



CASE STUDY 08

SEPTEMBER 2013

**Belaire Owners' Association Vs. DLF Limited, HUDA & Ors. (Case No. 19/2010)*
(ABUSE OF DOMINANCE IN THE REAL ESTATE INDUSTRY)****FORUM:**

Competition Commission of India (CCI)
&
Competition Appellate Tribunal (COMPAT)

ACTS/SECTIONS REFERRED:

Competition Act 2002¹ of India
Section 4(2) (a): abuse of dominant position when an enterprise or a group directly or indirectly, imposes unfair or discriminatory condition of good and services
Section 19 (4): Inquiry into dominant position of enterprise
Section 19 1 (a): The Commission may inquire into any alleged contravention of the provisions on receipt of any information from any person, consumer or their association or trade association
Section 2 (u): Definition of service

PARTIES TO THE CASE:

1. **Informant:** Belaire Owners' Association
2. **Opposite Party:** DLF & Others

BACKGROUND OF THE CASE/FACTS:

DLF has launched a Group Housing Complex (The Belaire) in Gurgaon, planned to construct 5 multi-storied residential buildings. In its initial plan, DLF designed five multi-storied buildings which would consist of only 19 floors with a total of 368 apartments to be constructed within a period of 36 months.

In May 2010, the informant filed an instant case under Section 19(1) (a) of the Competition Act, 2002 and alleged that DLF, by abusing its dominant position, imposed highly arbitrary, unfair and unreasonable conditions on the informant through its agreements. As a matter of fact, the rights of the informant in this agreement were affected by the DLF. The Informant

further, alleged that the various clauses of the house agreement had imposed unilateral and one sided clauses and the action of DLF pursuant thereto was prima facie unfair and discriminatory, thus attracting the provisions of Section 4 (2) (a) of the Act.

Director General's Report:

The CCI, held that there was a *prime facie* case against DLF under the Act, and asked Director General (DG) to investigate the informant's allegations on DLF, as a dominant player in market and whether there exist a relevant market. The DG's investigation report observed that allegations made by the informant were true and the Act was applicable in this respective case. The DG report stated that since the cost of each flat was more than 1.5 cores, DLF constituted the 'high end residential market' in Gurgaon. This was observed that a customer wanting a flat in Gurgaon would not look for a flat in other area, or go for a lower priced flat still under development in the city. The DG report further analysed, DLF in exercise of its market power and dominance violated the Section 19 (4) and also has imposed unfair conditions of sale to consumers, which violated Section 4(2) (a) (i) of the Act.

ISSUES INVOLVED AND FINDINGS OF CCI:

Issue 1: Do the provisions of Competition Act, 2002 apply to the facts and circumstances of the instant case?

On the issue of jurisdiction, the CCI stated that the Act applies to all the existing agreements which entered into prior to the coming into force of Section 4. Further, Commission placed reliance on several Supreme Court judgments to conclude that housing activities undertaken by development authorities are considered as services and covered within the definition of service as provided under section 2 (o) of the Consumer Protection Act, 1986. Relying on the definition of Service under Consumer Protection Act and Sec 2 (u) of the Competition Act, CCI held that "it is clear that the meaning of 'service' as envisaged under the Act is of very wide magnitude and is not

¹ Hereinafter referred to as the Act

*http://www.cci.gov.in/index.php?option=com_content&task=view&id=150

exhaustive in application, thereby including the activities undertaken by DLF within its ambit.”

Issue 2: What is the relevant market, in the context of Section 4 read with Section 2(r), Section 19(5), Section 19(6) and Section 19(7) of the Competition Act, 2002?

The commission on the issue of relevant product & service market held that a relevant market is delineated on the basis of a distinct product or service market and a distinct geographic market. These terms have been defined in Section 2(r) of the Act read with Section 2(s) and Section 2(t).

DLF's 'high end' residential building in Gurgaon targets only specific consumers, according to their capacity to pay. On the issue of relevant geographic market, CCI stated that a decision to purchase a high-end apartment in Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location. Thus the Commission was of the view that Gurgaon is known to possess certain unique geographical characteristics such as its proximity to Delhi, proximity to airports and a distinct brand image as a destination for upwardly mobile families.

Issue 3: Is DLF dominant in the above relevant market, in the context of Section 4 read with Section 19 (4) of the Competition Act, 2002?

The commission analysis, as per the Section 4 (a) and Section 4 (a) (ii), DLF position of dominance in the relevant market cannot be ignored as its advantages of over competitors in size and resources, and concluded “DLF operate independently of competitive forces prevailing in the relevant market or to affect its competitors or consumers or the relevant market in its favour.” It was held that DLF had the highest market share (45%), *vis-a-vis* the market share of the nearest competitor (19%) which was more than twice of its competitor, leading to hardly any competitive constraints. Further, DLF had a clear early mover's advantage and occupies a leadership position as real estate is a sector with natural entry barriers due to high cost of land and brand value of incumbent market leaders.

Issue 4: In case DLF is found to be dominant, is there any abuse of its dominant position in the relevant market?

On this issue, the CCI held that DLF has resorted to malpractice in the agreement and its acts of abuse of dominance position can be clearly seen in this case. The abuse was alleged to be committed by imposing

unfair conditions on the buyer through the Provisional Booking agreement, which is signed by the buyer after having paid substantial costs, therefore, DLF leaving no option to the buyer to object to loop-sided provisions of the agreement.

There are some clauses analysed by CCI, such as DLF's right to change the layout plan without consent of allottees, DLF unilateral power to make changes in the agreement and the power to supersede without any right to the allottees. DLF continues to enjoy full rights on the community buildings and sites, there was no rights given to the buyer in this regard and further, allottees have no exit option except when DLF fails to deliver possession within agreed time, but even in that event he gets his money refunded without interest only after sale of said apartment by DLF to someone else. The CCI held that these are evidences of unequal bargaining power between the parties.

CCI Order & COMPAT: On this case, CCI held that DLF has contravened the section 4 (2) (a) (i) and (ii), directly and indirectly, imposing unfair or discriminatory conditions in the sale of services. CCI found DLF guilty of abusing its dominant position in the market and imposed a penalty of Rs. 630 crores on DLF. The CCI further directed DLF to cease and desist from formulating and imposing such unfair conditions in its Agreement with buyers in Gurgaon and to suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of the order on DLF.

DLF challenged the CCI order before COMPAT which granted stay order against the CCI order of imposing penalty under section 27 (b) of the Act subject to DLF furnishing an undertaking to pay 9% interest on the amount of penalty to be determined by COMPAT for the period from the date of order by CCI till the date of payment by DLF. Further, COMPAT ordered that the directions of CCI for modifications of terms of the Agreement shall remain in abeyance. However, the direction of CCI to "cease and desist" with the implementation of the Agreement was not stayed.

As per the COMPAT remand, both the parties submitted the modified terms and conditions before CCI. The CCI after hearing both the parties, has modified the standard terms and conditions of the flat buyers agreement in its simple meaning order with deleting nearly 16 clauses from the agreements. This modified agreement order by CCI was again

challenged by the DLF in COMPAT. The case is still pending with the COMPAT.

ANALYSIS OF THE JUDGEMENT/ORDER:

The recent order dated 03.01.2013 by CCI in the DLF case is not applicable to the flat buyer agreements of the other builders. If the CCI order on modified buyer's agreement is supported by COMPAT, it would be huge relaxation to all the property buyers who have invested huge amount and not satisfied with the service provided by builders. In this order, CCI has tried to remove the unfair and one sided clauses in the Flat Buyer Agreement which were till now common to most of similar agreements of other builders. DLF will have a chance to go Supreme Court against COMPAT's order. This case can make a change

in the whole real estate sector, if the apex court approves the modifications. It will affect the industry in a big way. The real estate sector will have to stop any exploitative business practices.

There are large numbers of cases pending in different forums because of little awareness about the reach of the competition law. To stop exploitative business practices and unfair & monopoly services to the consumers, there is a demand for proper guideline in this sector, which only can be possible with the positive order by the Supreme Court. So till then, it is the consumer and buyers have to keep their faith and patience on the CCI, COMPAT and Apex Court.

Prepared By: Biranchi Narayan Panda, CIRC