

## **In Re: Naveen Kataria and Jaiprakash Associates Limited**

Through this quarterly publication, CUTS International intends to undertake an independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt with in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefits of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

## Executive Summary

Although competition issues and their associated violations have been handled across all sectors of the economy, there are still several issues when it comes to the real estate sector. The main contention is that it is difficult to define the relevant market, given that real estate development can be for many purposes that are not easily distinguishable. Moreover, when individuals decide to buy a residential property, it might be difficult to argue that the geographic market is concentrated in a particular area, as it could be possible that price and purpose matter more than geographic location. Also, there are many developers focusing on the different segments of the real estate business, making it difficult for any one particular developer to be identified as dominant. However, with all these complications, the Competition Commission of India (CCI) was able to decide on a case in the real estate sector which had dragged for a long time. In an order dated August 09, 2019, CCI found Jaiprakash Associates Limited guilty of abusing their dominance in the real estate market and fined the company Rs. crore 13.82 while also ordering the company to cease and desist from indulging in the conduct in the future.

The case was filed by an individual in her capacity, after experiencing what she felt was an abuse of dominance in the real estate sector. The case, which alleges the violation of Section 4 of the Competition Act, 2002 (the Act) on abuse of dominance, was filed in terms of Section 19(1)(a) of the Competition Act, 2002 (the Act). In terms of section 19(1)(a) of the Act:

“The Commission may inquire into any alleged contravention of the provisions contained in [...] or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association.....”

This analysis shows how this case has a lot of implications on the manner in which competition law is applied to protect the process of competition rather than individuals and how market definition in competition cases is central in competition analysis.

## Details of the Case

### Background

In 2014, Naveen Kataria (the Informant) filed a complaint with CCI against Jaiprakash Associates Limited (Jaiprakash) alleging that the firm had contravened the provisions of Section 4 of the Act. Jaiprakash is a real estate development firm that has over the years developed real estate projects in several areas in the Noida and Greater Noida regions of India.<sup>1</sup> These include independent houses, villas, townhouses and apartments. On January 19, 2011, the informant booked a villa developed by Jaiprakash with a super area of 5700 sq. ft. along with a basement measuring 500 sq. ft. for a consideration of Rs. 40,500,000. The Informant paid 95 percent of the total consideration. However, Jaiprakash failed or did not mention further details on the requirements that the informant had to fulfill, including the provisions, such as complimentary golf membership, total area of the plot, and additional basement area of 500 sq. ft. Besides, the Informant was not told that additional construction beyond the agreed area would be charged @ Rs. 7105 per sq. ft.

Despite letters of pointing out these deficiencies, Jaiprakash did not accede, resulting in additional costs beyond what the informant anticipated to incur. Jaiprakash insisted that although the Provisional Letter of Allotment did not mention these details, the letter is a standardised text and the omitted details about the basement area were in-built in the transaction as reflected in the sale brochure'. Having failed to settle, the informant sought recourse to the CCI.

### Investigation by the DG and CCI's Order

On May 21, 2015, the Commission produced an order after considering the entire material about the case that the Director General (DG) should cause an investigation into the matter and submit a report. The initial report by the DG following the directions from the Commission was produced on August 01, 2016. The initial DG report as well as the subsequent report shows that both the Commission and the DG had some challenges in defining the relevant market. Originally, the Commission had defined the relevant product market as '*the market for the provision of services of development and sale of residential units*'. The DG refined this definition to take into account the fact that the nature of the property in question was actually within an

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<sup>1</sup> The specific details about this case are available on the CCI website at: [www.cci.gov.in/sites/default/files/99-of-2014.pdf](http://www.cci.gov.in/sites/default/files/99-of-2014.pdf)

integrated township which is distinct from standalone residential apartments, hence 'residential units' in the Commission's definition would be too broad. The DG therefore in its initial report defined the relevant product market as '*market for provision of services for development and sale of residential properties (including flats, villas, plots) in integrated townships*'.

The DG also argued that the residential units located in Noida and Greater Noida can be argued to be distinctively homogeneous such that preferences given by a customer to Noida and Greater Noida would make them distinguishable from the neighbouring areas. In the same vein, rules and regulations applicable in Noida and Greater Noida for development of housing complexes are different from other locations such as Ghaziabad, Gurgaon, Delhi, etc. Thus Noida and Greater Noida was identified as the relevant geographic market. The relevant market was therefore identified as '*market for provision of services of development and sale of residential properties (including flats, villas and plots) in integrated township in Noida and Greater Noida*'. However, the Commission took exception to this market definition, especially concerning the product market. The DG had included flats, plots, and villas in the same category yet there are differences in the characteristics between flats and villas. The Commission referred back to the DG for further investigations. This resulted in the second report of the DG which resulted in a revised market definition as '*market for the provision of development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships in Noida and Greater Noida*'.

Jaiprakash was found to be dominant in the relevant market and its conduct was also found to be abusive of this dominance. However, Jaiprakash raised objections and pointed to further developments, which included the following:

- They had managed to resolve the dispute with the Informant and an affidavit was submitted in which the Informant sought to withdraw the matter from the Commission;
- The matter should have been dealt with before the sectoral regulator, i.e. Real Estate Regulatory Authority (RERA) as it was better placed to handle the matter which was simply a contractual dispute;

- The definition of 'goods' as provided under the Act refers to the Sale of Goods Act, 1930. However, this excludes immovable property from its ambit, hence CCI should not be involved;
- CCI had handled cases involving the firm before and the market definition used in the previous cases should be the standard. No new definition of markets should be done as a result.

Despite these objections, the Commission was able to argue why it was still best placed to deal with the issue, resulting in the issuance of the order finding Jaiprakash guilty of abuse of dominance and liable to a fine together with a cease and desist order.

### Analysis by CUTS

While the case has a lot of interesting developments, our analysis is mainly drawn to four critical issues that emerged which could serve as important lessons on the competition analysis landscape. These include the following:

#### **1. Enforcement of competition law is more concerned about protecting competition rather than individuals**

The Informant, after being approached for a settlement was able to capitulate and was willing to have the issues resolved outside the CCI ambit. A formal written affidavit was also deposed to the effect that the informant wanted to withdraw the case from CCI as a successful resolution had been reached by the parties. However, the response by CCI to this is very revealing. In the first place, the Act together with all the regulations to date have not provided for withdrawal of a case that has been filed under section 19 of the Act. Secondly, the Commission pointed out that it was established to protect and promote competition and not to decide disputes between parties. This is very critical as what was being investigated is a violation of the law and restriction on competition. The merits of the case, therefore, had to be heard as this would also serve as warnings to similar perpetrators in the future. This also underlines the general understanding of competition enforcement that even though someone could be the complaint, the competition analysis is intended to protect the process and not individuals.

## **2. Abusive firms always attempt forum shopping**

It is always important for a proper interface to exist between sector regulators and competition authorities lest firms try to engage in forum shopping. The argument that the Real Estate Regulatory Authority is better placed to deal with the issue is a clear attempt at forum shopping. It is also expected from a guilty party to always want the case to be heard at a platform where there are expectations of a favourable judgement. However, it is also important for CCI to engage with all regulatory authorities to ensure that there is a clear interface so that even where the parties approach RERA, competition issues will still be referred to CCI.

## **3. Market definition is central to competition analysis**

The main argument by the firm was to try and find limitations in the market definition. It is also critical to note that the market definition was arrived at after refinement of two definitions. And not surprisingly, the firm tried to argue that the same market definition used in previous cases should be maintained. The distinction between the previous cases and the new case also appeared to be related. The other previous cases related mainly to residential properties, whereas this case focused on a different property, a villa. If the definition had been maintained as residential properties, the firm would turn out not to be dominant and it would not even be necessary for the merits of the case to be heard. It is therefore commendable that CCI has invested well in its market definition capacity which has afforded it to handle the cases well.

## **Conclusion**

While cases of abuse of dominance are easy to categorise, this case comes out as a difficult case. In general, abuse of dominance can be segregated into two categories; exclusionary practices and exploitative practices. Exclusionary practices refer to practices by a firm in a dominant position intended to suppress competition or to drive competitors out of the market. Since the informant was not a rival firm, this does not apply. Exploitative practices, on the other hand, take place where a firm in a dominant position engages in practices that are intended to gain profits by exploiting customers or its competitors. This is where the alleged practices fall. However, exploitative practices examples normally given include tie-ins, discrimination, and excessive pricing. However, the merits of the case make it difficult to place them in these three categories of exploitative abuse of dominance.

In the first place, the Commission found that one of the clauses put in the agreement was the even though the Informant has paid for the right to stay in the premises, the firm insisted on having the right to come and construct new developments on the site, including spaces and sceneries which would have attracted the applicant to the premises. This provision was found to be unfair and one-sided. However, this practice can easily escape most of the competition laws across the world as it is not a clear cut case of a tie-in or discriminatory practice.

However, the Act has a provision to cater for such a practice, in that Section 4(2)(a) also classifies an act as abusive if it imposes “unfair” conditions in the purchase of services. Thus, while it is not a common violation of the competition laws, it is adequately provided for in the India competition law. The same is also true for the rest of the provisions in the contract which the Commission found to be abusive; they could escape punishments in other jurisdictions where provisions on abuse of dominance are restricted to the traditional forms of abuse of dominance. What is commendable therefore is that the India competition law is versatile enough to deal with various forms of abusive conduct.

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