

COMPETITION COMMISSION OF INDIA

Case No. 21 / 2011

Date: 08.11.2011

INFORMANTS:- Mr. Jagmohan Chhabra
 Mrs. Shalini Chhabra
OPPOSITE PARTY : M/s Unitech Ltd., Gurgaon

ORDER UNDER SECTION 26(1) OF THE COMPETITION ACT, 2002

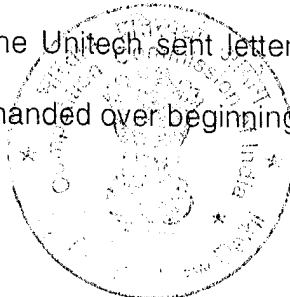
As per R. Prasad (dissenting)

The information in this case was submitted to the Commission on 18.05.2011 by Shri Jagmohan and Mrs. Shalini Chhabra alleging contravention of Section 4(1) of the Competition Act. The information providers has also asked for interim relief under Section 33 of the Competition Act.

2. According to the information the facts of the case in brief are as under:-

(2.1) The informants have booked 2 apartments with Unitech in Project "ESCAPE" and have made about 72% payment with respect to one flat and 42% payment with respect to the other. As per the agreement the payments to be made were Time based and not construction linked.

(2.2) The informants sent a letter dated 30.11.2007 to Unitech mentioning about very poor progress at site. In response the Unitech sent letter dated 19.12.2007 assuring that the possession shall be handed over beginning from 4th quarter of 2009.

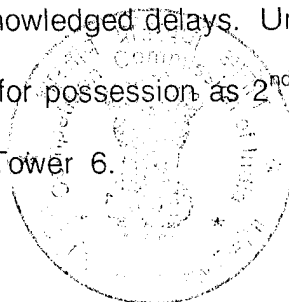


as per the schedule. But as there was no progress on the project, the informants vide letter dated 07.06.2010 (which was personally delivered in Unitech's office) informed that because of go slow tactics of Unitech the informants are withholding further payments till the time project is completed as per the schedule. They have also highlighted about late start of the project from the inspection.

(2.4) According to the agreement Unitech have to compensate Rs. 5 per Sq ft/ per month for delay on its part, whereas if there is a delay from the customer side in making the payment he has to pay @ 18% PA compounded quarterly on late payments. It was not acceptable to the informants and they demanded that compensation on late payments from the Unitech should be same i.e. @18% p.a. The informants also informed Unitech that the delay in the project is a part of deficiency in service, hence, they shall not be making any further payments.

(2.5) According to the informants, as the project is delayed by over 1 year and 8 months already and by its estimated new completion date, more than 2.5 years and considering that they are paying the commercial bank interest @ 15 % PA on the home loan, further payments would only be made after the builder credits interest and on handing over of the project.

(2.6) According to the informants, Unitech did not reply to the submitted letters and later on sent a letter dated 17.01.2011 stating that Tower 5 would be handed over in 2nd Quarter of 2010 and acknowledged delays. Unitech by letter dated 11.04.2011, give another new date for possession as 2nd Quarter of 2011 for Tower 5 and 3rd Quarter of 2011 for Tower 6.



(2.7) After many reminders from the informants Unitech has sent a letter dated 02.05.2011 warning informants to pay the instalments due on Calendar basis with 18% PA interest with quarterly computing, by 17.05 .2011 else the flats allotted would be cancelled.

3. Allegations raised by the informants are as under:

(3.1) Unitech has used its dominant position and has diverted/misused the funds collected for the construction of project to some other destination resulting in delay of project by as much as 3 years.

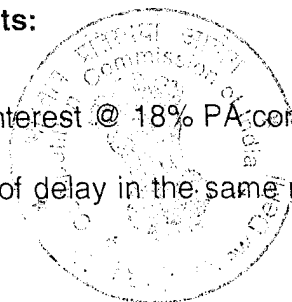
(3.2) The Unitech had malafide intentions from the inception and for his very reason, provided for payments from the allottees on “calendar basis (time basis)” rather than the “construction linked basis” which is a normal practice in trade.

(3.3) According to the agreement, late payments by allottees attract interest @ 18% PA compounded quarterly. On the other hand, any delay by the builder in completion of the project only entails a penalty of Rs 5 per Sq Ft/ per month which works out to be roughly 10%.

(3.4) The possession was to be delivered by the builder for both the flats in August, 2009 i.e., within 3 years of the agreement date. Despite pinpointing from the very inception about the late start of the project by letters, the builder deceitfully kept mentioning that the project was on schedule and possession shall be offered on due date to which Unitech failed.

4. Relief sought by the informants:

(4.1) To direct the Unitech to credit interest @ 18% PA compounded quarterly on the payments made for the period of delay in the same manner that the Unitech is



entitled to charge for late payments as per the agreement and not to charge any interest for the period of delay in payments due to delay attributable to it, in execution of the project.

(4.2) According to the informant, to restrain Unitech from using its dominant position in charging payments from allottees on calendar (time) basis rather than construction linked basis. According to the informants this direction would be given on a macro level in the interest of consumers in the real estate industry at large, if the Commission so feels, in larger public interest.

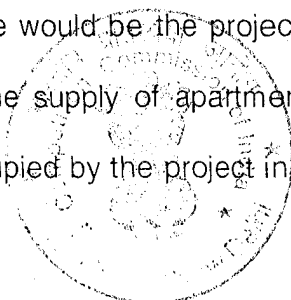
5. **Interim relief sought by the informants:** As the builder has threatened with dire consequences of cancelling flats for non payment with interest @18% PA with quarterly compounding by 17 May 2011, the informants, sought directives to the Unitech under Sec 33 of the Act restraining it from taking any coercive action against them until investigation by the Commission.

6. **Analysis:** When the information providers wanted to purchase flats there was a wide choice as they could have gone to any of the builders who operate in Gurgaon. But probably because of the brand name of Unitech, quality of construction and the price factor, they agreed to buy the flats from Unitech Ltd. In pursuance of the intention of the purchase of flats, information providers entered into an agreement with Unitech Ltd. as well as Pioneer Urban Land and Infrastructure Ltd. on 04.08.2006. According to the terms of the agreement the allotment of flats made was provisional and information providers agreed to pay a sum of Rs. 94,17,552/- for flat no. 303, tower – 5 in the complex known as “ESCAPE” sector 50, Gurgaon. According to the terms of the agreement, the amount paid was first to be adjusted against the interest and then against the purchase price. According to the terms of the agreement an amount of the 20% of the consideration money was to be

paid as earnest money and if the purchaser failed to pay any instalment within 90 days from due date, Unitech had right to forfeit the entire amount of earnest money and the allotment of the apartment was to be treated as cancelled. Further, any money paid above the earnest money was to be refunded by Unitech without interest. It was also stated in the agreement that the cost of the apartment is calculated on the basis of Super Area. The builder has also the right to change the layout plan and therefore there could be a change of flat area. Even the Preferential Location area of the flat and the storey which was allotted to the buyer could be changed. Club membership was mandatory and the buyer had to pay external development charges and infrastructural development charges. As far as maintenance was concerned after construction the maintenance was to be carried out by the agency nominated by Unitech Ltd. and at the time of delivery of the flat, three years maintenance charges @Rs.1.80 per Sq.Ft. had to be paid by the flat buyers to the builder. In addition the security deposit for maintenance was to be paid by the buyers to the builder. The information providers had no right in the complex except the right of access and exit to their apartment. The delivery of the property was to be made within 36 months of the date of the agreement. If the purchasers delayed payment they had to be paid interest charges at 18% interest per annum compounded quarterly. If the builder delayed the delivery it had to pay Rs.5 per sq. ft. per month of super area. After entering into an agreement the information providers in February 2008 found that hardly any construction had started. The information providers had purchased Flat no. 403 in tower 6 and Flat no. 303 in tower 5 'ESCAPE'. According to the agreement the possession should have handed over the flats before August 2009. The information providers found that till March 2010 there was hardly any construction activities in tower '5' and '6'. In fact till today the construction of the two flats has not been completed and possession has not

been given to the information providers. It is further seen that the installments were to be paid by the purchaser on time basis not with reference to the completion of the project. The information providers found as there has been no progress in the construction of the flats, they stopped paying instalment. As a consequence in May 2011 M/s Unitech sent a notice that the apartments allotted to them would be cancelled in accordance with the terms of the agreement.

7. On the basis of these facts, it has to be decided whether they appears to be prima facie case for investigation under section 26(1) of the Competition Act. The fact is that the information providers entered into an agreement with the Unitech. The question is whether Unitech came to a position of dominance. The next issue to be decided as to whether what would be relevant market in this particular case. In section 2(r) of the Competition 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. Another aspect to be considered is switching costs to buyers. In this particular case if the buyers wanted to switch from Unitech to any other developer / builder the switching costs would very high as the earnest money paid by the purchasers would be for forfeited. Therefore after entering into the agreements with the developers, the information providers became captured customers which allowed the builders to affect its consumers (i.e. the IPs) in its favour. As far as the relevant market is concerned the relevant market would be the project itself i.e. in this case "ESCAPE". Escape is conglomerate of various flats and there are a large number of buyers of flats. Therefore the relevant market in this case would be the project known as Escape. The relevant product market would be the supply of apartments and the relevant geographic market would be an area occupied by the project in sector 50, Gurgaon.



As switching cannot be resorted to by the information except at a cost and again to the builder the IPs are at the mercy of the builder. This is clear from the fact that instead of giving premises in 36 months of the agreement, the builder has taken more than 5 years and still more time is required. Further if the purchasers delayed payment, they had to be charged interest @18% PA compounded every quarter whereas if the developer delayed the project, it had to pay only Rs. 5 per sq. Ft/ per month. This is certainly unfair. It is also seen that in the terms of the agreement there is a mention of maintaining charges to be made in the advance for 3 years and that the maintenance would be carried out by the developer or its nominee. This appears to be case of tie-in arrangement.

8. On the perusal of this facts a view of the provisions of section 19(4)(g) of the Competition Act as well as clause a, b, c, d, f and Section 19(4) of the Competition Act there appears to be case of abuse of dominance. Further there is case of tie-in arrangement which is anticompetitive under section 3(4) of the Act and can be considered as one of the factors under Section 19(4)(m) of the Act.

9. As there appears to be prima facie violation under Section 4 of the Act as Unitech in this case is a dominant position in the relevant market, the Director General is directed to investigate this case with reference to Section 26(1) of the Act.

Sd/-
Member (P)

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