

Draft

COMPETITION COMMISSION OF INDIA

Dated : 14th December, 2011

Case No. 63/2011

M/s EMGEE Greens Co-operative Housing Society ... Informant

Vs

Mudhit Gupta, Proprietor, EMGEE Development & Consultant ... Opposite Party 1

Hariraj Family Trust ... Opposite Party 2

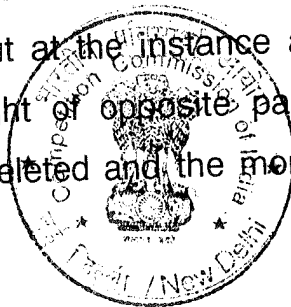
SPV Family Trust ... Opposite Party 3

Ashiana Family Trust ... Opposite Party 4

ORDER UNDER SECTION 26(2) OF THE COMPETITION ACT, 2002

The informant M/s EMGEE Greens Cooperative Housing Society filed this application under Section 19(1) of the Competition Act seeking following relief :-

- 1) This Commission to direct and order that the Flat Purchase Agreement executed between the members of the informant and the opposite parties be modified to the extent of the unfair terms, such as – (1) retention of the dilapidated building indicated in the original lay out annexed to the information be deleted (2) the liberty of modification of the original lay out at the instance and will of the opposite parties be deleted / right of opposite parties to collect money under various heads be deleted and the money directed to be returned.



- 2) The Commission should impose a monetary penalty on the opposite parties for their abuse of dominant position and unfair conduct towards the informant and its members.
2. The brief facts relevant for the purpose considering the application, as submitted by applicant are as under :-
- i) The informant entered into an agreement with the opposite parties who were the joint owners of the project for residential building called 'EMGEE Greens'. The flats in this project were sold to the members of applicant Cooperative Society (the Flat owners).
 - ii) The agreement between the Flat owners and opposite parties was entered into sometime in the year 2004. All the flats were sold in 2004 and possession of flats was given to the owners later. The owners have alleged that the opposite parties failed to provide features as committed by them at the time of starting the project and stated in the promotional literature. The opposite parties, at the time of starting the project had assured the following features :-
 - (i) **Solid waste management** – A zero garbage system through a combination of vermin composting, aerobic composting and dry garbage recycling, thus reducing the burden on civil infrastructure by nearly 185 tons of garbage per annum.
 - (ii) **Rain water harvesting** – It provides for nearly 10,000 liters of water every day during monsoon months besides recharging ground water and existing bore



wells to provide year round water supply and reducing dependency on tankers.

- (iii) **Water recycling** – Requiring minimal capital investment, it saves nearly 40,000 litres of Municipal supply daily, and provides free supply of water for flushing, gardening and car washing. Total savings to the flat-owners will be Rs.5.00 lacs per annum.
- (iv) **Energy efficiency & conservation** – These measures include the use of energy-saving lamps and solar photovoltaic panels in the common usage areas.
- (v) **Terrace garden** – Apart from visually pleasing greenery, it will reduce the energy load on the top floor by reducing heat absorption, provides additional recreational space and also gives a supply of fresh organic fruits, vegetables and flowers to the residents.
- (vi) **Plantations** – Over 15,000 sq.ft. of area is set aside for a green belt of plantations of indigenous trees which provide a pollution free environment, improve the microclimatic conditions and water retention capabilities in the complex, apart from adding to the aesthetic appeal of the site.

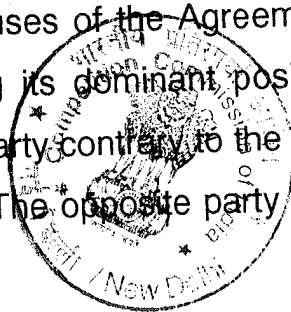
It is submitted that these amenities and features prompted the buyers to buy flats as they were not the ancillary but essential features of the residential project. The project became so attractive because of these features. Prior to promotion of present building the land on which the project was to be built was being used by opposite parties as industrial land with factory and office space. The opposite parties demolished



and cleared the factory premises except a small office complex. Since opposite party failed to demolish the office complex, as promised in its literature, the informant society filed a suit in Bombay High Court against the opposite parties and had been granted interim relief.

3. The opposite party after booking the Flats at the projected site, had applied for permission for conversion of land from industrial use to residential use from the municipal authorities. While applying for conversion of the land opposite party did not include any of the special features of the project and thereby committed a fraud on the flat purchases. The opposite party had also promised to the purchaser for providing landscape to garden, swimming pool, health club and community hall. The landscape to garden was not provided. Swimming pool was left incomplete. No permission was granted by Competent Authority for construction of swimming pool and club. Thus, the opposite party played a fraud upon the flat buyers.

4. The opposite party not only failed to provide the features as aforesaid but abused its dominant position by including unfair terms in the contract i.e. sale agreement with the flat owners. While as per original plan, the office block and factory buildings were to be demolished, the opposite party retained an old office building covering about 250 sq.mtrs. of area. This old dilapidated building has been retained by the opposite party contrary to the assurance given at the time of booking the flats and a suit was pending in the High Court of Bombay in this regard. The opposite party in the Flat Buyers Agreement, recorded unconditional consent of the purchaser in certain clauses of the Agreement showing that the building would be retained, by abusing its dominant position. This so called consent was obtained by the opposite party contrary to the projected plans at the literature circulated by opposite party. The opposite party in contravention of this



made an application to the Municipal Authority for amendment of the plan seeking retention of one existing building which was supposed to be demolished as per approved plan of 05.10.2007, through their architect Mr. Anish Chauhan. This decision of the opposite party was abuse of dominant position.

5. The opposite party entered into an agreement with the purchasers based on a standard form of agreement. As per this agreement, over and above the purchase consideration, the opposite party collected various sums of money abusing its dominant position. The various heads under which various amounts were collected were (i) legal cost of preparing the agreement (ii) share money (iii) charges for formation of Society (iv) proportion of the outgoings (v) electricity expenses (vi) corpus funds for garden, roads, street lights (vii) corpus funds for club house (viii) club membership and admission fees varying for each flat owner from Rs.75,000/- to Rs.1,60,000/- depending on the area of the flat. The opposite party also failed to give account of the money collected by them for maintenance purposes under various heads despite the members of society repeatedly asking for the same.

6. The allegations are also made by the informant that the opposite party was to provide a new underground water tank for storage of drinking water. However, instead of providing a new underground water tank opposite party retained an old industrial water tank for the purpose of providing drinking water which caused tremendous health risk to the flat owners. The informant submitted that opposite party was guilty of contravening under section 3 of the Competition Act and sought the aforesaid relief.

7. Section 3 of the Competition Act provides that :-

“Any agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any



person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons including cartels engaged in identical or similar trade of goods or provision of services which –

- a) directly or indirectly determines purchase or sale prices;
- b) limits or controls production, supply, markets, technical development, investment or provision of services;
- c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services or number of customers in the market or any other similar way;
- d) directly or indirectly results in bid rigging or collusive bidding;”

Section 3(3) of the Competition Act is attracted in a case of an anti competitive agreement entered into between enterprises or association of enterprises or persons or association of persons engaged in identical or similar trade or profession of services. Since the applicant and opposite party are not engaged in identical or similar trade or profession of services so section 3(3) would not be attracted.

Section 3(4) of Competition Act reads as under :-

“Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets in respect of production, supply, distribution, storage, sale or price of or trade in goods or provision of services including –

- (a) tie-in arrangement
- (b) exclusive supply agreement
- (c) exclusive distribution agreement
- (d) refusal to deal



(e) resale price maintenance shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation – For the purpose of this sub-section –

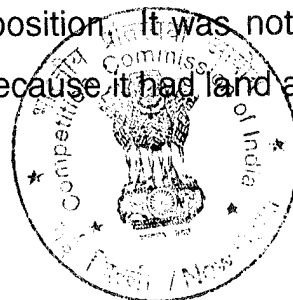
- (a) “tie-in arrangement” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) “exclusive supply agreement” includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (c) “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) “resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those price may be charged.

Section 3(4) is attracted when an agreement is made among the enterprises or person at different stages or levels of production generally in different markets, if the agreement is likely to cause an appreciable



adverse effect on the Competition Act. In the present case though the agreement between the opposite party and the members of informant is an agreement between seller and purchaser but this agreement cannot be said to have an appreciable adverse effect on competition. Not providing of features as promised and non fulfillment of the contractual obligations are not covered under section 3(4) of the Competition Act. These are contractual issues relating to non-performance of contract and can be agitated before civil court. The applicant has already filed a Writ Petition before Bombay High Court concerning retention of a part of old building. We, therefore, consider that it is not a case covered under section 3 of the Competition Act.

8. In order to attract Section 4 of the Competition Act the applicant has to establish that opposite party was a dominant player in the relevant market and it abused its dominant position. Dominance has to be looked upon in reference to the relevant product market and geographical market. Relevant product market in this case is the market of residential flats in the year 2004 in Mumbai and the geographical market has also to be seen as the market of the product in Mumbai. The Competition Act came into force in 2009. The Commission can not consider dominance in residential Flat market of 2004 in geographical area of Mumbai to invoke its jurisdiction in 2011. The opposite parties presently has nothing to do with the Flats. All flat owners have already formed a co-operative society and got rid of opposite parties, except that issues arising out of old contract are still pending. Moreover, the opposite party was building only one project on the industrial land which was earlier owned by the opposite party, by getting the user of the land converted. It only shows that opposite party was not even a regular builder, what to talk of having dominant position. It was not in the profession of building and it started a singular project because it had land available with it.



9. We therefore, consider that no issues concerning competition in India has been raised in this application and the real issues are actually contractual issues for which the remedy lies elsewhere. We find it a fit case for closer under Section 26(2).

Sd/-
Member (G)

Sd/-
Member (P)

Sd/-
Member (AG)

Sd/-
Member (T)

Sd/-
Member (D)

Sd/-
Chairperson

