

COMPETITION COMMISSION OF INDIA

Dated: 12.08.2011

Case No. 19 of 2010

Belaire Owner's Association

Informant

Vs.

DLF Limited
Haryana Urban Development Authority
Department of Town and Country
Planning, State of Haryana

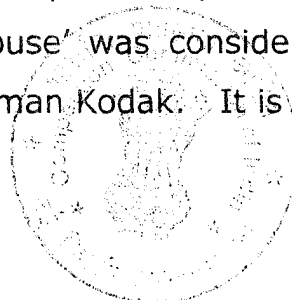
Opposite Parties

Order under Section 27 of the Competition Act

As per R. Prasad, Member (supplementary):

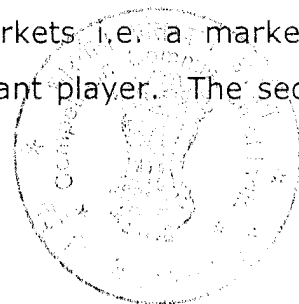
Orders have been passed by the Commission in this case today with which I am in agreement and which I have also signed. But I would like to further add the following:

1. In this particular case when a buyer enters the market, he has the choice of going to a large number of builders for the purpose of purchase of a flat. There is large competition in the market. But when a consumer makes a choice and enters into an agreement with a builder he is bound by the agreement and even if he wants to switch to another builder he has to pay high switching costs. Further, when consumer enters into an agreement with the builder, an information asymmetry occurs as all the elements of the agreement are neither read by him nor explained by the builder. In the U.S. a concept of 'aftermarket abuse' was considered by the Supreme Court in the case of Eastman Kodak. It is therefore



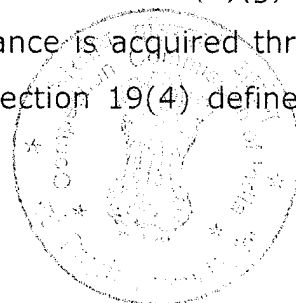
necessary to discuss the issues before the US Supreme Court in the case of Eastman Kodak.

2. In this connection it is necessary to examine the concept of 'after market abuse' as explained by the U.S. Supreme Court in the case of Eastman Kodak Co. Vs. Image Tech. SVCS504 U.S. 451(1992). In this case, Kodak was the seller of photocopying machines. In the market of photocopying machines Kodak was not a dominant player. As far as the services and the repair market for the photocopiers was concerned, Kodak was initially selling the spares to various dealers who used to service the photocopiers and use the spares supplied by Kodak. Kodak found that some of these service dealers started developing their own spares to service the photocopiers and some of them used to give better service than Kodak itself. Kodak therefore changed its business model and asked the equipment manufacturers to supply the equipment to it only. Kodak then used to sell the spares to those buyers of Kodak photocopiers who could service them themselves or used to service the photocopiers with spares in Kodak's premises. In this manner, Kodak had control over 100% of the spares and around 85% of the service itself. Thus, many of the earlier Kodak dealers who used to service the Kodak photocopiers were driven out of business. These dealers filed an antitrust case against Kodak. The District Court ruled in favour of Kodak. The dealers took the case in appeal to the court of Appeals for the Ninth Circuit. The Court of Appeals held that Kodak's approach was anticompetitive, exclusionary and involved a specific intent to monopolise. Aggrieved against the judgement of the Court of appeals Kodak went to the Supreme Court of the U.S.A."
3. The Supreme Court considered the facts of the case. In the opinion of the Supreme Court there were two markets i.e. a market of photocopiers where Kodak was not a significant player. The second



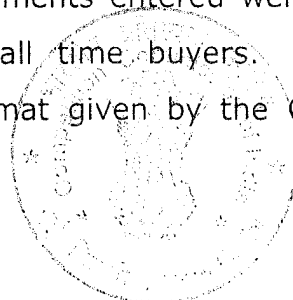
market was described by the Supreme Court as an aftermarket and consisted of service after sales. In this after market, there was a tie in scenario as spares would be given with the service. The Supreme Court then relied on its own decisions on market power. In the case of Jefferson Parish 466 US at 14.9, Supreme Court had held that market power is power "to force a purchaser to do something that he would not do in a competitive market". In another case U.S. vs. E.I. du Point de Nemours & Co. 351 U.S. 377, 391(1956), the Supreme Court had defined market power as "the ability of a single seller to raise price and restrict output". The existence of such power is ordinarily inferred from the seller's possession of a predominant share in the market Jeffer Parish 466 US 17.1. The Supreme Court then held that in the aftermarket Kodak enjoyed monopoly power. The Supreme Court also held that a customer is "locked in" after the purchase of the equipment as the switching costs are high. The customer can then be subjected to abuse. The Supreme Court also held that it is a question of fact as to whether information costs and switching costs foil the assumption that the equipment and service market act as a pure complement to each other. On these facts, the Supreme Court held that the behaviour of Kodak was anticompetitive.

4. In this particular case also there are two markets. The first market is where a consumer enters into an agreement with builder and the second market is the aftermarket after he has entered into an agreement with the builder and then the consumer is governed by the agreement which he has entered into with the builder. By the virtue of the agreement the builder acquires a dominant position over the consumer. This issue is covered in Section 19(4)(g) of the Act. The word "otherwise" mentioned in Section 19(4)(g) is very pertinent. In this particular case, dominance is acquired through the agreement. Further, provisions of the Section 19(4) defines factors



which the Commission has to consider in its order. The Section is inclusive and therefore has to be given a wide interpretation. In fact Section 19(4)(m) talks of any other factor which the Commission may consider relevant for the inquiry. Therefore while determining abuse of dominance the Commission is entitled to consider any other factor which shows that the enterprise is in a dominant position to affects its competitors or consumers or the relevant market in its favour. In this particular case the informant became a captured consumer and he could be discriminated and abused. Therefore in this case in the aftermarket as there existed high switching costs and information asymmetry the abuse of dominance is established. In fact the decision of the U.S. Supreme Court in the case of Eastman Kodak has been incorporated in the explanation to Section 4 read with Section 19(4) of the Act.

5. Considering these facts, there is material to hold that there is contravention of the provisions of Section 4(2)(a)(i) of the Competition Act. The conditions of service given by the O.P. are no doubt unfair in accordance with conditions mentioned in the agreements.
6. As the abuse of dominance is established and it is also established that the dominance came due to the agreements which the information providers had entered into with the O.P., the question which arises is to whether the action of the O.P. creates an adverse effect on competition in India. In my view, whenever there is an abuse of dominance due to unfair conditions in the agreements, it creates an adverse effect on competition in India. Further in this case, the contracts entered into by the information providers were contracts of adhesion and the agreements entered were between a very big economic player and small time buyers. In fact the agreements were signed in the format given by the O.P. and the

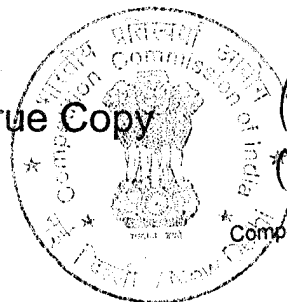


consumers had paid substantial sums of money to the O.P. Thus if a buyer wanted to shift to another builder, he would have lost substantial amount of money. Thus, there existed an information asymmetry and high switching costs. In such a case where the number of buyers were limited, a new entrant in the building market would have got no buyer even if the new builder was more innovative or had better products. Thus, the high switching cost would foreclose the market for a new builder. The agreements entered into by the O.P. and the prospective buyers therefore created an adverse effect on competition in India. The agreements therefore contravene Section 3(1) of the Act read with Section 3(2) of the Act.

7. The majority view of the Commission is that there was no abuse of dominance by Haryana Development Authority and the Department of Town and Country Planning, Haryana. In this case, original the permission was given by these authorities for the construction of 19 floors. Later on, these authorities allowed construction of 29 floors at the instance of O.P. It is unfair to the interest of the buyers of flats and it may be an irregularity on the part of the authorities. This has to be examined by the concerned authorities in the State of Haryana.
8. Considering the case, violation of Section 3(1) and Section 4(2)(a)(i) in this case is established. The levy of penalty of 7% of the average turnover is justified and I agree with the majority view.

sd/-
Member (R)

Certified True Copy



(S.P. GAHLAUT)
16/8/2011
Assistant Director
Competition Commission of India
Govt. of India,
New Delhi