

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 26 of 2018

(Arising out of the Order dated 28.02.2018 passed by the Competition Commission of India in Case No. 86 of 2016.)

IN THE MATTER OF:

Ghaziabad Development Authority

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Ghaziabad Development Authority,
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A-14/16, L.G.F. Vasant Vihar, New Delhi- 110057

...Appellant

Versus

Competition Commission of India

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New Delhi- 110001.
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Smita Jhingran, Secretary

...Respondent

Present

For Appellants:

Mr. Ajit Kumar Sinha, Sr. Adv. with Shashank Singh, Naveen Soni, Deborah Serto, Adv.

For Respondents:

**Mr. Balaji Subramanian, Mr. Akash Kundu,
Dr. Shama Nargis, Dy. Dir. (Cci)
Ms. Srashti Parashar, CCI R1**

J U D G E M E N T

(18.12.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed under Section 53 (b) of the Competition Act, 2002 (the “**Competition Act**”) by Ghaziabad Development Authority (“**GDA**”) who is the Appellant herein, for challenging the Impugned Order dated 28.02.2018 in Case No. 86/2016 passed by the Competition Commission of India under Section 27 of the Competition Act.

2. Competition Commission of India is the Sole Respondent in the present appeal.

3. Heard the counsel for the parties and perused the records made available.

4. While reserving the order, we directed both the parties to file Written Submissions within seven days vide order dated 21.10.2024. We note that only Respondent i.e., Competition Commission of India has filed its Written Submissions on 06.11.2024, however, by several reminders no Written Submissions have been furnished by the Appellant i.e., GDA.

5. The Appellant submitted that GDA was constituted under Section 4 of the Uttar Pradesh Urban Planning and Development Act, 1973 and engaged in the development and sale of real estate in Ghaziabad and is duly empowered to acquire, hold, and dispose of land while undertaking various development activities within the region.

6. The Appellant elaborated that in 2008, it launched a housing initiative known as the Pratap Vihar Residential Housing Scheme, specifically designed for the Economically Weaker Section (**EWS**). As part of this Scheme, a lottery draw was conducted in 2009, resulting in the allocation of flats to Satyendra Singh (hereinafter referred to as the “**Informant**”) and 341 other beneficiaries at a price of Rs. 2,00,000 each. However, in 2015, the Appellant issued letters to these allottees demanding an increased payment of Rs. 7,00,000 for the flats. This action led the Informant to approach the Competition Commission of India (**CCI**), alleging unfair practices and abuse of dominant position by the Appellant under the provisions of the Competition Act.

7. The Appellant contends that on 27.12.2016, after hearing the parties, CCI erroneously found merit in the Informant’s allegations and directed the Director General (Investigation) (hereinafter referred to as “**DG**”) to conduct an investigation based on an order dated 02.02.2017, issued under Section 26(1) of the Competition Act.

8. The Appellant submitted that GDA is an organ of the State of U.P. and therefore can not be treated as ‘Enterprise’ u/s 2(h) of the Competition Act. The Appellant stated that on this ground alone, the Impugned Order deserve to be set aside. The Appellant also pleaded that it is not profit oriented organisation and therefore can not be treated by CCI as private enterprise.

9. The Appellant stated that in addition to its own Scheme, during the years 2008-2009, Uttar Pradesh Awas Evam Vikas Parishad also implemented an EWS scheme for Siddharth Vihar. The Appellant explained that during this period, the Appellant introduced several other housing initiatives, including Koyal Enclave, Balmiki Kunj, Nand Nikunj, Rajinder Nagar, and Indira Puram. Additionally, in 2011, Ansal API launched an EWS scheme named Ashra in Ghaziabad. The Appellant elaborated that these facts contradict CCI's assertion that inaccurately characterized the Appellant as a dominant entity in providing services related to affordable housing for economically weaker sections within Ghaziabad.

10. The Appellant stated that the DG summoned both the Appellant and the Informant to collect relevant materials and documents for investigation purposes and subsequently, a report was submitted by the DG to CCI on 04.09.2017. The Appellant acknowledged that on 04.10.2017, CCI forwarded the DG's report to all parties involved and instructed them to submit their statements and objections by 08.12.2017.

11. The Appellant submitted that objections against the DG's Report were filed by the Appellant on 07.12.2017. Following a hearing regarding these objections on 20.12.2017, CCI directed the Appellant to furnish written submissions by 10.01.2018 and CCI asked the Appellant to provide financial statements and income tax returns for fiscal years 2014-15 to 2016-17.

12. The Appellant submitted that it filed written submissions along with additional objections concerning the DG's Report on 10.01.2018, which included financial statements for fiscal years 2014-15 to 2016-17 and the Appellant sought an extension for submitting income tax returns from the Appellant through a letter dated 10.01.2018. The Appellant stated that aggrieved by CCI's orders dated 04.10.2017 and 20.12.2017 mandating financial disclosures from its officials, a writ petition (W.P. (c) no. 947 of 2018) was filed challenging these orders. The Appellant submitted that during proceedings of this petition, CCI indicated that there would be no further action regarding financial disclosures by the Appellant and consequently, the writ petition was disposed of by the Hon'ble Delhi High Court accordingly.

13. The Appellant stated that during its ongoing investigation process, on 21.02.2018, relevant turnover details pertaining to services offered for developing and selling low-cost residential flats under affordable housing schemes targeting economically weaker sections were provided by the Appellant.

14. The Appellant submitted to the CCI that on 28.02.2018, CCI issued an order under Section 27 of the Competition Act ("Impugned Order"), imposing a penalty amounting to five percent of its average turnover/receipts derived from services related to low-cost residential flats under affordable housing schemes

for economically weaker sections over three preceding financial years totalling Rs.1,00,60,794 alongside a cease-and-desist directive.

15. The Appellant alleged that the DG's determination of the 'relevant market' as *"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 erroneous and has been incorrectly affirmed by the CCI in the Impugned Order. The Appellant asserted that a proper assessment of its dominant position in the relevant market must consider the criteria outlined in Sections 19(6) and 19(7) of the Competition Act for defining both the 'relevant product market' and 'relevant geographic market', specifically, the DG's classification of Ghaziabad as the relevant geographic market, arguing that it should encompass the broader Delhi NCR region.

16. The Appellant highlighted that the eligibility criteria for potential allottees, as stated in the Scheme's brochure, do not restrict applicants from outside Ghaziabad. Successful allotments have been made to residents from Haryana and Delhi. The Appellant contended that consumers viewed the Scheme as a viable option, yet CCI failed to consider the residential status of these allottees when determining the 'relevant geographic market.' Given these factors, the Appellant requested CCI to recognize 'Delhi NCR' as the appropriate geographic market, necessitating a reassessment of whether the Appellant holds

a dominant position based on this accurate delineation, which was not considered by CCI.

17. The Appellant submitted that merely being in a dominant position, as outlined in Section 4 of the Competition Act, does not constitute a contravention unless there is an abuse of that position. The Appellant asserted that the Appellant did not engage in any abusive conduct under Section 4 of the Competition Act, contrary to the findings of CCI in the Impugned Order. The Appellant emphasized that Section 4 specifies that the mere existence of dominance does not equate to anti-competitive behaviour; rather, it is the abuse of such dominance that is prohibited.

18. The Appellant submitted that for an abuse to be established under Section 4(2)(a)(i) of the Competition Act, there must be evidence of unfair or discriminatory conditions imposed on the purchase or sale of goods or services. The Appellant explained that in the present case, when the Appellant decided to increase the price of flats from Rs. 2,00,000 to Rs. 7,00,000, it duly informed the allottees and sought their consent through a letter dated 27.11.2015.

19. The Appellant justified the price increase due to unforeseen circumstances, that could not have been anticipated and that the original cost of Rs. 2,00,000 was an estimated figure subject to potential inflation. It is the case of the Appellant that, Satyendra Singh, the Informant and an allottee under the Scheme, provided consent for this price increase in a letter dated 17.12.2015.

20. The Appellant asserted that it obtained consent from several allottees regarding this adjustment in pricing. At the time of launching the Scheme, the applicable Costing Guidelines from 1999 allowed for price increases exceeding 10%, with provisions for allottees to receive refunds with interest if they disagreed with such increases. The Appellant submitted that since allottees had options available to them, including refunds with interest, there was no abuse of dominant position by the Appellant.

21. The Appellant stated that additional costs associated with contingencies and overheads were waived in determining the revised flat prices; thus, if these costs had been included, the revised pricing would have exceeded Rs. 7,00,000 and is argued that there were no unfair or discriminatory conditions imposed on allottees under Section 4(2)(a)(i) of the Competition Act, as they retained full flexibility to withdraw from the Scheme and receive their deposits back with interest without facing any penalties or excessive charges.

22. The Appellant submitted that even if it were found to have engaged in an abuse of dominant position under Section 4(2)(a)(i) of the Competition Act, the CCI has erred in determining the quantum of the penalty imposed under Section 27. According to Section 27(b) of the Competition Act, upon finding a contravention, the CCI may impose a penalty not exceeding 10% of the average turnover for the preceding three financial years. In the Impugned Order, the CCI imposed a penalty of Rs. 1,00,60,794, which represents 5% of the Appellant's

average turnover from services related to low-cost residential flats for economically weaker sections. The Appellant contended that the CCI failed to adequately consider specific mitigating factors that should have influenced its decision regarding monetary liability. The Appellant submitted that the erstwhile COMPAT has emphasized the importance of considering such mitigating factors to avoid arbitrary penalties, as seen in cases like *MDD Medical Systems v. Foundation for Common Cause and M/s. Gulf Oil Corporation Limited v. Competition Commission of India*.

23. The Appellant highlighted that it is not a habitual offender and this instance marks its first contravention of the Competition Act. A comprehensive inspection conducted on 08.03.2018, revealed that the Appellant had acted in good faith by granting an extension to its contractor while imposing an estimated fine for delays in construction. The Appellant submitted that GDA is committed to completing construction and delivering flats to allottees as promptly as possible.

24. The Appellant stated that the CCI's directive for the Appellant to 'cease and desist' from conduct found in violation of Section 4(2)(a)(i) of the Competition Act could hinder progress on these developments. The Appellant urged that this cease-and-desist order be overruled as halting construction would not benefit the allottees, and requests permission to continue work under the

revised cost framework with the aim of expeditiously delivering possession of flats to those who consented to the increased prices.

25. Concluding his pleadings, the Appellant requested this Appellate Tribunal to set aside the Impugned Order. The Appellant also requested to annul cease and desist order and consider reducing penalty.

26. Per contra, the Respondent refuted all the averments of the Appellant treating these as baseless and misleading.

27. The Respondent submitted that the present Appeal has been filed against the Order of the Respondent/CCI dated 28.02.2018, wherein it was held that the Appellant unilaterally increased the price of flats and imposed arbitrary and unfair terms on allottees from the economically weaker sections of society. The Respondent stated that the conduct of the Appellant was found to constitute an abuse of its dominant position in the market for the provision of services related to the development and sale of low-cost residential flats under affordable housing schemes in Ghaziabad, thereby violating Section 4(2)(a)(i) of the Competition Act.

28. The Respondent elaborated that in 2008, GDA announced a scheme for the allotment of low-cost residential flats for Economically Weaker Sections (EWS) in Pratap Vihar, Ghaziabad, with an eligibility criterion that included an income limit of Rs. 25,000 per annum. This demographic represents a vulnerable segment of society. The initial cost of the flat was set at Rs. 2,00,000,

payable in instalments, with an interest rate of 10.5% per annum for delayed payments. The Respondent stated that there was no provision for interest on delayed possession, nor was there a fixed date for possession, highlighting the one-sided nature of the scheme.

29. The Respondent further stated that even after seven years without any delivery of flats, GDA informed allottees in 2015 that the price had been revised to Rs. 7,00,000, requiring their consent within fifteen days or risk cancellation of their allotment.

30. The Respondent submitted that Appellant sought to justify this significant price increase by claiming that the initial price was a mistake as it did not account for land costs and that certain specifications had changed. The Respondent emphasized that it is implausible that a housing scheme organization like Appellant/GDA would overlook land costs. The Respondent refuted the argument of the Appellant claim and submitted that these so-called new specifications cited, such as painting and safety provisions are fundamental requirements that should have been included from the outset. The Respondent emphasized that this explanation of the Appellant is not convincing and exemplifies how GDA abused its dominant position by more than tripling the price while delaying delivery even after several years and that too relating to vulnerable allottees from economically weaker segment who felt compelled to accept these terms as such EWS allottee did not have bargaining powers.

31. The Respondent further contended that GDA has argued that it does not qualify as an "enterprise" under the Act and has challenged the definition of the relevant geographic market as being limited to Ghaziabad. However, Section 2(h) of the Competition Act broadly defines 'enterprise' to include any person or any entity engaged in activities related to production or provision of services, encompassing government departments unless they pertain to sovereign functions. The respondent submitted that the activities undertaken by GDA, such as land acquisition and property sales, are commercial in nature and can also be performed by private entities; thus, GDA qualifies as an enterprise under the Act.

32. The Respondent elaborated about market definition by conceding that while there is no dispute regarding the relevant product market, GDA contends that the relevant geographic market should encompass Delhi NCR and Uttar Pradesh due to its open scheme. The Respondent refuted such claims of the Appellant that only because the scheme was accessible to individuals outside Ghaziabad does not justify categorizing Delhi NCR as a single relevant geographic market. The Respondent elaborated that relevant geographic market is defined as an area where goods or services are interchangeable under similar competitive conditions; thus, significant differences exist in competition conditions across various cities within NCR.

33. The Respondent highlighted that even if there is a modest price increase in Ghaziabad, consumer preferences are influenced by external factors such as transportation costs when purchasing EWS flats. A consumer seeking EWS housing in Ghaziabad would not consider housing in Gurgaon or Faridabad as substitutes due to these differing conditions.

34. The Respondent submitted that CCI's approach in determining consumer preferences has been validated by COMPAT in prior rulings and as such is undisputed fact that GDA holds a dominant position within this market; however, its justification for tripling prices based on inflation and increased land costs is untenable. The Respondent elaborated that the initial price was clearly stated as Rs. 2 lakhs; thus, GDA's claims regarding non-inclusion of land costs in the initial price of Rs. 2 lakhs are inconsistent with its previous assertions.

35. The Respondent submitted that the Appellant has claimed that Clause 6 of the Ideal Guidelines for Costing of Properties of Awas Vikas Parishad and Development Authorities, 1999 provides an exit option for allottees, allowing them to withdraw from the project and receive a refund of their deposited amount along with interest at a rate of 9% per annum and the Appellant further argued that this provision indicates that allottees were not "locked in," and therefore, there is no case of abuse of dominance. On this issue, the Respondent contended that this so-called "exit option" does not support GDA's position and instead it exemplifies a "take it or leave it" approach, which is characteristic of

an abuse of dominance. The Respondent submitted that the existence of such an option does not mitigate the unfairness of the situation faced by the allottees.

36. The Respondent stated that GDA's purported exit option is neither practical nor considerate of the circumstances faced by consumers in the relevant market. The Respondent explained that the housing scheme was specifically designed to assist EWS consumers in acquiring flats at a significantly lower price compared to market rates, with payment terms extended over a period of 20 years and if such consumers were to exit the scheme, they were unlikely be able to secure similar flats at such an affordable price due to their limited financial means. Thus, the exit option fails to provide genuine relief or choice for the allottees.

37. The Respondent submitted that the Appellant has claimed that no other allottees have raised complaints regarding this matter, however, the Respondent contended that this assertion is irrelevant to the case at hand. The Respondent stated that under Section 19 of the Competition Act, the CCI has the authority to investigate any alleged contravention of Sections 3 or 4 either on its own initiative, upon receiving information in the prescribed format, or based on a referral from another authority. There is no stipulation requiring a minimum number of victims (i.e., allottees) to come forward for action to be taken and therefore the CCI can proceed even *Suo moto*.

38. The Respondent further clarified that the role of the victim, or allottee in this instance, under the Act is that of an "informant." Their responsibility is simply to present facts to the Commission that establish a prima facie case under Section 26(1) of the Competition Act. Following this, an investigation is conducted by the DG, and subsequent proceedings are based on the findings of the DG's report.

39. The Respondent submitted that in instances of abuse of dominant position, it is required to recognize that the enterprise in question often possesses significant power, which may deter most consumers from voicing complaints. This is precisely why the legislature has not established a minimum threshold for informants for the Commission to take action.

40. The Respondent stated that disputes related to real estate projects can fall under various regulatory frameworks and authorities, including the Insolvency and Bankruptcy Code (IBC), Real Estate (Regulation and Development) Act (RERA), Consumer Protection Act, Competition Act, civil courts, and even High Courts. However, this case specifically pertains to aspects governed by the Competition Act, where there is no requirement for a minimum number of informants or complainants to be established or enforced due to the nature of the statute.

41. Concluding his arguments, the Respondent stated that GDA's actions have imposed unfair and discriminatory terms on allottees as defined under Section

4(2)(a)(i) of the Competition Act. The Respondent also stated that the penalty imposed by CCI that is 5% of average turnover, is not reasonable given its objective of deterrence and considering no mitigating factors were presented during proceedings and submitted that no interference with this penalty is warranted based on these findings. The Respondent requested this Appellate Tribunal to dismiss the appeal with cost.

Findings

42. From above pleadings of the Appellant as well as the Respondent, it becomes clear that certain issues are required to be determined in order to decide the appeal. The issues raised by the Appellant are primarily on the following grounds :-

- (a) The Appellant is not an enterprise in terms of Section 2(h) of the Competition Act, since GDA is an organ of the Government of Uttar Pradesh. Further, the Appellant is non profit oriented organisation.
- (b) The other point of the Appellant is that the relevant geographic area should have been taken entire NCR rather than district of Ghaziabad.
- (c) Yet another issue raised by the Appellant is that it is not a dominant player since other players existed in the relevant market.
- (d) Last point of the Appellant is that even assuming that it was a dominant player in the relevant market, the Respondent / CCI should not have imposed the penalty looking into the mitigating factors.

All these points are interconnected and inter-dependent and therefore we shall deal all these issues in conjoint manner in the following discussions.

43. We note that one of plea taken by the Appellant is that it is not an ‘enterprise’ within the meaning of Section 2(h) of the Act as it was only performing the statutory function of constructing flats for EWS allottees under the Scheme and since it is not an ‘enterprise’, its alleged conduct cannot fall under the purview of the jurisdiction of the CCI. We observe that the term ‘enterprise’ has been defined in Section 2(h) of the Act which reads as under: -

*“2(h)...a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, **but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space...**”*

(Emphasis Supplied)

44. It has been brought to our notice that, 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**', in 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'.

45. We observe that other than the activities of the Government which are relatable to sovereign functions and activities carried by the four departments of the Central Government *i.e.* atomic energy, defence, currency and space, all other activities of the Government are covered under the definition of 'enterprise' as specified in Section 2(h) of the Act. We note, based on pleadings of both parties and record made available that the activities performed by GDA are economic activities and several of them are being carried on for a commercial consideration. Thus, plea of the Appellant, that it is not an enterprise in term of Section 2(h) of Competition Act, is rejected.

46. As regards the arguments of the Appellant that it is an organisation not for profit orientation, and thus cannot be treated as Enterprise, we do not find it to be logical. In any case, this pleading, although not found convincing or established, does not have any adverse bearing on the Impugned Order passed

by the Respondent. If found dominant player in the relevant market and culprit of exercise of abusive powers, the CCI has to take action according to provision of the Competition Act. We do not find any merit in submissions of the Appellant on this ground and similarly we do not find any error in the Impugned Order on this ground.

47. Now we will deal the issue of relevant market. As per Section 2(r) of the Act, **“relevant market means the market which may be determined by the CCI with reference to the ‘relevant product market’ or the ‘relevant geographic market’ or with reference to both the markets”**. The term ‘relevant product market’ has been defined under Section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of characteristics of the products or services, their prices and intended use. To determine the ‘relevant product market’ in terms of the provisions contained in Section 19(7) of the Act, the CCI has to give due regard to all or any of the stipulated factors viz. physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.

48. The relevant geographic market has been defined under Section 2(s) of the Act as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are

distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the ‘relevant geographic market’ in terms of the provisions contained in Section 19(6) of the Act, the CCI has to consider all or any of the factors viz. regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.

49. We note that considering the factors enumerated under Section 19(7) and 19(6) of the Act, the DG has delineated the relevant market in this matter as *“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”*.

50. We note that the Appellant has submitted that NCR should be taken as the relevant geographic market in the matter instead of the territory of Ghaziabad as any resident of NCR could apply for its housing schemes subject to fulfilment of other conditions of the Scheme as set out in the Brochure.

51. We note that flats launched under the Pratap Vihar Residential Scheme was specifically for EWS who otherwise may not be able to afford to purchase flats from the private developers/builders and the applicants’ annual income limit was Rs. 25,000/- is considered relevant to consider them in this category. Under the scheme of GDA or UPAVP, registration is first required to be made

by an applicant on payment of the laid down amount; the allotment is made subsequently through a draw of lottery. Allottees of flats under the schemes are randomly selected through a computerised process. This is not the case with the private developers where consumers have the option to choose flats of their choice. Further, there is an eligibility criterion which is applied in the housing schemes of GDA whereas private developers do not have such an eligibility criterion.

52. It is significant to note that, while determining the relevant geographic market as ‘the district of Ghaziabad in Uttar Pradesh’, the DG noted that a person belonging to EWS category has meagre resources and therefore, his choice/ selection of flat in a particular scheme/ locality would be restricted in terms of price of the flat, distance and travel cost from work place, *etc.* It has been brought out that in terms of the provisions of Section 4 of the Urban Planning and Development Act, 1973 of Uttar Pradesh, the services of GDA are restricted to the territory of Ghaziabad district only. We note that this has bearing on the status of GDA.

53. We observe that only because of the reason that schemes of the Appellant are open for all residents of NCR, the relevant geographic market cannot be taken as NCR. It is noted that a relevant geographic market means an area where goods or services are sufficiently interchangeable or substitutable under similar conditions of competition and are distinct from the neighbouring areas and the

entire region of NCR cannot be said to be one market because there are considerable differences in the conditions of competition for EWS flats in the different cities in NCR.

54. Thus, we find that the sale of low-cost residential flats under affordable housing schemes for the EWS in the district of Ghaziabad is the relevant market in this case as currently decided by CCI. Thus, we do not agree with the Appellant on this ground.

55. As regards the assessment of the position of dominance of GDA in the relevant market- Explanation (a) to Section 4(2) of the Competition Act provides that ‘dominant position’ means a position of strength, enjoyed by an enterprise in the relevant market, which enables it to - (i) operate independently of the competitive forces prevailing in the relevant market; or (b) affect its competitors or consumers or the relevant market in its favour. Further, to determine whether an enterprise is in a dominant position or not in a relevant market, the CCI is required to have due regard to all or any of the factors as enumerated under Section 19(4) of the Act such as market share of the enterprise, its size and resources, size and importance of its competitors etc.

56. In this regard, we note the relevant section 4 and Section 19(4) and 19(6) of the Competition Act, which read as under:-

“Sec 4- Abuse of dominant position –

(1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation. — For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation. —For the purposes of this section, the expression—

(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. (b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c) “group” shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.

Sec 19(4)- The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely: —

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

- (g) **monopoly or dominant position** whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise;
- (h) **entry barriers including barriers such as regulatory barriers**, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- (i) **countervailing buying power**;
- (j) **market structure and size of market**;
- (k) **social obligations and social costs**;
- (l) **relative advantage**, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- (m) **any other factor** which the Commission may consider relevant for the inquiry.

Sec 19(6)- The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely: —

- (a) **regulatory trade barriers**;
- (b) **local specification requirements**;
- (c) national procurement policies;
- (d) adequate distribution facilities;
- (e) **transport costs**;
- (f) language;
- (g) **consumer preferences**;
- (h) need for secure or regular supplies or rapid after-sales services.

*Sec 19 (7)- The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely: — (a) physical characteristics or end-use of goods;
(b) price of goods or service
(c) consumer preferences;
(d) exclusion of in-house production;
(e) existence of specialised producers;
(f) classification of industrial products.”*

(Emphasis Supplied)

57. We observe that on issue of dominance of the Appellant, the DG reported that during 2008 and 2009, there were only two entities offering flats under EWS schemes *i.e.* GDA and Uttar Pradesh Avas Evam Vikas Parishad (UPAVP). The DG also stated that Ansal API was the third enterprise which entered into the relevant market only in 2011. It was noted that, in terms of the total number of EWS flats offered, during 2008-2015, GDA was having 77.42% market share. Apart from this, on the basis of size and resources, GDA enjoyed exclusive powers to undertake development work in Ghaziabad. The DG also reported that the consumers in the relevant market were predominantly dependent upon GDA and after analysing the factors enumerated under Section 19(4) of the Act, the DG concluded that GDA is in a dominant position in the relevant market. It is also observed from the Impugned Order of CCI, which is based on DG's report and examination by CCI that GDA was dominant player

in relevant market and finally GDA has abused its dominant position by imposing unfair conditions and price on the allottees of the Scheme in contravention of the provisions of Section 4(2)(a)(i) and (ii) of the Competition Act, respectively. The absence of any enabling stipulation or clause in the allotment letter or Brochure, the conduct of GDA in revising the price from Rs. 2,00,000/- to Rs. 7,00,000/- could not be said to be fair especially when no new facilities were being provided. The DG held that conditions requiring the allottees to pay interest @ 10.5% per annum in case of delay in payment without any corresponding financial liability on GDA to compensate the allottees in case of delay in delivery the possession of the flats is also one-sided and seems unfair. We note that CCI, before passing the Impugned Order has gone through the DG's report and has accepted most of DG's report.

58. We have noted that the cost of EWS flats was increased by the Appellant without any valid justification and thus can be treated akin to an abuse of GDA's dominant position. The conduct of the Appellant in raising the price of the EWS flats from the initial price of Rs. 2 lakhs to Rs. 7 lakhs 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 be construed as a case of abuse of dominant position by the Appellant in the relevant geographic market and the conduct of the Appellant tantamount to unilateral modification of the terms of

the allotment of the flat as well as imposition of unfair conditions in the sale of services provided by the Appellant in the relevant market in contravention of the provisions of Section 4(2)(a)(i) and Section 4(2)(a)(ii) of the Act. We also note that unilateral imposition of interest on alleged delayed payments by the allottees and no such corresponding obligation on the part of the Appellant for delayed handing over of flats is also abuse of dominant position in relevant geographic market. We agree to CCI's finding in the Impugned Order, on the account of the relevant geographic market as well as abuse as dominant player by the GDA.

59. Now we will examine the issue regarding quantum of penalty imposed by the CCI. We note that under the provisions contained in Section 27(b) of the Competition Act, the CCI may impose such penalty as it may deem fit, which shall be not more than 10% of the average of the turnover for the last three preceding financial years.

60. It is the case of the Appellant that CCI should have taken into consideration the mitigating factors like providing flats to EWS etc., and therefore, should not have imposed this penalty which is more than Rs. 1 Crore. We observe that the CCI is entitled to impose necessary penalty subject to maximum stipulated penalty in the Competition Act. As regards, imposition of penalty, after establishing the fact that the Appellant was dominant player in the relevant geographic market, after establishing that the Appellant abused its

position as dominant player, CCI has no option on to impose penalty so that such occurrence does not repeat in future by the Appellant or by such other players placed in similar situation. Thus, CCI is within its rights to impose penalty.

61. As regard, quantum of penalty we have noted that CCI has imposed penalty @5% of average turnover/ receipt from the proceeds of only services for development and sale of low cost residential flats in affordable housing scheme for EWS for the last three relevant years based on financial statement filed by the Appellant. We note that in terms of Section 27(b) of the Competition Act, CCI may impose such penalty as it may deem fit which shall not be more than 10% of the average of turn over for last three preceding financial years. Thus, theoretically CCI could have impose penalty up to 10% of total turnover of the Appellant but looking to various factors and role of Appellant for providing flat of EWS, CCI has decided to impose only 5% penalty (instead of 10% penalty) and that too, only on average turnover/ receipt related to EWS, instead of full turnover of the Appellant which cannot be termed as unreasonable or excessive. In view of this we do not find any illegality in the Impugned Order as far as the imposition as well as the quantum of penalty is concerned and therefore, we are not convinced with the arguments of the Appellant on this account.

62. In fine, the appeal is devoid of any merit, fails and stands rejected. No cost. IA's if any are closed.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Mr. Naresh Salecha]
Member (Technical)**

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