

COMPETITION COMMISSION OF INDIA

Dated: 24th January, 2012

Case No. 55 of 2011

Kolkata West International City Buyers'
Welfare Association, Howrah

Informant

Vs.

(i) Kolkata West International City Pvt. Ltd., Kolkata
(ii) Kolkata Metropolitan Development Authority
Bidhan nagar, Kolkata

Opposite Parties

R. Prasad (dissenting)

The informant in this case is an association of buyers of row houses/ bungalows in a project of Kolkata West International City Pvt. Ltd. (KWIC) which was to be developed in Dist. Howrah, West Bengal. The project was the first FDI project, an integrated township to be constructed on land of 390 acres leased out by Kolkata Metropolitan Development Authority (KMDA). For Phase I of the project 80 acres were handed over by KMDA to KWIC. The initial booking of the project started in 2006, without obtaining the necessary permission and clearances from the relevant statutory authorities. The project was to be completed by 2008 but till today the project is not yet complete and the facilities and the connectivity to the township has not been provided till date. After collecting 80% of the cost of the properties from the prospective buyers, KWIC gave agreements, which were contracts of adhesion, to be signed by the prospective buyers. The buyers, sensing that they would loose large sums of money if they did not sign the agreements, agreed to the terms of the agreements which were one sided and signed the agreements. In the information, the informants had stated that KWIC had abused its dominant position under Section 4 of the Competition Act and prayed for the following action to be taken by the Commission:



- (a) Initiate appropriate inquiry against M/s Kolkata West International City Pvt. Ltd. including but not limited to the abuse of dominant position by M/s Kolkata West International City Pvt. Ltd. and such other aspect as this Hon'ble Commission deems appropriate;
- (b) Direct the Respondents to produce the relevant records involving the decision making process culminating into the grant of sanction/approval of the Building Plans/Lay-out Plans;
- (c) Discontinue forthwith all the unfair and discriminatory clauses imposed upon the buyers by the Respondent No. 1 by abusing its dominant position;
- (d) Pass order providing exit option to an Allottee with full refund of money paid by the Allottee, together with interest @ 24% p.a. thereon as well as appropriate compensation towards opportunity cost;
- (e) Modify the Agreement thereby doing away with the abusive and discriminatory clauses working to the detriment and disadvantage of the Allottees;
- (f) Pass order imposing penalty on M/s Kolkata West International City Pvt. Ltd.;
- (g) Pass order awarding the cost and expenses in favour of the Petitioner Association;
- (h) Pass such other or further order[s] as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the present case.

2. The Commission gave a hearing to the information providers and Shri M. L. Lahoty Adv. appeared and pleaded on behalf of the information providers. He also submitted an affidavit on behalf of Shri Abhay Upadhyay, President of the association which submitted the information. In this affidavit Shri Upadhyay has stated that the relevant geographic market is the Western Periphery of Kolkata namely Distt. Howrah and the relevant product market is 'bungalow' and 'row houses' constructed amid the facilities and the amenities provided in the modern Integrated Satellite Township. It was also stated that the relevant product is unique and distinct without any substitute in the relevant geographic market i.e. in the District of Howrah. It was argued that the case is similar to the case of DLF where the Commission had directed an investigation under Section 26(1) of the Act and passed a final order. The details of similarities in the two cases are detailed as under:-

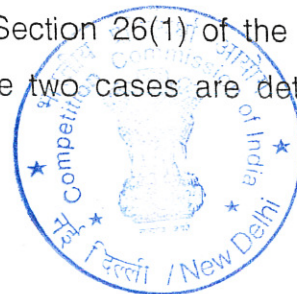


Chart showing similar unfair and abusive clauses imposed by DLF in the case of Belaire in Gurgaon and Kolkata West International City Pvt. Ltd. in Howrah, West Bengal.

I. Disparity in the rate of interest chargeable in the event of default by the parties:

DLF in Belaire Project	KWICPL	Findings by CCI in its Order dated 12.08.2011
Clause 35 of the Apartment Buyers' Agreement heavily tilts the scale in favour of DLF hereby the Allottee has been foisted with the liability to pay exorbitant rate of interest in case the Allottee fails to pay the installment in due time i.e. 15% for the first 90 days and 18% thereafter. The huge disparity and abusive dominance of DLF was in full display under Clause 11.4 whereby DLF would pay only Rs.5/- per sq. ft. to the Allottee for each month's delay, i.e. 1 % per annum.	Vide Clause 3.2 (page 56 of the petition) the Allottee has been saddled with the liability to pay interest @ 18% per annum in case of delay/default in payment of installment. On the other hand under Clause 5.1 (page 57 of the petition) the KWICPL has got away with the meager liability to pay prevailing Saving Bank rate of interest of the State Bank of India for each month in case it fails to handover the possession after the expiry of the stipulated time frame. Not only this, what makes Clause 5.1 excessively unfair is the fact that the KWICPL shall pay even this negligible interest but only adjust it at the time of issuance of Letter of Handing Over and that too will be calculated after enjoying a grace period of six months.	This Hon'ble Commission has treated such disparity in Para 12.90 (xvi) (page 216) as punitive penalty for default by allottees and insignificant penalty for DLF's default. Further, in Para 12.101 (page 223) this Hon'ble Commission has taken a critical view of such disparity. In para 13.3 (page 234) this Hon'ble Commission has in categorical terms held such condition to be unfair under Section 4(2)(a)(i) of the Act.

II. Sole discretion of the developer to unilaterally alter the project without consent of Allottees

Under Clause 9.1 the Allottee has been made to agree on dotted line that the Company would carry out, on his/her behalf, such additions, alterations, deletions and modifications in the building plans, floor	As per Clause 2.2 (page 55 of the petition) the KWICPL has reserved to itself the discretion to alter the specification of the unit without involving the Allottee at all. For doing this, neither the consent of the Allottee would be taken, nor would he be given any formal	This Hon'ble Commission has in paras 12.98 (page 221), 12.101 and 12.102 (pages 223-224) has considered this Clause to be heavily loaded. Para 12.105 (page 226) records the huge disadvantages suffered by Allottees. Finally, in para
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plans, Apartment plans, change in specifications, etc. as the Company consider necessary. Further the Company has also kept to itself the right to increase the number of floors of the building. DLF exploited this abusive Clause much to the detriment of the Allottees by increasing the number of floors from 19 to 29.	intimation. Under Clause 7.2 (page 59 of the petition), KWICPL further fortifies its position of dominance over the Allottee by asserting that the Company may do so without any prior permission of consent from any of the Allottees. It is noteworthy that the KWICPL has already implemented these abusive Clauses, much to the helplessness of the Allottees, by launching " Kolkata West Heights ", a multi-storied highrise in the same Phase-, I adversely impacting the Integrated Satellite Township Project as originally conceived.	13.3 (page 234) the Commission has held such condition to be unfair.
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III. Time is of essence only in case of payment by the Allottees and not in case of the completion of the Project and handing over the possession:

Under Clause 8 while time had been made essence when it comes to payment of installments by the Allottees, DLF has conveniently relieved itself by not making time as essence for completion in fulfilling its obligations, more particularly, handing over the physical possession of the apartment and Completion Certificate to the Allottees.	Clause 3.1 (page 55 of the Petition) stipulates that the timely payment of payable amounts (Installment/Down Payment) in accordance with the payment schedule as stipulated in the Provisional Allotment Letter shall be the essence of allotment.	Such a lop-sided clause heavily leaning in favour of the developer has been held to be unfair by this Hon'ble Commission under para 13.3 (page 234) read with para 12.95 (page 220)
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IV. Highly unfair and disproportionate forfeiture:

Vide Clause 4 , DLF has authorized itself to forfeit the earnest money (10% of the total cost) together with any interest paid, due or payable alongwith any other non refundable amount in case of failure by the Allottee to perform his/her obligations.	Under Clause 3.2 (page 56 of the petition) in case of delay the company has the option to cancel the Allotment and forfeit/deduct 5% of the price of the unit and refund the balance without any interest. This condition of deduction/forfeiture of 5% of the unit value finds reiteration in Clause 3.9 .	In terms of para 13.3 (page 234) read with para 12.95 (page 220) such forfeiture has been held to be unfair by this Hon'ble Commission.
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V. Encumbrance of the property by creation of third party right by the developer:

<p>Under Clause 23 DLF used its dominance over the Allottees to agree that DLF would raise finance/ loans from any financial institution or bank by way of mortgaged/ charge, etc. and the DLF/financial institution/ bank shall always have the first lien/charge of the said Apartment for all dues and other sums payable by the Allottees or in respect of any loan granted to the Company for the purpose of the construction of the said Building / said Complex.</p>	<p>Vide Clause 7.10 (page 60 of the petition) KWICPL has reserved to itself the power to delegate all its responsibility to any third party and also assign its interests to which allottees are neither parties nor have any say.</p> <p>In fact, KWICPL has already utilized this power by alienating some portion of the land of this Integrated Satellite Township to a third party.</p>	<p>In terms para 13.3 (Page 234) read with para 12.95 (page 220) such forfeiture has been held to be unfair by this Hon'ble Commission.</p>
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3. The only issue to be decided here is whether it is a case where investigation under Section 26(1) of the Act can be directed. On similar facts in the case of DLF investigation by the D.G. was directed. There is no reason for the Commission to take a different stand. The majority view though in this case is that no case is made out and therefore the case has been ordered to be closed.

4. Before analysing the case, I have to consider the majority view. In the majority order there is a discussion of explanation to Section 4 of the Competition Act. There is also discussion of relevant market, relevant product market and the relevant geographic market. It has been assumed that in order to be in a dominant position in the relevant product market other players have to exist and dominant player should control the market. The concept of switching to other houses and bungalows in the relevant geographic market was also considered. In the majority view one single township cannot be considered as a geographic market and that the applicant had to identify the other surrounding areas where houses and bungalows were available

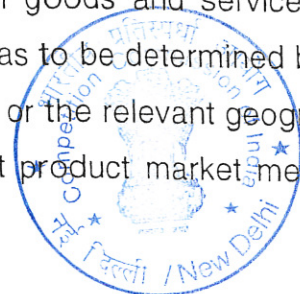


Commission is not able to examine demand substitutability, supply substitutability and the potential demand, the Commission cannot determine the market power of the enterprise. In the opinion of majority if the township had to be considered in the relevant market in terms of having similar features in the nearby areas have to be considered. A view has been taken that a single township cannot be the relevant market. It has been assumed that other townships are coming up in the vicinity of the township under consideration.

5. The majority then considered the arguments of the informant and considered that a comparison had to be made with different townships anywhere in the country. It was also the view of the majority that if a project itself is considered as the relevant market then the provision of Section 4 would apply to each and every building however small or big it may be. It has been held that Section 4 of the Act was to curb anti-competitive practices by a dominant player when the consumer had no alternative. It was therefore held that the relevant product and geographic market cannot be defined in such a narrow manner. The case has been closed on the ground that informant was unable to give information regarding surrounding townships and other projects as well as the market share of the other players in the market.

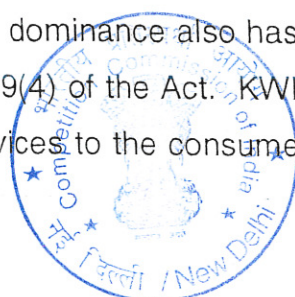
6. While analyzing this case, it has to be held that this is a case of service in accordance with Section 2(u) of the Act. When a consumer proposes to purchase a property he enters into a competitive market where he has a choice of going to any builder. But once he makes a choice and goes to a developer by paying the earnest money for the purchase of a property he becomes a captured consumer because if he switches to any other developer, he loses the earnest money. Even the agreement is signed after the consumer pays substantial amounts of money. Thus, there are two markets – the first market is when the consumer wants to purchase the property and the second market is the aftermarket i.e. when he has made the choice.

7. The next issue to be decided is the concept of dominance and relevant market. Market is a wider term where large number of goods and services are transacted whereas relevant market is the market which has to be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Relevant product market means a



market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the product or services, their prices and intended use. In this case, the issue is of service and not of product. Such service is available at various locations in India but if the consumer has made his choice by selecting a builder in one location then the choice is made. In that case either there is no choice available to the consumer or in his opinion there is nothing which is substitutable. There is no doubt that a market means that many players are available in the market for service but once a person has made his choice, he has only one service provider for a service which would be available for a period of time. In fact it becomes a monopolistic market of services just like an electricity market where only one service provider is available in one location. Further, as far as the consumer is concerned because of the high switching costs to the consumer, there is no other substitutable or interchangeable provision of services. As far as relevant geographic market is concerned, it means a market comprising the area in which the conditions of competition for provision of services or the services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. This provision of the Act as defined in Section 2(s) of the Act talks of competition for services or services which are homogenous from the neighbouring area. There is nothing in the Act which prohibits that the project itself cannot be taken as the relevant geographic market. In fact the service is being rendered in the said geographic area by one service provider and this provision of service is not available in the neighbouring areas. Further, even if service is available in the neighbouring areas, it is matter of investigation and also that the homogeneity in the area under consideration may be different from the area in the neighbourhood. Thus, the relevant market in this case should be the provision of services for the construction of rows and bungalows on the land of 80 acres in District Howrah, West Bengal.

8. The next issue is of dominance and the dominance arises out of position of strength in the geographical area as discussed above and in this area KWIC is able to affect its consumer in its favour. This is in accordance with reference to the clause (ii) of the explanation to Section 4 of the Act. The dominance also has to be seen with reference to the factors mentioned in Section 19(4) of the Act. KWIC has acquired its monopolistic position for the provision of services to the consumer after



the consumer booked the flats/bungalows in the 80 acres of land in Dist. Howrah, West Bengal. Further, the consumers are totally dependent on the service provider i.e. KWIC. Therefore clauses (f) and (g) of Section 19(4) are applicable in this case. The abuses have been mentioned in the information. It appears to be a case of abuse of dominance. Investigation is required for both market and after market abuse.

9. The Director General is therefore directed to investigate this case and submit a report within sixty days of receipt of this direction.

10. The Secretary is directed to forward a copy to the Director General.

Sd/-
Member (R)

Certified True Copy



S.P. Gahlaut
23/02/2012
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ASSISTANT DIRECTOR
Competition Commission of India
New Delhi