

Competition Commission of India
[Case No. 74 / 2011]

Date: 18.10.2012

Informant (IP): Mr. Ram Niwas Gupta and Mrs. Priyanka Gupta

Opposite Party (OP): M/s Omaxe Ltd. and M/s Shanvi Estate
Management Services Pvt. Ltd.

As per R. Prasad (Minority)

Order Under section 27 of the Competition Act, 2002

I am not in agreement with the majority order and I am passing a separate order for reasons given separately.

Facts and allegations in brief:

1. Present information was filed under section 19 (1) of the Competition Act, 2002 (‘the Act) by Mr. Ram Niwas Gupta and Mrs. Priyanka Gupta (together referred to as informants – IP1 and IP2) against M/s Omaxe Ltd. and M/s Shanvi Estate Management Services Pvt. Ltd. (the Opposite Parties – OP1 and OP2). The informants have alleged that opposite parties have violated the provisions of Competition Act, 2002.
2. OP1 is the real estate developer and OP2 is a maintenance agency nominated by OP1. The IP has submitted that he was allotted a plot of land on transfer basis by OP 1 in one of its project named ‘OmaxeCity’ Sonapat, Haryana in 2006. The IP 1 transferred the plot in favour of IP2 later on. OP2 is a maintenance agency nominated by OP1 to look after maintenance works in the said project.

3. The IP1 has mentioned that as per clause 29 (a) of the Plot Buyer Agreement, OP1 kept the sole discretion of nominating a maintenance agency to handover the maintenance of the residential township after its completion to itself. The IP 1 had objected to the unfair terms and conditions of the 'Buyers Agreement' and insisted for changes in such terms and conditions but OP1 didn't allow any changes to be made on the ground that the said agreement is standard for all customers.
4. The IPs have alleged that by nominating OP2 as the maintenance agency, OP1 has forced the customers to subscribe only to the maintenance services as provided by its maintenance agency, thereby depriving them from getting better services in the market from which they could have benefitted if its maintenance agency had to compete with the other players in maintenance services market. The I.P. has also alleged poor services on the part of OP's maintenance agency.
5. IPs has alleged that the said conduct of the Opposite Parties is a tie-in-arrangement which is in contravention of the provisions of section 3 (4) of the Act.

DG's Investigation and Findings

6. Director General carried out investigation in pursuance to the order of the Commission in the matter issued under section 26 (1) of the Act. The DG has stated that developers and builder have appropriated the responsibility for arranging the maintenance agency unto themselves, for a period of five years from the date of completion of the project / or the formation of RWA. They do so in terms of the provisions of the Haryana Development and Regulation of Urban Area Act, 1975 and the Haryana Apartment Ownership Act 1983.
7. It has been stated that enactments of Haryana Government appear to be intended to ensure that required maintenance services are made available to plot / flat buyers on a continuous basis from the date of possession as it may not be feasible for the early occupants to arrange for such services and occupancy increases only with the passage of time.

8. However, DG observed that full disclosures regarding the terms of purchase and details of maintenance charges / services are not made known to the buyers upfront at the time of booking of plots / flats, or even at the time of signing the Buyer's Agreement. It is generally at the stage of offer of possession that the details of the maintenance services and the charges are disclosed. At this stage, the plot / flat buyers are required to sign the maintenance agreement with the unilaterally nominated maintenance agency. Since by this time substantial amount is already paid, the builders do not allow any exit option to the buyers, even if the terms are not acceptable to the buyers as the developers do not allow exercise of any exit option.
9. DG has further noted that even if the buyers are aware beforehand for the terms of purchase and details of maintenance charges, they have no other alternative but to agree to the same in view of similar trade practices of the other developers / builders.
10. According to DG, there is neither any allegation nor any evidence to suggest price fixing or limiting supplies / provisions of services or other ingredients of clause (a) to (d) of sub-section (3) of Section 3 of the Act. Therefore, it cannot be stated that the developers have entered into anti-competitive agreements in violation of the provisions of section 3(3) read with section 3(1) of the Act.
11. DG concluded that the arrangement between OP 1 & OP 2 cannot be said to be in contravention of sub-section (3) of section 3 of the Act as the two entities are not engaged in similar trade or business.
12. With regards to infractions of Section 3(4) read with section 3(1) of the Act, it has been alleged that tie-in-arrangement is in respect of the maintenance services provided along with the purchase of plot/flats. However, as section 3(4) of the Act prohibits entities operating at one level of production chain from entering into agreement with other entities operating at different levels of production chain and in different markets by various methods including tie-in-arrangement the case of the I.P. could not be covered as the I.P. is a consumer and is not at any stage or levels of production chain.

13. According to DG, unfair terms of the plot buyer's agreement, non disclosure of full details etc. could not be brought within the ambit of Section 3(4) of the Act.

Analysis:

14. I have carefully considered the facts and allegations made by the Informants and DG's investigation & analysis of the issues. The issues in this case are similar as to the number of previous cases that is abuse of dominance by the developer / builders and anti-competitive practices carried on by them. In this case also I will iterate the same reasoning and justification as I did in my previous orders in similar cases.

15. In the present case, the issue of dominance and its abuse has not been looked in to and investigated by the DG. DG has covered only the allegations leveled by the IPs pertaining to Section 3 infringement. I began the analysis with the contravention of Section 4 and thereafter that of Section 3. The analysis w.r.t. dominance, in this case also, starts with the delineation of the relevant market followed by assessment of dominance and analysis of the issues and allegations leveled by the informants.

16. Relevant market under section 4 is different from the market under section 3 of the Act. 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 the characteristics of the products or services, their prices and intended use.

17. The present case is the case of providing services to the customers and therefore the provisions of section 2(u) of the Act will apply in this case. The service starts right from the moment the buyer pays the booking amount till the expiry of the buyers' agreement. In the present case, the OP1 entered in to 'buyers agreement' which can aptly be called as agreement to render

service stipulating rights and duties of the parties whereby the builder has agreed to provide the service of construction of a complex, building, civil structure or a part thereof for consideration.

18. Originating from this buyers agreement is maintenance service agreement for provision of maintenance related services for the common areas of the project for subsequent five years after the completion of the structure and offering of possession by the Builder who is under the obligation to provide such service according to the relevant enactments of the Haryana Government. It is relevant to produce the relevant clauses of both the 'Buyers Agreement' as well as 'Maintenance agreement' before starting relevant market delineation.

Buyers Agreement:

“That in order to provide necessary maintenance services, the company may upon the completion of the said project, hand over the maintenance of the said project to any body-corporate, association etc. (hereinafter referred to as “Maintenance Agency”) as the company in its sole discretion may deem fit. The Maintenance, upkeep, repair, lighting security etc. of the project including other common areas, landscaping and common lawns, water bodies of the project will be organized by the company or its nominated Maintenance Agency. The Plot Buyer(s) agrees and consents to the said arrangements. The Plot Buyer(s) shall pay maintenance charges which shall be fixed by the company or its nominated Maintenance Agency from time to time depending upon the maintenance cost. The Plot Buyer(s) shall be liable to pay interest at the rate of 18% per annum for non-payment of any of the charges within the time specified failing which it shall also disentitle the Plot Buyer(s) to the enjoyment of common services including electricity, water etc.”

Maintenance Agreement:

“AND WHEREAS as per the terms of the said Buyer’s Agreement, the Developer has appointed the said maintenance Agency as its nominee

maintenance agency and have entrusted to the said Maintenance Agency, on a permanent basis, the work of management, administration, preservation, operations & facility management and upkeep of the said Township Project, operation of common services therein supply of water and also operations & facility management, repair and replacement of common areas and facilities to which the user has agreed.”

“AND WHEREAS the Maintenance Agency shall provide the maintenance services, raise bills directly on the user and collect payments thereof and to do all such acts, deeds etc. as may be necessary to provide maintenance services and collect bill thereof.”

19. The clause of the buyers agreement mentioned above extend the service for the period of five years from the date of possession of the flat / plot of land in a colony. This brings out the fact that provision of service of construction is not limited to the period starting from booking of the flat / plot till the possession rather till the expiry of the maintenance agreement or earlier when the maintenance is taken over by the RWA.

20. The buyer before entering in to the agreement has several options and choices available to him. He is free to go to any builder or colonizer. But once the option has been exercised, the choice of going to the alternative service providers ceases to exist. The purchase of flat / plot of land have different features and characteristic which place this whole transaction at different footing than the transactions in other products (buying and selling).

21. The attributes of this product makes it a different category in itself and accordingly, should be viewed differently than the other products. The various characteristics are as follows –

- i) The size of transaction in monetary terms
- ii) A bundle of services
- iii) The period involved for the provision of service

- iv) No. of stages in the process of completion of transaction
- v) The frequency of purchase after use
- vi) The procedure of buying the product
- vii) The nature of product
- viii) Ability to change if not found up to the mark
- ix) Dependency on the services of the builder
- x) Prerogative of the builder to make selection of the service providers
- xi) Uncertainty about the prices of the services
- xii) Uncertainty about various terms and conditions for the provision of various services
- xiii) The various switching cost involved – monetary as well as non-monetary
- xiv) Applicability of certain laws

22. All the above mentioned features to a great extent makes the buyer of the service dependent upon the service provider for a fairly long period where considerable switching costs are involved.

23. For the maintenance service for the project, the buyers have to rely on the builder / colonizer. As mentioned earlier, this agreement has its culmination from buyer agreement. Accordingly, we may call the maintenance service an aftermarket. Though the aftermarket has not been defined anywhere, but still an attempt can be made to define it. We may define an "aftermarket transaction" to be any transaction with two characteristics: (1) the aftermarket product or service is used together with a primary product, and (2) the aftermarket product or service is purchased after the primary product. From the discussion so far and nature and characteristics of the product involved, the booking and buying of the flat is one part (foremarket) and thereafter the after market. As can be seen from the terms in the

agreement, a flat / plot owner cannot dwell in the flat / plot without having these maintenance services. This aftermarket is not only dependent upon the foremarket but also act as complementary product to it.

24. The buyer having done the booking, thereafter becomes dependent upon the builder for the next maintenance service part. The moment the buyer becomes dependent upon builder, he faces high switching cost in going for other flat / plot of other projects of other builders.

25. Let us now examine the nature of aftermarket (maintenance service) with respect to the factors mentioned in sections 19(6) i.e. relevant geographic market and 19 (7) – relevant product market of the Competition Act, 2002 to delineate the relevant market in the present case.

26. **Relevant Geographic Market:** The builders / colonizers are under an obligation to provide maintenance services for the project according to the provisions of the applicable laws of the Haryana Government. Thus, the laws of the state forbid the buyers to take the services of agencies other than builder for the initial five years after the possession. The services required are related to the respective project only. This is sufficient to establish that the relevant geographic market is project itself.

27. That the relevant geographic market is project can also be concluded from the fact that buyers need the maintenance services on regular basis for the project.

28. **Relevant Product market:** That relevant product market is the after market of the maintenance services for the project can be inferred from the presence of following factors –

- Right of the builders to appoint the maintenance agency for the project
- Existence of specialized maintenance agencies

- Buyers need the services of these agencies as they cannot carry them out themselves.

29. In the backdrop of the foregoing analysis, I conclude the two relevant markets firstly, the market of real estate (plots as well as flats both under construction as well as constructed). I will not delve into the exact definition of this foremarket. ***The second relevant market is the aftermarket for the project concerned arising after the booking of the flat / plot comprising of various services coming under the umbrella of maintenance service.***

30. For arriving at the definition of the relevant market as above, I have relied on US Supreme Court's decision in the case of Eastman Kodak where a concept of 'aftermarket abuse' was given. According to the US Supreme Court, there were two markets i.e. a primary market where the OP may not be a significant player and the secondary market where the OP becomes a dominant player by virtue of signing agreement with consumers for sale of the property or after sales or service.

31. The next step in the process is the assessment of dominance of the Opposite Party in the aftermarket of provision of service.

32. Before stepping on to examine the dominance, the relevant provisions and sections of the Competition Act, 2002 need mention.

“The explanation to section 4 of the Act defines the dominance as -

(a) "Dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) Operate independently of competitive forces prevailing in the relevant market; or

(ii) Affect its competitors or consumers or the relevant market in its favour”

33. Also relevant are the factors mentioned in the section 19(4) of the Act. The factors applicable in the present case for the ascertainment of the dominance are stated along with the establishment of dominance.

1) The consumers are dependent on the builder / colonizer, for the relevant enactments of the Haryana Government makes it obligatory on the builders / colonizers to provide maintenance services.

2) The buyers are completely dependent upon the builder. The buyers are individuals who largely do not know each other and are scattered. Moreover, the individual buyers do not possess the economic power comparative to that of builders. They are thus entirely on the mercy of the builders.

34. The other grounds which contribute to the dominance of Opposite Parties are given below-

1. **Information Asymmetry**: - The very presence of information asymmetry make one party at higher footing i.e. the Opposite Party and the other i.e. the buyers at lower. When a prospective buyer approaches the builder / developer he is shown the brochure of project which highlights the various attractive / promising features of the project however, all the negative features / characteristics are not shown prominently and are thus concealed from the eyes of buyer at the time of booking. Even if some of the terms of buying are mentioned, the consequences of the terms or conditions which may affect the decision of buying are not explained to him. The builders retain with them the freedom to change the terms. All such things are the highlights of the DG report.
2. Moreover, the builders are completely free to provide the services at the terms and conditions which are decided unilaterally by them and made known to the buyers at very later stages of the project generally around the completion of the project. This introduces element of uncertainty and precludes the buyer to make informed decision. This information asymmetry enables the developer / builder at later stages of the project to exploit the consumers.

3. **Switching cost:** -The high switching costs prevent the buyers from changing their decision as it will involve the forfeiture of their hard-earned money. Knowing this fact absolutely well, the builders' starts abusing the consumer.
 4. **The Agreement:** - The buyer agreement itself is one of the reasons which enable the builder/ developer to exercise his dominance over consumer.
- 35.The above factors aptly prove the dominance of the Opposite Parties enabling OPs to affect the consumers or the relevant market in their favour.
- 36.Let us now examine and analyse the conduct of the OP in the relevant market raising the issue of abuse of dominance. The DG has not examined the conduct of the parties from the angle of dominance and its abuse. I am analyzing the same, picking up the conduct part from the DG report. Following are the conducts of the parties which raise the competition concerns as -
- 37.It has been stated by IPs and agreed to by DG that full disclosures regarding the terms of purchase and details of maintenance charges / services are not made known to the buyers upfront at the time of booking of plots / flats, or even at the time of signing of Plot Buyer's Agreement.Moreover, various terms of the agreement (Buyers) as well as those of maintenance agreement are one-sided and titled in favor of the Builder / developer e.g. penal rate of interest, advance invoice for a period of one year, unreasonable high charges etc.
- 38.By not making available various terms and conditions of the two agreements upfront to the buyer by the builder at the time of booking may significantly influence the buying decision, thus asymmetry gets promoted. This non-availability of information encourage the uncertainty. Further due to the various powers builder have given to themselves regarding the appointment of the agencies, their rates etc. uncertainty gets more push to the disadvantage of the buyers. Accordingly, upfront knowledge promotes informed decision making which may exert significant influence on their

buying decisions. Even if a buyer asks for all such details he will get to know terms and conditions of the buyer agreement only. Though the terms concerned with the maintenance aspect find place in the buyer agreement, the detailed terms and conditions regarding maintenance are disclosed only at the time of possession. Even the maintenance service charges remain undisclosed and uncertain till possession and disclosed at the time of possession only.

39. The buyer by this time has paid nearly the full amount for the flat / plot, is not in a position to switch. However, the exploitation of the buyers starts soon after booking and receipt of the allotment letter of the flat, as we observed in several previous cases.

40. DG has also admitted that full disclosures regarding the terms of purchase and details of the maintenance charges / services are not made known to the buyers upfront at the time of booking of plots / flats nor even at the time of signing of plot Buyer's agreement. It is generally at the stage of the offer of possession that the details of the maintenance services and the charges are disclosed. At this stage, the plot / flat buyers are required to sign the maintenance agreement with the unilaterally nominated maintenance agency. Buyers now cannot exit even if terms are not acceptable to them, as the developers do not allow exercise of any exit option.

41. According to me, the above non-disclosure considerably impacts the decision of the buyers and promotes inefficiency in the market to the detriment of the consumers. This promotion, willful or as a practice, of inefficiency results in exploitation of buyers in the hands of the builder. All this information asymmetry as practice carried on encourages the abuse of dominance by builders. This goes against the basic purpose of the Act –

- **To free the markets of the practices having adverse effect on competition:** –The above practice of non- disclosure since give rises to information asymmetry puts the buyers in a disadvantageous position and impacts his decision to make right choice. Not being able to make informed choice disturb the genuine competition possessing

features of full disclosure of material terms and conditions, promotion of players competing on efficiency etc.

- **To protect the interest of consumers:-** The consumers are totally at the mercy of the builders and are unable to cry foul as they are scattered and not in a position to challenge the power and might (both economic as well as non-economic) of builders.

- **Freedom of trade: -** The freedom of trade can be both direct as well as indirect. The direct freedom is the when there is no hindrance and obstacles in any form exists to the potential as well existing competitors in the market. The restriction on the buyers in any form to exercise their choice also impacts the freedom of participants in the market on the supply side.

42. According to DG, the conduct of OP1 demonstrate that it does not involve the buyers in the appointment of maintenance agency while the involvement of buyers in the appointment of maintenance agency and / or in the evaluation of quality of services paid / charged for has not been prohibited anywhere. The non-involvement of the buyers in such decisions, while taking care of maintenance services by the developers / builders, creates conditions which restrict freedom of trade for such providers who may offer better maintenance services.

43. The next issue to be dealt with pertains to the one sidedness of the terms and conditions of the agreement to the detriment of the buyers. In the present case the terms of the maintenance agreement which may influence buying decision e.g. penal rate of interest and advance invoice for a period of one year etc. are tilted in favour of the Opposite parties (Builder and appointed maintenance agency).

44. DG has also admitted that the terms of the buyers agreement do not express the autonomy of the contractual parties. The fact that the consumers are at the mercy of the Maintenance Agency appointed by the

developer and abuse is evidenced from the point that OP No.2 has raised an invoice dated 01.12.2009 on the IP for an amount of Rs. 15056/- payable within 30 days for maintenance services to be provided for the period from 01.12.2009 to November 2010. It may also be noted that clause 29 (a) of the Plot Buyer's Agreement dated 20.11.2006 mentions a penal rate of interest at the rate of 18% per annum; however the said penal rate of interest has been unilaterally increased to 2% per month i.e. 24% per annum vide clause 31 of the maintenance agreement signed on 01.12.2009. The conduct of OP No. 1 & OP No.2 in raising invoice for a period of one year in advance and subjecting the buyers to pay the same within 30 days failing which penal interest at the rate of 2% per month may be imposed, is an unfair trade practice as the same amounts to not only charging but also imposing penal rates for services not yet rendered.

45. The OP No.1 vide its letter dated 22.12.2009 has required the IP to obtain NOC from the Maintenance Agency the OP No. 2 as a condition precedent to the registration of the plot in favor of the IP. It is pertinent to state that even though OP No. 2 was not a party to the contract between the IP & OP No.1, yet the OP No. 1 has forced the IP to either into contractual obligation for maintenance services with OP No. 2 has been unilaterally nominated and from which maintenance charge has also been unilaterally fixed. Such a trade practice amounts to an unfair trade practice which has the effect of causing public harm.

46. DG has further stated that the refusal to provide an exit option also amounts to a restrictive trade practices as it restrict the choice of a customer from moving out of the project in case he is not satisfied with the appointment of maintenance agency or fees payable for such services or the nature & ability of the services provided.

47. The above two paras amply describe and report the exploitation of buyers and the unfairness of the terms. There is no doubt that the terms of the agreement were one sided. The OPs have taken undue advantage of the terms and uncertainty. Though DG has called the terms as unfair and said that this is a practice. Whether the terms are unfair is to be tested -

A term in an agreement is unfair if-

- It would cause a significant imbalance in the parties' right and obligation arising under agreement.
- The term is not reasonably necessary to protect the interest of the party who would be advantaged by the term.
- It would cause detriment to party if it were to be applied or relied on.

48. The detailed account given by the DG is sufficient to establish that various terms of the agreements satisfy the above three testing parameters. It leaves no shred of doubt that one sided terms are unfair. I have already mentioned elsewhere that the OPs are dominant in the relevant market. The application of unfair terms by the dominant enterprises violates the provisions of Section 4(2)(a)(i) of the Competition Act, 2002.

49. So far as the question of violation of section 3 is concerned; the practices being followed by the OP as well as other builders are quite common and anti-competitive. The various practices resorted to by builders / developers have already been mentioned in detail while explaining the contravention of section 4.

50. It is general practice that full disclosure regarding the terms of purchase and details of maintenance charges/services are not made known to the buyers upfront at the time of booking of plot/flats, nor even at the time of signing of Plot Buyer's Agreement. It is generally at the stage of offer of possession that the details of the maintenance services and the charges are disclosed. DG has stated that even if the buyers are aware beforehand of the terms of purchase and details of maintenance charges, they have no other alternative but to agree to the same in view of similar trade practices of the developers/ builders in general. DG has concluded parallel conduct and common or similar trade practices of the builders/ developers.

51. It is worthwhile to state the provision of Section 3 (3) of the Act.

“Any agreement entered into between enterprises or associations of enterprises or persons or associations 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, shall be presumed to have an appreciable adverse effect on competition

52. Accordingly, the infraction of section 3(3) can be drawn on the basis of explanation in paragraph 49, 50 and 51 mentioned above. I have concluded the violation of section 4(2)(c) of the Act i.e. the denial of market access elsewhere. DG has also stated elsewhere in his report that these practices restricts the freedom of trade of efficient service providers and accordingly results in denial of market access. Section 4(2)(c) and Section 3(3)(b) of the Act can be related. The practice of denial of market access under section 4 by dominant entity has the effect of limiting the provision of service in the relevant market. Similarly, the similar trade practice carried on by other participants in the market which restricts freedom of trade of efficient entities, denies access to market for them. DG has agreed that restricted trade practice is carried on by other participant in the foremarket and this restricts the freedom of trade of efficient entities. In view of above, I conclude the contravention of section 3(3)(b) of the Competition Act, 2002. However, since DG is already investigating the practices of the Real estate developers for various one-sided terms in the buyer agreements as well as not revealing several applicable costs at the time of booking of flats,

I am of the view that terms and conditions considered to be one sided in this case and observed by DG as a practice being carried on by all developers, be clubbed with the existing investigation carried on by DG.

53. To sum up, there is violation of Section 4 as well as Section 3 of the Act. Accordingly, in view penalty should be levied on both OP1 and OP2 as they have abused the position of dominance in the relevant market. In view of the above, and in exercise of powers under section 27 (a) of the Act, I direct OP1 offering services of building /developing and mandated to provide maintenance service respectively:-

- i. to cease and desist from formulating and imposing such unfair conditions in its agreements with buyers.
- ii. to suitably modify unfair conditions imposed on its buyers
- iii. Keeping, in view the totality of the facts and circumstances of the case, the Commission considers it appropriate to impose penalty at the rate of 2% of the average of the turnover for the last three preceding financial years on OP-1.

Turnover for year ended 31.03.2010 Rs 1014.70 Crore

Turnover for year ended 31.03.2011 Rs 1544.74 Crore

Turnover for year ended 31.03.2012 Rs 1871.15 Crore

Total Rs 4430.62 Crore

Average (Total ÷ 3) Rs 1476.87 Crore

2 % of average Rs 29.54 Crore

- b. The Secretary is directed to convey this order to the parties concerned and to DG to club the various practices mentioned in this order with the existing investigation of practices carried on by it.

S/d-
(R. Prasad)
Member