

**BEFORE THE**  
**COMPETITION COMMISSION OF INDIA**

**[Case No. 74/2011]**

Decision Dated: 18.10.2012

1. Shri Ram Niwas Gupta  
60, Suraj Nagar, Azadpur,  
Delhi-110033

2. Mrs. Priyanka Gupta  
60, Suraj Nagar, Azadpur,  
Delhi-110033

*- Informants*

1. M/s Omaxe Ltd,  
7, Local Shopping Complex, Kalkaji,  
New Delhi-110019

2. M/s Shanvi Estate Management Services (P) Ltd.,  
10, Local Shopping Complex, Kalkaji,  
New Delhi-110019

*- Opposite Parties*

**Order under Section 26(6) of the Competition Act, 2002**

The instant matter has been considered by the Commission on the basis of information received from Shri Ram Niwas Gupta and Ms. Priyanka Gupta (hereinafter, referred to as the "Informants") under Section 19 (a) of the Competition Act, 2002 (hereinafter, referred to as "the Act"). The informants have alleged that M/s Omaxe Ltd. (hereinafter, referred to as "OP-1") and M/s Shanvi Estate Management Services (P) Ltd (hereinafter, referred to as "OP-2") have violated the provisions of Section 3(4) of the Act.

## **2. Background of the Case**

The factual background of the case as stated in the information, in brief, is as under:

- 2.1 As per the information OP-1 is a registered public limited company, engaged in the business of development and sale of various real estate projects. OP-2 is a registered company, engaged in the business of providing maintenance services in various real estate projects developed by OP-1. It has been stated in the information that OP-2 has provided or is providing maintenance services in 13 ongoing and past projects of OP-1. It has also been stated in the information that the shareholders and directors of OP-2 are the employees of OP-1 and the entire revenue of OP-2 is coming from the maintenance services provided by it in the projects of OP-1.
  
- 2.2 As per the information, OP-1 has allotted a plot bearing no. 193 measuring 325 sq. mt. in the name of Informant No-1, *i.e.*, Shri Ram Niwas Gupta, in one of its residential projects named as 'Omaxe City' located at the Sonapat District in the state of Haryana, vide its allotment letter dated 14.06.2006. An agreement (hereinafter, referred to as the "Buyer's Agreement") to that effect was entered into between OP-1 and the Informant No-1 on 20.11.2006. Subsequently, Informant No-1 has transferred the said allotment in the name of Informant No-2 *i.e.*, Mrs. Priyanka Gupta.
  
- 2.3 It has been alleged in the information that in the 'Buyer's Agreement' OP-1 has stipulated certain terms and conditions which are one sided, unfair and heavily loaded in favour of OP-1. At the time of signing the agreement, the Informant No-1 had objected to the unfair terms and conditions of the 'Buyer's Agreement' and insisted for changes in such terms and conditions, but OP-1 did not allow any changes in the said agreement.

2.4 The Informants have stated that as per Clause 29(a) of the 'Buyer's Agreement', OP-1 has retained the sole discretion of nominating a maintenance agency for the maintenance of the residential projects, after its completion, with itself. The Clause 29(a) of the 'Buyer's Agreement' states 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., as the company in its sole discretion may deem fit. The maintenance, upkeep, repairs, 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 buyers 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 buyers 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 buyers to the enjoyment of common services including electricity, water etc."

2.5 The informants have submitted that on the basis of the provisions of Clause 29(a) of the 'Buyer's Agreement' after completion of the said project OP-1 nominated OP-2 as the maintenance agency for provision of maintenance service in the Omaxe City. The decision of OP-1 in this regard has been communicated to Informant No-1, vide its letter No. OL/SNP/657, dated 24.11.2009. In the said letter OP-1 has asked that Informant No-1 signs the maintenance agreement with OP-2, before execution of the 'Title Deed' of his allotted plot.

2.6 The Informants have alleged that by reserving the right to nominate a maintenance agency in the Omaxe City at its own discretion and later nominating its own sponsored agency *i.e.*, OP-2 as the maintenance agency in the said project, OP-1 has forced the plot buyers to subscribe to the maintenance services of OP-2.

2.7 Further, the Informants have alleged that OP-1 is an established player in the business of development and sale of real estate projects and it is using its established position in the real estate market to provide an unfair competitive advantage to its own sponsored company OP-2, which is relatively a new player in the maintenance services market. As per the informants, by nominating OP-2 as the maintenance service provider in Omaxe City, OP-1 is foreclosing competition in the market of maintenance services and accordingly, depriving the Informants and other plot buyers from getting better services, cheaper prices and other benefits of competition.

2.8 The informants have alleged that the decision of OP-1 to nominate OP-2 as the maintenance service provider in its residential project, Omaxe City, amounts to a tie-in-arrangement between them, which is anti-competitive in nature, under the provisions of Section 3(4) of the Act.

### **3. Order for DG Investigation**

The Commission considered the facts and allegations of the matter as provided in the information alongwith other relevant materials available on record in its various meetings. After examining the facts and averments, the Commission formed a *prima facie* opinion that there exists a prima facie case in the matter and accordingly, under the provisions of Section 26 (1) of the Act, referred the matter to the Director General (hereinafter, referred to as the “DG”) on 11/01/2012 for investigating the matter and directed the DG to submit the investigation report within 45 days from the date of the order.

### **4. Investigation by the DG**

Pursuant to the order of the Commission under Section 26 (1) of the Act, the DG has conducted an investigation into the matter in accordance with the provisions of Section 26 (3) of the Act and submitted its report of the investigation to the

Commission on 11.06.2012. A brief of the DG's investigation and findings are stated below:

**4.1.** The following issues have been identified and addressed by the DG in his report:

- (i) Whether the market of maintenance services of the real estate projects is distinguishable from the market of development and sale of real estate projects itself?
- (ii) Whether the practice of OP-1 to reserve the right of appointing a maintenance agency for the projects developed by it, with itself, and later on appointing OP-2 as the maintenance agency, constitutes a tie-in-arrangement as per the provisions of Section 3 (4) of the Act and has foreclosure effect on the market of maintenance services for other competitors in the market?
- (iii) Whether the agreement/ arrangement between OP-1 and OP-2 is anti-competitive in terms of provisions of section 3(4) of the Act.

**4.2.** To investigate the issues stated supra, the DG has relied upon both primary and secondary sources of information/data. The primary sources of information include the information furnished by the informants, reply and additional information submitted by the informants, the Opposite Parties and other builders & developers operating in the Sonapat district of Haryana (hereinafter, referred to as "Third Parties") in response to the DG's investigation notice, etc. The DG has collected primary information by issuing questionnaires and letters to the informants, Opposite Parties and Third Parties such as TDI Limited, Ansal Developers Ltd., Prasvnath Developers Ltd., Tulip Developers Ltd., Jindal Realty Ltd., etc. The statements of the Informants and the President, Business Development of M/s Omaxe Ltd. have been recorded by the DG. The secondary sources of information relied upon by the DG include the relevant Acts and Rules governing the issue of providing maintenance services by the developers/builders

in the township projects in Haryana and related material/evidences available in public domain.

#### **4.3. Summary of Replies filed before the DG**

##### **4.3.1 Reply of the Informants**

4.3.1.1 In response to DG's investigation notice the Informants have submitted that at present there is no resident welfare association working in the Omaxe City. As per the informants, other than OP-2 there are other maintenance service providers operating in Sonapat District of Haryana. Some of such service providers are Basundhra Properties Pvt. Ltd., and TDI Facilities and Maintenance Ltd.

4.3.1.2 The Informants have further stated that OP-2 is charging Rs. 3.5 per square meter, per month, for the maintenance services whereas for similar services Basundhra Properties Pvt. Ltd., is charging Rs. 2 per square yard per month and TDI Facilities and Maintenance Ltd., is charging Re. 1 per square yard per month.

##### **4.3.2 Reply of OP-1**

4.3.2.1 In response to DG investigation notice, OP-1 has submitted its reply on 27.02.2012. Citing the orders of the Commission in previous few cases it has been submitted by OP-1 that 'the Agreement' entered into between OP-1 as a service provider and Informant as an end consumer cannot be considered as an anti-competitive agreement under the provisions of Section 3 of the Act. OP-1 has further submitted that the agreement or arrangement between the OP-1 and OP-2 as a maintenance agency, for providing maintenance services to the consumer is also not covered under provisions of Section 3(4) of the Act because OP-1 has not imposed a condition on OP-2 that it has to

procure inputs/intermediate products from it for the provision of the maintenance services.

4.3.2.2 Referring Section 3(3) (a)(iii) of the Haryana Development and Regulation of Urban Area Act, 1975, OP-1 has submitted that a developer of a colony is under obligation to maintain and upkeep of the project developed by it for a period of 5 years from the date of issue of the completion certificate. OP-1 has further submitted that as per the Rule 16 of the 'Bilateral Agreement' it entered into with the Govt. of Haryana, with respect to the project Omaxe City, it is responsible for the maintenance and upkeep of all roads, open spaces, public park and public health services for a period of five years from the date of issue of the completion certificate, unless earlier relieved of this responsibility.

4.3.2.3 OP-1 has further submitted that it follows the industry practice of appointing a maintenance agency before the concerned Resident Welfare Association ("RWA") is formed. It has also stated that other real estate companies operating in Sonapat district of Haryana are following the same practice. It has been further submitted that as of now no RWA has been formed in Omaxe City and as and when the same is formed, it at the request of the RWA shall handover the maintenance services of the project to such RWA of Omaxe City.

4.3.2.4 OP-1 has also submitted that it has already handed over maintenance services in many of its projects to the respective RWA. As per OP-1, it does not put any restriction on the RWA to continue to use the services of the maintenance agency appointed by it. In that matter the RWA is free to continue with the maintenance agency appointed by OP-1 (I.E., OP-2) or select any other maintenance agency for the purpose from the open market.

4.3.2.5 OP-1 has further stated that in terms of Clause 3 of its bilateral agreement with OP-2, OP-2 will provide the maintenance services in Omaxe City only until the happening of the following events:

- (i) Termination of the agreement by giving 30 days' notice by other parties;
- (ii) Taking over maintenance of all roads, open space, parks, etc. in the said project by the government or local authority;
- (iii) Taking over of maintenance services by Residents Welfare Association (RWA) of the project formed for this sole purpose.

4.3.2.6 According to OP-1 it has nominated OP-2 as the maintenance service provider in accordance with the provisions of Haryana Development and Regulation of Urban Area Act, 1975. When the RWA is formed in Omaxe City it will hand over the maintenance service charge to RWA. In that case RWA is free to either continue with OP-2 or choose a separate maintenance service provider from the open market.

### 4.3.3 **Submissions of Third Parties**

4.3.3.1 Developers other than OP-1 such as Ansal Properties & Infrastructure Limited, Parsvnath Developers Limited, TDI Infrastructure Limited, Jindal Reality Pvt. Limited, Tulip Infratech Pvt. Limited, Vipul Limited, BPTP Limited, Unitech Limited, SRS Real Estate Limited and Vatika operating in Sonapat district of Haryana have submitted their replies in response to the notices issued by the DG. These builders/developers have submitted that it is the industry practice that until the project is completed and completion certificate is issued by the statutory authority and until the RWA is formed, as an interim arrangement, the maintenance services of the project are being provided by them or through a nominated maintenance agency in respect of those units, possession of which have been handed over to the allottees. It is also submitted by these developers that after formation of RWAs, the maintenance services are handed over to the respective RWAs.

#### **4.4. Findings of DG Report**

4.4.1. On the basis of the replies received from OP-1 and Third Parties, DG has observed that it is an industry practice that developers/builders reserving the right of appointing a maintenance agency for the project developed by them until the RWA is formed. Most of the developers make provisions for maintenance services and charges thereof at the stage of signing of the plot/flat buyer agreement. The maintenance charges are intimated and levied by the developers from the date of offer of possession of the plot/ flats. The DG has also observed that the maintenance services are generally provided by the wholly owned subsidiaries of the concerned developers/ builders.

4.4.2. It has been observed by the DG that as per the provisions of Haryana Development and Regulations of Urban Areas Act, 1975 and the Haryana Apartment Ownership Act, 1983 and the rules made there under a developer/ colonizer is under an obligation to undertake the responsibility for maintenance and upkeep for a period of 5 years from the date of issuance of completion certificate of the project. In terms of the provisions of Sec. 3 (3) (a) (iii) of Haryana Development and Regulation of Urban Areas Act, 1975 and the rules made there under, the responsibility for the maintenance and upkeep of all roads, open spaces, public park and public health services for a period of five years from the date of issue of the completion certificate shall be that of the developer unless earlier relived of this responsibility and thereupon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the local authority, as the case may be. In terms of the provisions of Section 6(5) & 6(6) of the Haryana Apartment Ownership Act 1983, the maintenance, repair and replacement of the common areas and facilities and the making of any addition or improvements thereto shall be managed by the association of the apartment owners through the manager or board of managers.

4.4.3. DG has also noted that the consumers are at the mercy of the maintenance agency appointed by the developers which is evidenced from the fact that the OP-2 has raised an invoice dated 01.12.2009 on the Informant for an amount of Rs. 15,056/- payable within 30 days, for maintenance services to be provided for the period from 01.12.2009 to November 2010. It is also noted that clause 29(a) of the 'Buyer's Agreement' dated 20.11.2006 mentions a penal rate of interest at the rate of 18% per annum. Moreover, Clause 31 of the maintenance agreement allows the service provider to increase the penal rate of interest unilaterally by 2% per month *i.e.*, 24% per annum. The DG is of the view that the conduct of OP-1 and OP-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 imposing penal rates for the services that had not yet been rendered.

4.4.4. With regards to the issue of same or similar trade practices, DG has stated that merely on the basis of common or similar trade practices the imputation of agreement amongst the builders/developers cannot be made if otherwise there is evidence in the market of a vigorous competition *inter se* amongst the developers/builders. Parallel conduct *ipso facto* is not a prohibited conduct. DG has also noted that the plots/flats offered to the customers in the market are of varied nature and are offered by the large number of developers and builders who offer different quality of amenities/services at different rates. There is neither any allegation nor any evidence to suggest that builders are engaged in price fixing or limiting supplies/provisions of services. Thus, DG is of the view that the OP-1 has not entered into any anti-competitive agreements with any other builders/developers which is in violation of the provisions of section 3(3) read with section 3(1) of the Act. DG has also mentioned that the arrangement/agreement between OP-1 and OP-2 also 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.

4.4.5. With regards to the issue of infraction of Section 3(4) read with section 3(1) of the Act in the context of the alleged 'tie in sale' of maintenance services as a tied product with the plots or flats in the townships residential complex, DG has stated that Explanation (a) to sub-section (4) of Section 3 of the Act states that a tie-in-arrangement includes any agreement requiring a purchaser of goods, as a conditions of such purchase, to purchase some other goods. In the present case, the alleged tie-in-arrangement is in respect of the maintenance services provided along with the purchase of plot/flats.

4.4.6. DG has further observed that the provisions of Section 3(4) of the Act is applicable to an agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provisions of services. Thus, the provisions of Section 3(4) can only apply if the alleged agreement is between parties who are at different stages or levels of production chain in different markets. In the instant case the OP-1 is a builder/developer of plots/flats and OP-2 is maintenance service provider for such plots/flats. So, provisions of Section 3 (4) of the Act are not applicable in this case. Moreover, there is no evidence in the agreement entered into between OP-1 and OP-2 which suggests that the OP-1 has imposed a condition on OP-2 to procure from it some additional inputs/product (s)/services in addition to an intermediate product. The arrangement between OP-1 and OP-2 is in the nature of a contract for performance of maintenance services by the OP-2. There is no additional or tied product required to be supplied or procured by the OP-2 from OP-1 as a condition of such agreement. Thus, DG is of the view that the agreement/ arrangement between OP-1 and OP-2 cannot be said to constitute 'tie in arrangement' in terms of the Explanation (a) to sub-section (4) of section 3 of the Act.

4.4.7. DG has also observed that Section 3(4) of the Act prohibits entities operating at one level of production chain from entering into agreement with other entities operating at other levels of production chain in different markets by various methods including 'tie in arrangement' if such agreement causes appreciable adverse effect on competition.

4.4.8. While addressing the anti-competitive concerns of agreement entered into between OP-1 and the Informant No. 1 for purchase of plot or between OP-2 and the Informant No. 1 for maintenance services, DG has stated that the consumers cannot be said to be at any level of production chain in different market. Citing the order of Commission in Case No. 83/2011 in the matter of Shri Praveen Kumar Sodhi v. Omaxe Ltd & Ors, DG has held that, an end consumer is not a part of any production chain in different markets.

4.4.9. On the basis of aforesaid findings and observation DG has concluded that the Opposite Parties have not infringed any of the provisions of either Section 3(3) or Section 3(4) read with Section 3 (1) of the Act in the matter.

5. The Commission considered the DG report in the meeting held on 27<sup>th</sup> June, 2012 and decided to send a copy of the report to the Informant for filing objections within two weeks of the receipt of the report. The Commission also directed the Informant to appear for oral hearing on 31.07.2012. However, as the Informant neither filed any objection/ reply nor appeared for oral hearing the Commission in its meeting held on 31.07.2012 decided to proceed further and pass appropriate order in the matter.

## **6. Decision**

6.1. To arrive at the decision in the matter, the Commission has carefully perused the entire material submitted by the informants, the submissions made by the Opposite Parties and Third Parties before DG, the Report of DG and all other relevant material and evidences available on record.

6.2. The Commission noted that in the instant case OP-1 is engaged in the business of provision of services for the development and sale of real estate projects and OP-2 is engaged in the business of providing maintenance services to the allottees/consumers in the real estate projects developed by OP-1.

6.3. From the facts of the case following issues are emerged for consideration before the Commission:

I. Whether the agreement entered into between OP-1 and the Informant No. 1 with regards to purchase/allotment of plot in Omaxe City and the agreement entered into between OP-2 and the Informant No. 1 to avail maintenance services is anti-competitive in terms of provisions of Section 3(4) of the Act.

II. Whether the agreement/arrangement between OP-1 and OP-2 to provide maintenance services to the plot buyers in the real estate project Omaxe City being developed by OP-1 is anti-competitive in terms of provisions of Section 3(4) of the Act.

6.4. Since the issues involved in the present case pertains to Section 3(4) of the Act, the Commission is of the view that it is necessary to examine the relevant provision of Section 3(4) of the Act before proceeding to examine the above stated issues. The provisions of Section 3(4) of the Act reads as;

“(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

- a) Tie-in arrangements;
- b) Exclusive supply agreement;
- c) Exclusive distribution agreement;

- d) Refusal to deal;
- e) Resale price maintenance;

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation — For the purpose of this sub-section, - (a) “tie-in arrangement” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

6.5. The Commission noted from above that the provisions of Section 3(4) envisage a vertical agreement among the enterprises or persons entities operating at different stages or levels of production chain in different markets in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provisions of services. Therefore, it is required to first identify “different stages or levels of production chain” and “different markets” before undertaking further examination whether any vertical agreement between the two entities operating in such markets has caused Appreciable Adverse Effect on Competition in India.

6.6. **Examination of Issue No. 1: Whether the agreement entered into between OP-1 and the Informant No. 1 with regards to purchase/allotment of plot in Omaxe City and the agreement entered into between OP-2 and the Informant No. 1 to avail maintenance services is anti-competitive in terms of provisions of Section 3(4) of the Act.**

6.6.1 On the issue pertaining to the agreement between OP-1 and the Informant No. 1 for purchase/allotment of plot in Omaxe City and the agreement entered into between OP-2 and the Informant No. 1 to avail maintenance services, the Commission observed that such agreements have been executed between OP-1, as a developer, and the Informant No. 1, as an end consumer and between OP-2, a service provider and the Informant No. 1, and end consumer. The

Commission is of the view that the end consumers do not fall in the production or supply chain within the meaning of section 3(4) of the Act, since the end consumers are not in a position to impair the supply side of the market.

6.6.2 On this issue DG in his investigation has held the view that that the end consumers cannot be said to be at any level of production chain in different market. So, the agreements entered into between the Informant No. 1 with OP-1 and OP-2 are not covered under the provisions of Section 3 (4) of the Act. The Commission is also of the same view in this regard. It is to be noted that the Commission also held the similar view in an earlier similar case having case no. 83/2011 in the matter of Shri Praveen Kumar Sodhi v. Omaxe Ltd and others.

6.6.3 On the basis of above analysis the Commission hold that since the end consumer does not fall in the production or supply chain of the provision of goods or services in the market within the meaning of provisions of section 3(4) of the Act, the said agreements between OP-1 and the Informant No. 1 and between OP-2 and the Informant No. 1 in the instant case shall not be liable for examination under section 3(4) of the Act.

**6.7. Examination of Issue No. 2: Whether the agreement/arrangement between OP-1 and OP-2 to provide maintenance services to the plot buyers in the real estate project Omaxe City is anti-competitive in terms of provisions of Section 3(4) of the Act.**

6.7.1 The Commission observes that Clause 29 (a) of the 'Buyer's Agreement' stipulates that OP-1 might engage any body-corporate, association etc. as the maintenance agency for maintenance, upkeep, repairs, lighting, security etc. of the project at its sole discretion. In accordance with this agreement OP-2 has been nominated as maintenance agency for the project by OP-1. Further, the

Commission observes that as per the provisions of Haryana Development and Regulations of Urban Areas Act, 1975 and Haryana Apartment Ownership Act, 1983 and the rules made there under a developer/colonizer is under an obligation to undertake the responsibility for maintenance and upkeep for a period of 5 years from the date of issuance of completion certificate of the project. It has been clearly brought out by the DG that OP 2 is the maintenance agency only for the first five years of the project as provided under Haryana Apartment Ownership Act, 1983 and the rules made thereunder. During the period of construction also maintenance is required and since the flat owners would not have occupied the flats so they cannot organise maintenance. The agreement also provides that maintenance agreement will be in place only until the Resident Owners' Association is formed. Once this Association is in place they will decide about the maintenance and will appoint agency of their choice for the maintenance. Thus there does not appear to be any violation of the Act in having such a maintenance agreement.

6.8. In the light of foregoing analysis the Commission is of the opinion that the provisions of Section 3(4) cannot be made applicable in the instant matter.

6.9. Thus, keeping in view the facts and circumstances of the case and findings of DG investigation, the Commission comes to the conclusion that no infringement of provisions of Section 3 of the Act is established against the Opposite Parties in the present matter. Therefore, the matter relating to this information is disposed off accordingly and the proceedings are closed forthwith.

7. Secretary is directed to communicate this decision of the Commission to the informant as well as to the Opposite Parties accordingly.

**S/d-**  
**H.C. Gupta**  
(Member)

**S/d-**  
**Geeta Gouri**  
(Member)

**S/d-**  
**Anurag Goel**  
(Member)

**S/d-**  
**Justice (Retd.) S. N. Dhingra**  
(Member)

**S/d-**  
**Ashok Chawla**  
(Chairperson)