

Shri Satyendra Singh v. Ghaziabad Development Authority (Case No. 86 of 2016)

Decision date: 28.02.2018

Keywords: *Jurisdiction; sovereign functions; abuse of dominant position*

Issue: Whether GDA by increasing the price of flats allotted to Economically Weaker Sections (EWS) had abused its dominant position?

Rule: Sec. 4(2)(a) of the Competition Act, 2002

The Informant was stated to be an allottee of a low cost residential flat by the OP in 2008 for the Economically Weaker Sections (EWS) [hereinafter, 'Scheme'] in Ghaziabad, Uttar Pradesh. The OP is a statutory body. 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. 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.

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. It was also contended that the allegations of the Informant are not maintainable as GDA is not a profit making organization. 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 relating to sovereign functions is not included under the definition of 'enterprise' as per the provisions of the Act. 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. 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.

It was 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. 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.

The Commission referred 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) and Hon'ble erstwhile COMPAT in the matter of '*DLF Limited v. Competition Commission of India and Others*', (2014) Comp LR 1 (COMPAT). In the backdrop of the ratio propounded in the above-referred cases the Commission noted 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. 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.

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 Commission observes that the 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, 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.

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

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.

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. 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.

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.

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