisions of the Act by the OP.

Replies/ Objections/ Suggestions by the Parties

4. The investigation report of the DG was provided to the parties for filing their replies/ objections/ suggestions to the same. The Informant, the OP and the individual officers of the OP *viz.* Shri Vijay Kumar Yadav, former Vice-Chairman of GDA and Shri Ravindra Godbole, Secretary of GDA filed their replies. Briefs of their submissions are outlined below:

Replies/ Objections/ Suggestions of the Informant

4.1 The Informant did not submit any reply in response to the DG's investigation report. However, he filed a rejoinder to the additional submissions of the OP *vide* his submission dated 16.01.2018 wherein he raised the issue of non-submission of the audited balance sheets and profit and loss accounts/ turnover and income details by the OP and its individual officers as directed by the Commission *vide* its orders dated 04.10.2017 and 20.12.2017. He submitted that the financial statements of GDA would disclose that it is making profit.

Replies/ Objections/ Suggestions of GDA

4.2 GDA submitted its reply to the investigation report of the DG on 07.12.2017 and additional submissions on 10.01.2018. It was submitted that the provisions

of Section 4 of the Act were notified on 20th May, 2009 and the same do not indicate any retrospective application. Since the EWS flats under the Pratap Vihar Scheme were allotted in 2008 *i.e.* prior to notification of the provisions of Section 4 of the Act, any condition forming part of the allotment of said flats would fall outside the purview of the Act and hence, may not be subjected to investigation.

4.3 It was also contended that the allegations of the Informant are not maintainable as GDA is not a profit making organization. GDA constructs houses for general public and work out their final price on the basis of actual construction cost incurred on the project after completion of the work which is based on the costing procedure as defined in the Guidelines for costing issued by the Government of Uttar Pradesh. It is further submitted that GDA is not an 'enterprise' in terms of the provisions of Section 2(h) of the Act and announcement of the Scheme for allotment of EWS flats in the year 2008 was a glaring example of sovereign function. Any activity of the Government relatable to sovereign functions is not included under the definition of 'enterprise' as per the provisions of the Act. It was contended that since GDA is not an 'enterprise' as per the provisions of the Act, it cannot be subjected to the jurisdiction of the Commission.

4.4 On the relevant market, the OP submitted that its Pratap Vihar Residential Scheme is not the sole housing scheme launched during 2008 and 2009. UPAVP had also launched an EWS scheme at Siddharth Vihar. Several other options were available to the potential allottees in Delhi/ National Capital Region (NCR) which may be considered as interchangeable and substitutable with the Scheme. It has also been submitted that the district of Ghaziabad should not be considered as the relevant geographic market as any resident of NCR is eligible to apply for the housing schemes announced by GDA on fulfilling the conditions set out in the Brochure of the Scheme. It is submitted that the Informant, an allottee under the Scheme, is a resident of Delhi.

4.5 The OP stated that the conclusion in the DG's report that GDA is in a dominant position in the relevant market of 'provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections in the district of Ghaziabad' is based on incomplete consideration of the factual and legal aspects of the matter as well as the factors listed under Section 19(4) of the Act in their entirety. In view of these reasons it has been contended that OP is not dominant.

4.6 Arguing on the imposition of unfair conditions on the allottees, the OP stated that unlike the matter of *'Belaire Owners' Association v. DLF Limited and Others (2011) Comp LR 239 (CCI)* where the allottees did not have an exit option and had to pay interest in the event of delay in payment of instalments failing which DLF could unilaterally terminate the agreement, in this matter, the allottees had the option to withdraw from the Scheme if they were unwilling or unable to bear the increased price of the allotted flats and get refund of the deposited amount along with interest. Thus, it was submitted that no unfair conditions had been imposed on the allottees.

4.7 It is also contended that the DG has failed to appreciate the fact that price of Rs. 2,00,000/- as mentioned in the Brochure of the Scheme was on approximation and it was estimated at the initial stage and the same was not the final price. The final price of flats always depends upon the actual cost incurred on the project which can be ascertained only after completion of the project. It was stated that the State Government of Uttar Pradesh in its Guidelines for costing of properties by the development authorities and UPAVP has provided that if the cost of a house increases more than 10% of its preliminary estimation and in case the allottee does not agree to pay the increased price, then an option would be available to him/ her to get back the money deposited along with 9% simple interest per annum.

4.8 It was further submitted that construction work of the said housing project was being carried though contractors over a period of time and in such a situation,

escalation in the cost of construction was inevitable and could not be avoided. It has also been stated that usually to subsidise the cost of EWS houses, land cost is charged on other vacant properties of the Scheme; however, in the present case, as the houses were proposed in an already developed area, no significant land was left with the OP to cross subsidise the land value. It is also submitted that the price at which the flats were offered to the allottees of the Scheme was still less considering the market value of similar type of flats in the nearby areas. Furthermore, as per the costing Guidelines of the State Government of Uttar Pradesh, 15% contingency and 10% overhead charges are required to be added to the basic price while determining the final price of flats, but for the aforesaid scheme, such charges were waived off. If the said charges had been added, the price of the flats would have been more than Rs. 7,00,000/-.

4.9 It was further submitted that estimation of cost done at the time of announcement of the Scheme was not correct for which proceedings were initiated for determining the liability of the officers of the OP who were responsible for the same. The OP also argued that the allegations of the Informant cannot survive as majority of the allottees of the Scheme including the Informant have accepted the demand raised and have submitted their acceptance in writing. Further, it was pointed out that considering the hike in price of flats from Rs. 2,00,000/- to Rs. 7,00,000/-, the OP has revised and extended the period of repayment to 20 years so that the allottees can conveniently pay the increased price. It was also pointed out that to mislead the Commission, the Informant has concealed material facts and documents while filing the information *i.e.* his consent letter dated 17.12.2015 and the revised payment plan allowing additional period for depositing the increased amount. Further, it was contended that the Informant is abusing the process of law. Based on these grounds, it was argued that the allegations of the Informant are liable to the rejected.

4.10 It was lastly stated that a Writ Petition bearing no.7431 of 2016 had been filed by ten allottees of EWS flats under the Scheme before the Hon'ble High Court

of Allahabad praying to quash the demand notices of the OP for payment of enhanced price of Rs. 5,00,000/- and the same is still pending before the Hon'ble High Court of Allahabad.

Replies/ Objections/ Suggestions of the individual Officers of GDA

4.11 In response to the DG's investigation report Shri Vijay Kumar Yadav, former Vice-Chairman of GDA and Shri Ravindra Godbole, Secretary of GDA filed their submissions before the Commission v*ide* their replies dated 07.12.2017 and 10.01.2018 along with the submissions of GDA. While considering the issue of liability of the aforesaid individual officers of GDA under provisions of Section 48(1) and (2) of the Act, the Commission decided not to proceed against them.

Findings of the Commission

5. The Commission has perused the material available on record and heard the learned counsels appearing for the Informant, the OP and the individual officers of the OP on 20.12.2017.

6. Before delving into the issue of the alleged abuse of dominance by the OP in infraction of the provisions of Section 4 of the Act, the Commission would like to address the issue of jurisdiction of the Commission in the matter as raised by the learned counsel appearing for the OP during the course of hearing as well as in its written submissions/ additional submissions dated 07.12.2017 and 10.01.2018.

7. In its additional submissions dated 10.01.2018, the OP has stated that its alleged conduct cannot be examined under Section 4 of the Act as the Scheme was announced in May, 2008 which is much before the provisions of Section 4 of the Act came into effect. It was contended that any terms and conditions set out in the Scheme would not fall under the jurisdiction of the Commission as the

same were prescribed at a time when the provisions of Section 4 of the Act were yet to be enforced.

8. In this regard, the Commission would like to refer to the judgment the Hon'ble Bombay High Court in the matter of '*Kingfisher Airlines Limited and Another v. Competition Commission of India and Others', (2010) 4 Comp LJ 557 (Bom)* wherein the Hon'ble High Court has held that:

> "*The Act nowhere declares the agreement already entered into as void. If the Section is read, it says that after coming into force of the Act, no person shall enter into an agreement in contravention of the provisions of the Act and if entered into, same shall be void. This, to our mind, at the most, would mean that the Act does not render the agreement entered into, prior to coming into force of the Act, void ab initio…. But if the parties want to perform certain things in pursuance of the agreement, which are now prohibited by law, would certainly be an illegality and such an agreement by its nature, therefore, would, from that time, be opposed to the public policy. We would say that the Act could have been treated as operating retrospectively, had the act rendered the agreement void ab initio and would render anything done pursuant to it as invalid. The Act does not say so. It is because the parties still want to act upon the agreement even after coming into force of the Act that difficulty arises. If the parties treat the agreement as still continuing and subsisting even after coming into force of the Act, which prohibits an agreement of such nature, such an agreement cannot be said to be valid from the date of the coming into force of the Act….We are, therefore, of considered opinion that though the Competition Act is not retrospective, it would cover all the agreements covered by the Act though entered into prior to the commencement of the Act and sought to be acted upon". (emphasis supplied)*

9. Further, the Commission would like to make a reference to the observations of the Hon'ble erstwhile COMPAT in the matter of '*DLF Limited v. Competition Commission of India and Others*, (2014) Comp LR 1 (COMPAT) wherein the Hon'ble COMPAT has held that:

> *"Any imposition, or the act after 20th May, 2009 could be validly inquired into by the CCI, as the language of section 4 of the Act is not retrospective, but prospective. Therefore, any tainted imposition after that date could be a subject matter of the inquiry, but it cannot be said that the entering into the agreement in the year 2006-07, as the case may be was an imposition after the Act. The continuation of the agreement after 20th May, 2009 by itself would not attract the mischief of the Competition Act, unless there was some act in pursuance of those clauses, which were not contemplated in the agreement and would, therefore, amount to an imposition of condition". It was also held that, "...the buyers/ allottees complained of imposition of unfair and discriminatory conditions by the action of the Appellant (DLF) against themselves and this imposition was stated to be after 20th May, 2009. If that is so, then the CCI certainly has the duty and jurisdiction to take into account such impositions. Therefore, even if we do not find any justification on the part of CCI to look into and consider the ABAs, which were dated way back in 2006/2007, we do feel that the complaints about the breach of section 4 of the Act could be and were rightly entertained by the CCI, particularly of those impositions, which were post 20th May, 2009". (emphasis supplied)*

10. In the backdrop of the ratio propounded in the above-referred cases the Commission notes that in the instant matter the Scheme was announced by the OP in May, 2008 and the impugned allotment letter was issued to the Informant on 04.05.2009. Subsequently, the OP issued another letter on 27.11.2015 to all

the allottees of the Scheme asking them to pay additional Rs. 5,00,000/- towards the sale price of the flats allotted to them. It is observed that the trigger point for the Informant in agitating this matter before the Commission was the letter dated 27.11.2015. This was issued much after the provisions of Sections 3 and 4 the Act came into effect on 20th May, 2009. In the view of the Commission, this action amounts to fresh imposition of a condition which was not contemplated in the earlier allotment order or the Brochure. Further, it may be noted that the letter dated 27.11.2015 issued by the OP to the allottees of the Scheme intimating the increased price of the flats is in continuation of the allotment letter dated 04.05.2009 wherein the allottees were intimated the initial price of the flats along with other terms and conditions of allotment. Hence, the conduct of the OP in issuing the allotment letter dated 04.05.2009 and letter dated 27.11.2015, is to be seen in continuum and cannot be considered in isolation. Furthermore, even though the Scheme was announced by the OP in May, 2008, the unfairness embedded in the alleged abusive term and condition as set out in the Brochure of the Scheme and the allotment letter issued by the OP, is still subsisting as possession of the flats is yet to be given to the allottees and they are not being compensated for the said delay. Based on the above, the Commission is of the view that it has jurisdiction over the matter and the alleged abusive conduct of the OP fall well within the ambit of Section 4 the Act. Therefore, the contention of the OP in this regard is rejected.

11. The Commission also notes that the OP has contended that it is not an 'enterprise' within the meaning of Section 2(h) of the Act as it was only performing the statutory function of constructing flats for EWS allottees under the Scheme. Since it is not an 'enterprise', its alleged conduct cannot fall under the purview of the jurisdiction of the Commission.

12. The Commission observes that the term 'enterprise' has been defined in Section 2(h) of the Act as:

"a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space."

13. Further, the Hon'ble erstwhile COMPAT in its order dated 01.07.2016 in the matter of '*India Trade Promotion Organization v. Competition Commission of India and Others'*, Appeal No. 36 of 2014, has observed that the functions which are integral part of the Government and which are inalienable, are 'sovereign functions' and commercial actions/ trading activities and actions, which can either be delegated or performed by the third parties, are alienable and are not 'sovereign functions'. The relevant excerpt from the said judgment of the Hon'ble erstwhile COMPAT is produced below:

"....If the term 'enterprise', as defined in Section 2 (h) is read in conjunction with the definitions of the terms 'person' and 'service', it becomes clear that the legislature has designedly included government departments in relation to any activity relating to storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind. The width of the definition of 'enterprise' becomes clear by the definition of the term 'service'. The first part of the definition of 'service' makes it

clear that service of any description, which is made available to potential users, falls within the ambit of Section 2 (h). The inclusive part of the definition of 'service' takes within its fold service relating to construction and repair. These two words are not confined to construction and repair of buildings only. The same would include all types of construction and repair activities including construction of roads, highways, subways, culverts and other projects etc. It is thus evident that if a department of the Government is engaged in any activity relating to construction or repair, then it will fall within the definition of the term 'enterprise'. I may add that there is nothing in Section 2 (h) and (u) from which it can be inferred that the definitions of 'enterprise' and 'service' are confined to any particular economic or commercial activity. The only exception to the definition of the term 'enterprise' relates to those activities which are relatable to sovereign functions of the Government and activities carried by the four departments of the Central Government, i.e., atomic energy, defence, currency and space. It is also apposite to mention that Section 55 of the Act empowers the Government to issue notification to exempt from the application of this Act or any provision thereof any enterprise which perform a sovereign function on behalf of the Central Government or the State Government but, in its wisdom, the Central Government had not issued any notification granting exemption to the appellant. This implies that the Central Government had not considered the appellant to be an enterprise performing sovereign functions on behalf of the Central Government.

Although, the term 'sovereign function' has not been defined in the Constitution or the Act, but the same has acquired a definite meaning. It has been repeatedly held by the Courts that sovereign functions of the State/ Government are those which are

inalienable. These include enactment of laws, the administration justice, the maintenance of law and order, signing of treaties, meeting punishment to those found guilty committing crime. None of these and similar functions of the State can be delegated or performed by a third party or a private agency. In contrast, any activity relating to trade, business, commerce or like is a non-sovereign function because the same can be performed by any private party/entity. To put it differently, the functions which are integral part of the Government and which are inalienable are 'sovereign functions' and commercial actions/trading activities and actions, which can either be delegated or performed by the third parties are alienable and are not treated as 'sovereign functions'."(emphasis supplied)

14. Furthermore, explaining the meaning of 'enterprise', the Hon'ble erstwhile COMPAT, in the matter of '*Rajat Verma v. Haryana Public Works (B&R) Department and Others*', Appeal No. 45 of 2015, decided on 16.02.2016, has observed that :

"...If the term 'enterprise', as defined in Section 2(h) is read in conjunction with the definitions of the terms 'person' and 'service', it becomes clear that the legislature has designedly included government departments in relation to any activity relating to storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind..... We may add that there is nothing in Section 2(h) and (u) from which it can be inferred that the definitions of 'enterprise' and service' are confined to any particular economic or commercial activity. The only exception to the definition of the term 'enterprise' relates to those activities which are relatable to sovereign functions of the Government and activities carried by the four departments of the

Central Government, i.e., atomic energy, defence, currency and space." (emphasis supplied)

15. In view of the above, it is evident that other than the activities of the Government which are relatable to sovereign functions and activities carried by the four departments of the Central Government *i.e.* atomic energy, defence, currency and space, all other activities of the Government are covered under the definition of 'enterprise' as specified in Section 2(h) of the Act.

16. That being it, the Commission now proceeds to analyse the functions and activities performed by GDA. It is observed that GDA was established under Section 4 of the Urban Planning and Development Act, 1973 of Uttar Pradesh. Section 7 of the said Act has assigned the duty on GDA to promote and secure the development of Ghaziabad according to plan and for that purpose, GDA has the power to acquire, hold, manage and dispose of land and other property; carry out building, engineering, mining and other operations; execute works in connection with the supply of water and electricity; dispose of sewage; provide and maintain other services and amenities; and generally to do anything necessary or expedient for the purpose of such development and for purposes incidental thereto.

17. The Commission observes that these functions of GDA are neither akin to any sovereign function of the Government nor are they inalienable functions of the Government. Further, it is not the contention of the OP that it is not engaged in an activity relating to provision of services. The activities of the OP to acquire land, construct buildings, sell properties, execute work in relation to supply of water, electricity *etc*. are commercial activities. The Commission also notes that the Hon'ble Supreme Court *vide* its order dated 07.03.2017 in the matter of '*Competition Commission of India v. Coordination Committee of Artists and Technicians of W.B. Film and Television and Others'*, (2017) 5 SCC 17' has held that the notion of an 'enterprise' is a relative one. The Hon'ble Supreme has observed:

"The functional approach and the corresponding focus on the activity, rather than the form of the entity may result in an entity being considered an 'enterprise' when it engages in some activities, but not when it engages in others. The relativity of the concept is most evident when considering the activities carried out by non-profit-making organisations or public bodies. These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the market place and when the activity could, potentially, yield profits." (emphasis supplied)

18. Based on the foregoing, the Commission is of the view that there is no doubt that the activities performed by GDA are economic activities and several of them are being carried on for a commercial consideration. In the present matter, the OP is rendering services of development and sale of EWS flats for a charge. This is not an inalienable function of the State. Hence, GDA is an enterprise under Section 2(h) of the Act. As a necessary corollary, the argument put forth by the OP that it cannot not fall within the purview of the jurisdiction of the Commission as it is not an 'enterprise', is devoid of merit and the same is not accepted.

Determination of Relevant Market

19. The Commission notes that as per Section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the 'relevant product market' or the 'relevant geographic market' or with reference to both the markets.

20. The term 'relevant product market' has been defined under Section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of characteristics of

the products or services, their prices and intended use. To determine the 'relevant product market' in terms of the provisions contained in Section 19(7) of the Act, the Commission shall have to give due regard to all or any of the following factors *viz*. physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialised producers and classification of industrial products.

21. Further, 'relevant geographic market' has been defined under Section 2(s) of the Act as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the 'relevant geographic market' in terms of the provisions contained in Section 19(6) of the Act, the Commission shall have to give due regard to all or any of the following factors *viz.* regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.

22. Considering the factors enumerated under Section 19(7) and 19(6) of the Act, the DG has delineated the relevant market in this matter as *"the market for provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections in the district of Ghaziabad'.*

23. However, the OP has submitted that other than its Pratap Vihar Residential Scheme, few other schemes under EWS category were also launched in NCR region during 2008-09 which could be considered as interchangeable and substitutable to its EWS flats while determining the relevant product market. It was submitted that NCR should be taken as the relevant geographic market in the matter instead of the territory of Ghaziabad as any resident of NCR could apply for its housing schemes subject to fulfilment of other conditions of the Scheme as set out in the Brochure.

24. The Commission notes that flats launched under the Pratap Vihar Residential Scheme are specifically for EWS who otherwise may not be able to afford to purchase flats from the private developers/ builders. As noted by the DG, the applicants' annual income limit (in the impugned Scheme Rs. 25,000/-) is considered relevant to consider them in this category. To understand further the substitutability of the said product market, the DG has appropriately explained how these flats are different from the flats launched by the private developers. The private developers have not developed flats under a scheme similar to that of the OP during 2008 and 2009, except Ansal API who launched a similar project in 2011. Only UPAVP had launched flats under a similar scheme during 2008 and 2009.

25. Another aspect that that has been differentiated in the investigation report is the process of allotment of the flats of GDA or UPAVP *vis-a-vis* that of the private developers. Under the scheme of GDA or UPAVP, registration is first required to be made by an applicant on payment of the laid down amount; the allotment is made subsequently through a draw of lottery. Allottees of flats under the schemes are randomly selected through a computerised process. This is not the case with the private developers where consumers have the option to choose flats of their choice. Further, there is an eligibility criteria which is applied in the housing schemes of GDA whereas private developers do not have such an eligibility criteria.

26. The Commission observes that EWS flats fall in a distinct category and they are not substitutable with MIG and LIG flats. The Government of Uttar Pradesh had issued an order on 05.12.2013 revising the income limit of EWS allottees to Rs. 1,00,000/- per annum and LIG allottees from Rs. 1,00,000/- to Rs. 2,00,000/- per annum. Further, cost of EWS flats under the Scheme (Rs. 2,00,000/) was much less than the cost of LIG flats (Rs. 9,89,000/-) and MIG flats (Rs. 15,44,000/-). In view of the significant cost difference between LIG flats, MIG flats and EWS flats as well as the income eligibility criteria, the Commission holds that EWS flats constitute a separate product.

27. Next, the DG has considered '*the district of Ghaziabad*' as the relevant geographic market in this matter. While determining the relevant geographic market, the DG has noted that in making choice for the flat by an EWS consumer, prime consideration is the price as such consumers have meagre resources. Other than the price, their choice is also influenced by the distance of the flat from their working place as they have to pay transportation charges on daily basis to commute from their residence to the working place and they cannot afford higher transportation charges. Thus, an EWS consumer may not prefer a similar type of flat in NCR, even if it is available at the same/ similar price. In fact, similar types of flats may not be available in neighbouring areas of Ghaziabad such as Delhi, Noida *etc.* at a price lesser than that in Ghaziabad. Further, it is reported by the DG that the rules and regulations applicable for development of EWS flats in Ghaziabad are different from the other locations of NCR and Urban Planning and Development Act, 1973 of Uttar Pradesh empowers GDA to undertake development activities in the territory of Ghaziabad only.

28. In view of the above, the Commission observes that the relevant product market in this matter has been appropriately delineated as 'market for provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections'. The Commission also notes that the OP has not suggested any alternate relevant product market. Thus, there is no reason to disagree with the findings of the DG in regard to the relevant product market definition.

29. On the relevant geographic market definition, the Commission is of the view that the DG has defined the relevant geographic market in this case considering the factors listed under Section 19(6) of the Act. The Commission has noted the submissions of the OP in this regard and is of the view that only because of the reason that the schemes of the OP are open for all residents of NCR, the relevant geographic market cannot be taken as NCR. It may be noted that a relevant geographic market means an area where goods or services are sufficiently inter-

changeable or substitutable under similar conditions of competition and are distinct from the neighbouring areas. The Commission is of the view that the entire region of NCR cannot be said to be one market because there are considerable differences in the conditions of competition for EWS flats in the different cities in NCR. Even if there is a 5% increase in the price of the EWS flats in Ghaziabad, consumer's preference will not change since there are other external factors such as transportation cost *etc.* which influence the decision of the consumers while purchasing EWS flats.

30. Based on the foregoing, the Commission, in consonance with the DG's investigation report, is of the view that '*the market for provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections in the district of Ghaziabad'* is the relevant market in this case.

Assessment of the position of dominance of GDA in the relevant market

31. Explanation (a) to Section 4(2) of the Act provides that 'dominant position' means a position of strength, enjoyed by an enterprise in the relevant market, in India, which enables it to - (i) operate independently of the competitive forces prevailing in the relevant market; or (b) affect its competitors or consumers or the relevant market in its favour. Thus, the underlying principle in assessing dominant position of an enterprise in any relevant market is that whether the enterprise in question can act independently of the competitive forces in the relevant market or can affect the competitors or consumers or relevant market in its favour. Further, to determine whether an enterprise is in a dominant position or not in a relevant market, the Commission is required to have due regard to all or any of the factors as enumerated under Section 19(4) of the Act such as market share of the enterprise, its size and resources, size and importance of its competitors *etc.*

32. The DG has found that the OP is in a dominant position in the relevant market as defined *supra*. The Commission observes from the DG report that in the

relevant market, there were only two enterprises *i.e.* GDA and UPAVP offering flats under EWS schemes during 2008 and 2009. With the launching of its EWS scheme Ansal Aquapolis at NH-24, Ghaziabad on 07.02.2011, Ansal API was the third enterprise to enter into the relevant market. The DG has gathered that, in terms of the number of EWS flats offered, with 8712 number of flats, GDA had 81.45% market share during the years 2008 and 2009 whereas with 1984 number of flats, market share of UPAVP was 18.55% only. The DG has also aggregated the number of flats offered by all the three players operating during 2008 to 2015 and reported that during this period, market share of GDA was 77.42% whereas, market shares of UPAVP and Ansal API were 20.85% and 1.73% respectively. Thus, market share of GDA is highest in terms of the number of flats offered during the relevant period of 2008 and 2009. In fact when the Scheme of the OP was announced in May, 2008, no such scheme by any other developer was on the offer. Sidharth Vihar EWS scheme of UPAVP was announced on 19.09.2009 which is after the allotment of flats under the Scheme of the OP.

33. The DG has also reported that consumers of EWS flats in Ghaziabad are primarily dependent on GDA for their needs as they do not have enough options available in Ghaziabad. It is observed from the DG's report that the OP had launched more schemes than its competitors during the said period and the number of applicants registered with the OP is much higher than those registered with UPAVP. The ratio of the number of applicants and number of allottees of the OP during 2008 to 2015 was 7:1 whereas it was 3:1 in case of UPAVP. This indicates consumers' preference for the EWS flats launched by GDA as compared to UPAVP. Further, the Commission observes that a consumer would not switch over to similar type of flats available in the adjacent areas of Ghaziabad even if there is a small increase in the price of EWS flats in Ghaziabad. Other factors like consumer preference, transport, distance *etc.* may prevent the consumers from switching their purchase to other adjacent regions of Ghaziabad. Thus, the buyers may not possess enough countervailing power in this scenario.

34. As regards the size and resources of GDA during the said period, it is observed that the total capital fund of GDA was Rs. 2324.05 crores in 2008-09, it was Rs. 1454.63 crores in 2014-15. Further, the DG has reported that the dominance of the OP is established by virtue of the Urban Planning and Development Act, 1973 of Uttar Pradesh which has put the responsibility solely on the OP to plan, control, manage and develop housing societies, infrastructure *etc.* in Ghaziabad. This Act also mandates that no developer can construct any property in the district of Ghaziabad without the approval of OP. Thus, being a Government of Uttar Pradesh owned entity, the OP enjoys the market power and has an edge over its competitors in the relevant market because of the mandate given to it under the aforesaid Act.

35. As stated earlier, OP had the highest market share in the relevant market in 2008 and 2009 and between 2008 to 2015. It has ample resources and the Urban Planning and Development Act, 1973 of Uttar Pradesh gives it market power and an edge over its competitors. Not only that, consumers are largely dependent on the OP for EWS flats. The Commission observes that OP has not given any material to the contrary to refute the findings of the DG on dominance. As the OP has ability to influence the conditions of competition in the relevant market and has the strength to operate independently of the competitive forces, the Commission holds that the OP is in a dominant position in 'the market for provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections in the district of Ghaziabad'.

Examination of the alleged abusive conduct of GDA

36. After having analysed the dominance of the OP in the relevant market, the Commission proceeds to assess whether the OP has abused its dominant position in the relevant market.

37. As per the DG's report, OP had, *vide* letter dated 27.11.2015, increased sale price of the flat from Rs. 2,00,000/- to Rs. 7,00,000/- knowing well that the

Informant and other allottees under the Scheme belong to EWS of the society. The OP changed its stance *vis-à-vis* the allotment letter dated 04.05.2009 wherein it was informed that Rs. 2,00,000/- is the 'final cost'. However, in the letter dated 27.11.2015, this was changed to 'estimated cost' and the new estimated cost of the flat was informed to be Rs. 7,00,000/- approximately. The DG has not found any term or condition either in the Brochure of the Scheme or in the allotment letter which would indicate that the price of the flat might change in future. Further, no new additions were made to the flats that would justify the demand for a higher price. It has been reported by the DG that the OP has not yet given possession of the flats to the allottees and is not offering any compensation for the delay in giving the possession either. Instead, the DG has found the condition in the allotment letter by which penal interest @ 10.5% per annum would be levied on the allottees if there is delay in the payment of instalments. There is no corresponding liability on GDA in case of delay in giving possession of the flats. This condition is one-sided and therefore, unfair in terms of the provisions of Section 4 of the Act.

38. It was admitted by the OP that price of the flats was mentioned as Rs. 2,00,000/- in the Brochure of the Scheme and the allotment letter and subsequently, it revised the same *vide* its letter dated 27.11.2015. As per the OP, revision was necessitated due to initial incorrect estimation of cost by its official and a show cause notice to that effect has been issued to the officer responsible for the same. The OP has justified its action of revising the price of EWS flats under the Scheme by stating that the State Government of Uttar Pradesh issued Guidelines on costing under which, if the price of a house increases by more than 10% of its preliminary price and in case the allottee does not agree, he/ she will have the option to get back the refund of the money deposited at 9% simple interest per annum. The OP has contended that since construction of the project was carried out by a contractor over a period of time, escalation in the cost of construction was inevitable. It was also submitted that while estimating the cost for EWS houses, generally the land cost is charged on other vacant properties of the Scheme to cross subsidise the EWS flats. But, in the present case, houses

were proposed in an already developed area. So, GDA had no significant land left to cross subsidise the land value of the Scheme. Resultantly, actual land value was included while calculating the price of the houses under the Scheme. This was another reason for escalation in the price of the flats. The OP has further stated that considering the increase in price of the flats, payment period for instalments by the allottees of the Scheme was extended. In any case, if the allottees were not agreeable to the revised cost, they had the option to withdraw from the Scheme and get refund of the money deposited.

39. The Commission does not find the aforesaid justifications provided by the OP convincing. To apportion the blame on an officer appears to be a far-fetched excuse. It may be noted that the project had gone through various stages of approval before it was decided to be launched. No prudent authority could ignore such an important aspect as the cost of the project. Without thorough examination and without rounds of discussions at various stages, such a project cannot be launched. It is noteworthy that the Scheme which was announced earlier, has remained the same for eight long years with nothing added to it or its surroundings. In such a situation, compelling the consumers to pay a far higher price after a gap of more than seven years of launching the Scheme and, specially, when they belong to EWS and have limited capacity to pay is unfair and abusive under the Act. It may also be noted that the consumers of the Scheme are in a disadvantageous position as they do not have choice to shift to other any developer in case of increase in the price of the flats by the OP. Bereft of choices, they have to either succumb to the demand of the OP or withdraw from the Scheme. The decision to raise the price of the flats under the Scheme substantially *viz.* 3.5 time that of the original price without any justifiable reason, shows that the OP has the ability to operate in the market without any constraint.

40. It may be noted that GDA had informed the Informant, *vide* letter dated 27.11.2015, that the revised price of the flat allotted to him is Rs. 7,00,000/- and was asked to give acceptance within 15 days, failing which the allotment would

be cancelled and the deposited amount would be refunded as per the Rules. The Commission notes that the allottees were given a short time to decide and respond whether they need to continue under the Scheme or not. But more importantly, the quarterly instalment to be paid by the allottees after enhancement of price of the flats came to Rs. 15,995/-. This had to be paid by a section of the consumers for whom the prescribed income limit was Rs. 25,000/- per annum. Even after considering the new income limit of Rs. 1,20,000/- per annum, as was decided by the Government of Uttar Pradesh in 2015 for EWS allottees, it would be economically very challenging for them to meet the revised demand.

41. The Commission observes that there has been an inordinate delay of more than eight years in the delivery of flats to the allottees of the Scheme. It is observed that the OP has not been able to provide a reasonable explanation for the delay in giving possession of the flats. From the statements of the officers of the OP before the DG, it is noted that generally it takes about three years to complete construction of a project. But, in this case, even after more than eight years of announcement of the project, the OP has not been able to give possession of the flats. Initially, flats were promised to be delivered around August, 2009 which was postponed to March, 2016. As on date the status of delivery is not known. The Commission observes that for the allottees there is no provision for compensation by the OP for the delay in delivery of possession of the flats. Thus, the said conduct of the OP is not only unfair but extremely arbitrary.

42. Although the Commission has found the aforesaid conduct of the OP whereby the cost of EWS flats was increased without any valid justification as an abuse of GDA's dominant position, the Commission differs from the conclusion drawn by the DG that it also amounts to imposition of unfair price in violation of Section 4(2)(a)(ii) of the Act. The Commission is of the view that the conduct of the OP in raising the price of the EWS flats from the initial price without any enabling provision (either in the Brochure of the Scheme or allotment letter) on the pretext of miscalculation of cost of the project and increase in the cost of the

project over the years by the contractor, can only be explained as a case of abuse of dominant position by the OP in the relevant market. The Commission observes that the consumers who belong to EWS have been made to suffer because of such abusive conduct of GDA. That conduct tantamounts to unilateral modification of the terms of the allotment of the flat as well as imposition of unfair condition in the sale of services provided by the OP in the relevant market in contravention of the provisions of Section 4(2)(a)(i) and not Section 4(2)(a)(ii) of the Act.

43. The abusive behaviour of the OP is also seen in respect of imposing arbitrary and unilateral term and condition in the allotment letter if there is a delay in payment of the instalments by the allottees. As noted in para 37 *supra*, the OP stipulated penal interest @ 10.5% per annum if there is delay in the payment of the quarterly instalment by the allottees whereas no such corresponding provision has been made for the OP in case there is delay in giving possession of the flats. It gives the OP a free hand while the allottees would be suffering due to levy of heavy penal interest. Further, in the present case, GDA has not delivered possession of the flats to the allottees even after lapse of almost 10 years. Based on all this, the Commission is of the view that the impugned term and condition of the allotment letter is abusive being one sided and unfair and in violation of Section 4(2)(a)(i) of the Act.

44. In view of the above, the Commission passes the following order.

Order

45. The Commission directs the OP to cease and desist from indulging in such abusive conduct which has been found to be in contravention of Section 4(2)(a)(i) read with Section 4(1) of the Act.

46. The Commission has given a thoughtful consideration to the issue of imposition of penalty. After carefully considering the detrimental effect on the consumers

emanating out of the aforesaid anti-competitive conduct of the OP, the Commission is of the considered opinion that this is a fit case to impose penalty under Section 27(b) of the Act. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit, which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such persons or enterprises which are parties to such agreement or abuse.

47. The Commission is of the considered view that the aforesaid anti-competitive conducts of the OP are required to be penalised adequately to cause deterrence in future among the erring entities engaged in such activities. The Commission also notes that no mitigating factor has been raised by the OP in its submissions that can be considered while deciding the quantum of penalty to be imposed on the OP in this matter. Having regard to all these factors, the Commission feels it appropriate to impose a penalty on the OP at the rate of 5% of its average turnover/ receipts generated from the provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections for the last three financial years based on the financial statements filed by it as follows:

(INR)

Name of OP	**Turnover for FY 2014-15**	**Turnover for FY 2015-16**	**Turnover for FY 2016-17**	**Average Turnover for Three Years**	**@ 5% of Average Turnover**
GDA	8,10,95,787	11,55,39,835	40,70,12,001	20,12,15,874	1,00,60,794

48. Resultantly, a penalty of Rs. 1,00,60,794/- (Rupees one crore sixty thousand seven hundred ninety four only) calculated at the rate of 5% of the average turnover/ receipts of the OP generated from the provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections for the preceding three financial years is hereby imposed on the OP.

49. The OP is directed to deposit the aforesaid amount of penalty within 60 days of the receipt of this order and file a report to the Commission on the compliance of the aforesaid directions.

50. The Secretary is directed to inform the parties accordingly.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(U. C. Nahta)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi
Dated: 28/02/2018