Incomplete Contracts: An Analysis of the *DLF* Case

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This note describes an application of some of the ideas of incomplete contracting theory (ICT) to a particular antitrust case in the jurisdiction of India. The main aim of this note is to show that DLF's actions present a classic case of exploiting an incomplete contract rather than the abuse of dominance it has been accused of. A consumer association, the Belaire Owners Association of the project Belaire that DLF had developed, accused DLF of an abuse of dominance, a violation of the Competition Act 2002. It filed a case with the Competition Commission of India (CCI) which the CCI upheld and fined DLF Rs 630 cr (USD 95 m). We seek to identify the elements of the central culpable contract in the case (the Apartment Buyers Agreement) with an incomplete contract, then show that DLF's behavior corresponds closely to the kind of opportunistic behavior that can arise with incomplete contracts. By using this idea, we provide a better solution to the case than hitherto which suggest a line for further action towards resolution of the case. A few remarks are made on other contractual aspects of the case and its history.

1. Introduction

The idea of incomplete contracting, was pioneered by Grossman and Hart (1986), then developed by Hart and Moore (1990), Hart and Holmstrom (1987)and several others. More recently, newer applications and directions of research (see Schmidt (1996), Scott (2003), Schmidt (2003), Aghion and Holden (2011)) have emerged in this growing literature. Among other things, an important insight is that in the real world, contracts are frequently incomplete because the cost of writing a complete contract is prohibitive. As a result, contracts frequently suffer from gaps, ambiguities and missing provisions which can be exploited by parties in the event of an unspecified contingency arising. In such situations, the owner of the asset contracted upon has residual rights of control over the use of the asset which is likely to affect outcomes in the post contractual state by conferring superior bargaining strength. The actual post contractual outcome depends on the relative bargaining strengths of parties, the exit options available and the environment in which contracting parties operate. The idea that contracts are frequently incomplete has been used to develop theories to explain the size of firms and predict the kind of integration between contracting parties likely to take place in practice. These ideas have important implications for the efficient level of investment in large projects which are bulky in nature and involve bilateral relationships over a long period of time like hotel management contracts, defense contracts, contracts for energy supplies, builder buyer agreements etc.

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In countries where legal systems and the rule of law are relatively underdeveloped and market institutions are still evolving, ownership confers even more power. As a result, the ideas of incomplete contracting are likely to be very useful in the context of emerging economies and other less developed countries in new and perhaps unexpected ways. In this paper we present one such application to a real world problem. It so happens that the context of the example is an antitrust case which attracted substantial enforcement attention in the relatively new jurisdiction of India. It turns out that the idea of incomplete contracting is extremely powerful in this important antitrust case; a real estate developer took advantage of an incomplete contract entered into with allottees in one of its projects. As a result we need to discuss the antitrust case at length. The real estate industry, a sector of the Indian economy likely to see a lot of growth in the long run is rife with the sort of builder buyer contracts discussed here.

The developer in the above case, DLF Ltd, took actions being well aware of the Indian legal system, its weaknesses, loopholes and expense, its problems and opportunities. Without doing anything illegal with respect to the Competition Act 02 or very little, it exploited the contract very profitably to its own advantage. In so doing it did violate other laws, like State laws on housing and the Contracts Act; it may also have violated consumer protection laws but it did little or nothing to justify the abuse of dominance that it has been accused of. The result may be thought of a practical application of a theoretical construct. If the solution we propose to resolve this case is the correct one, the remedy to the antitrust case will accordingly need to be modified.

This paper is organized as follows. Section 1 provides an introduction, Section 2 a more detailed background of the competition case. In Section 3 we analyse the incomplete contract at length and show how the main accusation against DLF is a classic example of ICT in its use of residual rights of control due to ownership in an unspecified contingency. In Section 4 we show that DLF has not committed an abuse of dominance, that there is precisely one clause that is probably anticompetitive and only one other clause which may be anticompetitive but remains to be determined. In Section 5 we touch briefly upon the issue of jurisdiction and conclude with a brief history of the case so far.

2 Background of the Antitrust Case

DLF Ltd, the largest real estate developer in India, proposed to construct an apartment complex, called the Belaire, consisting of 5 multistoried residential buildings along with associated facilities in 2006. The Belaire was to be built in DLF City, Phase V, Gurgaon, a township created by the developer in the North Indian State of Haryana. As per the advertisement of the company, the 5 buildings were to consist of 19 floors each with a total of 368 apartments along with several other facilities to be provided within the complex (clubhouse, gymnasium etc). The construction was to be finished within 36 months. The payment schedule was linked to the projected stage wise completion of the project, with some amount to be paid at the time of booking, another amount to be paid 2 months later and the remaining schedule of payments was supposed to be construction linked as is usual in the builder buyer agreements of DLF.

In practice 5 buildings were made but each had 29 floors, the total number of apartments had increased to 564 resulting in areas and facilities originally earmarked being compressed. The time of construction and delivery was delayed by 2 years beyond the stated date even though the apartment allottees made their payments well on time, in fact well ahead

of the actual construction without actually checking that the necessary stage wise schedule of construction was being followed by DLF !

The Belaire Owners Association (BOA), an association of apartment owners in the Belaire apartment complex filed a case against DLF Ltd, the developer of the complex, with the Competition Commission of India (CCI) accusing them of an abuse of dominance in their use of contracts with consumers, apartment buyers. Two State government agencies, HUDA and DTCP were also co accused but since they were excused later we will avoid much further mention of them.

Belaire Owners Association (BOA), in their complaint with the CCI alleged that various clauses of the Apartment Buyers Agreement (ABA) entered into with the developer on buying the flats were arbitrary, unfair and unreasonable, had adverse effects on the rights of the allottees,that the actions of DLF were unfair and discriminatory and per se the acts and conduct of DLF were acts of an abuse of dominant position, in particular violated Sec4(2)(a) of the Competition Act 2002, applicable to the jurisdiction of the whole of India. The CCI in its main order (see Case No 19 of 2010, order dated 12/08/11 available at www.cci.gov.in) concurred with this view, that DLF held a dominant position and had contravened 4(2)(a)(i) of the Competition Act, 2002 (henceforth CA02) in its imposition of unfair conditions, directed DLF to cease and desist from formulating and imposing unfair conditions in its agreements with buyers. In addition it imposed a penalty of Rs 630 crore (USD 95 mn) on DLF in one of the early major decisions of the CCI. Recently similar cases have been filed against DLF to the CCI for its Sky Court and Regal Gardens projects in Gurgaon.

Under Indian law, the business of developing apartment complexes (condominiums) is governed by several statutes. Firstly there are federal laws governing contracting (the Contracts Act 1872) and the transfer of property (Transfer of Property Act 1882). Laws governing contracting are the most fundamental, the Federal Govt. being committed to the preservation of the right of freedom to contract. Other laws governing real estate vary from State to State (Real Estate is a State subject in India). In the State of Haryana these were the HDRUA (Haryana Development and Regulation of Urban Areas Act) 1975 and HDRUA Rules 1976; also the Haryana Apartment Ownership Act 1983 and Haryana Urban Development Authority come into play within the State.

As a fundamental part of the contract to sell its residential apartments to buyers, DLF requires buyers to abide by the terms of an agreement (the Apartment Buyers Agreement (ABA)). Because DLF is a big developer dealing with several projects simultaneously, these come in a standard format for buyers of single flats. This ABA is a long and detailed agreement which specified various aspects of the sold apartment, its use and that of the complex. It was this ABA and the clauses it contained which the buyers association had claimed were in abuse of dominance, a violation of the CA02.

We believe that the bulk of allegations made by the BOA are first and foremost violations of the Contracts Act 1872 in that they allow the developer to make changes in the layout plan (Dar (2012)), specifications of various sorts and other conditions at will without even informing the allottee let alone seeking their permission. These sorts of clauses violate the notion of a contract itself but can be remedied fairly easily by removing the offending clauses. (see the Supplementary order of Jan 3, 2013 available at www.cci.gov.in for a start down that line). But nevertheless note that they are violations of the Contracts Act 1872, and not the Competition Act 2002. The other clauses that do violate other State Housing Acts as well are not enforced by the competition agency (CCI) and lie

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outside the jurisdiction of the Competition Act 2002 and therefore the CCI.

While the ABA is a very one sided document favoring the seller relative to the buyer in most respects it does not necessarily violate any law on that account; a buyer will be hard pressed to find an apartment in any complex in the organized sector in Gurgaon which gives him better treatment. So once a buyer has bought an apartment in practically any complex in Gurgaon, he is subject to the same unfair treatment at the hands of the builder.

We will argue later that since all builders give the same one sided treatment to buyers, the builder lobby as a whole may be collectively culpable in that they all use similar builder buyer agreements. Unfortunately such collective action is not yet a part of our competition legislation and cannot be presently outlawed on that count.

In addition to the more obvious violations of the Contract Act, we argue that this ABA is a very cleverly written classic "incomplete contract" in which DLF exploited various technical loopholes to build 29 instead of 19 floors thereby increasing the number of apartments considerably, **without violating the original contract substantially**. In the process DLF profited financially (the average price of a flat was in the region of USD 750000 and it built 196 extra apartments). To see how this ABA was exploited by the company, we turn now to a detailed examination of the agreement itself.

3 The Apartment Buyers Agreement

The Apartment Buyers Agreement (ABA) is a legal document, a contract consisting of about 80-85 clauses including annexures, developed by DLF especially for its buyers of residential properties governing their purchase and use, falling under the purview of the Indian Contract Act (1872). A very similar but distinct such agreement (the Commercial Space Buyers Agreement) governs the sale of commercial property which DLF also produces a lot of (commercial office complexes, shopping malls). Inter alia this document specifies in detail the product being contracted for (an apartment and associated facilities) and the rights and duties of apartment buyers. For instance the size of the apartment, its specifications, its layout, the fittings used along with their specifications in detail, the location relative to other apartments in the complex, floorwise and the overall site being developed in relation to the colony in the city, all are specified clearly in the body of the document and annexures.

There are several clauses concerning payment, the amount payable, the rate per sq ft, preferential charges, booking charges, the amount retained as earnest money, the schedule of payments, mode of payments etc. Other sets of clauses deal with taking possession of the apartment, maintenance of the apartment, the payment of the interest bearing maintenance security, use of the common areas, etc

The clauses which concern us especially are those which pertain to exactly what the apartment buyer in an apartment complex owns and what he does not own but has the right to use. This is important because it delineates his property rights by law, what the apartment buyer can change as also what DLF retains after the sale of an apartment (their property

rights) by way of property and can consequently change. The ABA of DLF spells these out at length which we take up now as they are directly relevant to the present case.

In particular, firstly the allottee owns absolutely the covered area of the apartment itself. Here there is the carpet area falling within the 4 walls of the apartment as also terraces within this area (which however cannot be tampered with).

In addition apart of the common facilities in the building itself (those common areas of the building included in the computation of super area like entrance lobby, common toilets, lift lobbies, electrical shafts, fire shafts, plumbing shafts and service ledges on all floors, common corridors and passages, staircases etc.) form about 15-17% of the area he pays for (the super area) and which he therefore owns. Re this part, the ABA states that the apartment buyer has no ownership rights over this area other than to use them. However, this is illegal and needs to be amended, because this is a part of the building which is fully paid for by the apartment buyer, not just its use; the only thing is that this area is collectively owned by all the apartment owners in the building so the individual apartment owner does not have exclusive ownership rights here; rather such areas are jointly owned by all apartment owners. In particular, the idea is to prevent an individual from selling or amending some part of the areas in the building and outside intended strictly for common use. Thus for instance, if all the owners of the building collectively decide to relocate a lift shaft, DLF has no legal right to prevent them.

Finally, the ABA states that each apartment owner owns a pro rata share in the footprint of the building in proportion to their apartment super area as a proportion of total apartment super areas. This is the only piece of "land" in the whole complex whose ownership rests with the apartment owners after purchasing the apartment.

This brings us to the ownership of the other common facilities in the apartment complex. In particular, in the computation of super area of the Apartment, the following areas are not included

A) Areas earmarked for commercial purposes comprising shops, office spaces, malls etc within the said complex or within the said land

B) Roof top terrace above apartments excluding exclusive terraces allotted to apartments

C) Parking Areas in Stilts/open car parking Area around buildings, for allottees/visitors of complex

D) Club including related facilities (gym, swimming pool, tennis courts, club house, garden areas) in said complex outside the said building.

One part of the idea of not including these in the super area is to specify clearly to apartment buyers that they are not owners in anyway of common facilities A-D or the land on which they are built but can use them only upon payment of maintenance fees (user charges). The timely payment of these fees is mentioned in various clauses of the ABA; thus residents can be debarred from the use of the above facilities due to non-payment of maintenance for using the facilities of the complex.

DLF was accused of several things in the allegations of the BOA of which among the most prominent were the fact that DLF had arbitrarily increased the number of floors from 19 to 29, that this led to a compression of facilities that had been earmarked and that there had been a long delay in the delivery of the apartments which led to severe and concrete financial hardships for allottees.

Firstly, note that the extra 10 floors in each building had been built on the roof over which the existing apartment allottee has only the right of use and no

ownership rights which rests very clearly with DLF, that too on payment of maintenance fees. So on this front, existing apartment owners have no rights as DLF has not disturbed anything they are contractually committed to but only exercising their rights as owners of the roof; allottees could use the roof on the 29th floor in the identical way to the 19th floor if they wished to. What other effect did the increase in the number of floors, from 19 to 29 have on contractual commitments to existing allottees?

Firstly, it led to a decrease in the prorata area under the building, the only piece of land in the complex owned by apartment owners, which would get directly reduced by the addition of 10 floors which we have noted was owned by existing allottees as per the ABA. Therefore, they should have taken permission from apartment owners before building the extra floors who must certainly be compensated for this loss.

Secondly, it is probable there would be economies of scale with the increase in the number of floors so that the proportion of the super area to any particular apartment consisting of common areas should decrease, a good thing if the savings were passed onto existing allottees too. It would directly affect the costing of all apartments, old and new. However, no such savings in the construction of common areas within the building were passed onto existing allottees; there was neither a decrease in the price per sq ft or shrinkage in the super area with consequent savings to existing allottees. Moreover, they owned the earlier super area, as per contract, so suitable compensation again is certainly a must. Instead DLF gave larger discounts to new allottees for marketing purposes.

Third the increase in the number of flats would lead to a large increase in the number of people using each building and the common areas in it, an increase in the density of use which the contract has not specified. Here, since DLF does not have any contractual commitment, it is not violating any statute.

Fourth as far as club and related public facilities in the complex which the original allottees had contracted for, would all be having a much higher density of use which again has not been contracted for in the original contract, so once again DLF is not violating any contractual commitment because the density of use is unspecified in the original contract! Note also that these facilities have a public good character for the residents of the building; the level of their provision is the same irrespective of the number of users but there is a congestion effect. The ABA is incomplete on this point which allows DLF to take advantage of it. Of course when an apartment allottee in the first instance had booked an apartment they would be well aware of the size of the complex and its implications for density of users. There are gaps in the original contract leading to a missing provision on this important issue which DLF has been very clever in exploiting. This is the incompleteness in the contract which DLF used. As the owner of all other common areas, the roof rights and the land on which common facilities were built, DLF exercised its residual rights of control by building 10 extra floors on the roof. In this DLF did not do anything anticompetitive but rather asserted its rights and exploited the original incomplete contract very cleverly. Nevertheless, while it did not make the building of the 10 extra floors illegal, the two points referred to above re reduction in pro rata area and lack of passing on cost savings to old customers warrants that DLF compensate old customers, by contract. Also, since, DLF has very cleverly deprived old customers of some of their surplus with the increased congestion without which they would have enjoyed living in the building more, one can argue that they too should be compensated even though there is no contractual commitment to do so again because there was a missing provision in the original contract re

density of use.

Thus far, violations of the original contract are restricted to those mentioned above which can be sorted out by compensation. But this compensation is of a rather different sort than the penalty the Commission imposed and requires a computation of liability under the Contracts Act. We see then that introducing the notion of an incomplete contract into the antitrust analysis of the case is very useful and points the way to amend the contract to prevent such problems in the future. It is necessary to contract on some kind of measure of density of use for the common faciIities; this should also suggest how existing apartment owners need to be compensated.

In the above so far, there is very little that can be construed as anti-competitive in the ABA. Parts of the agreement which are in contravention of the Contracts Act are the Representations C,E, F,G, J, K all of which in various forms allow DLF to change the Layout Plan of the Complex including changing some areas as being earmarked from residential to commercial without requiring consent from the buyer. But these can be remedied fairly easily without changing the fundamentals of the Contract. (For a start in that direction, see the Supplementary Order in Case No. 19/2010 dated 3rd Jan, 2013, available at www.cci.gov.in) Care needs to be taken here that these amendments be made with reference to the Contracts Act as the basic statute rather than State Housing Acts.

The allegations against DLF regarding delay and the asymmetric treatment of builder and buyer on that count are very serious but do not actually violate either the Contracts or the Competition Act. Consider the asymmetric treatment to the buyer if he delayed paying the installments (18% interest pa) and if DLF delayed the delivery of the apartment (Rs 5 p sq ft), which certainly seems unfair but is not illegal. Suppose a company was buying several flats in the complex and possibly other complexes. Surely it would negotiate better terms of payment in case of its own delay in making payments as well as well as better terms from DLF in case of delay in delivery. It is the single consumer whose terms of payment are one sided and loaded against him. Nevertheless, delay in delivery in its various forms (including non delivery) should be treated as breach of contract by the courts and the terms of compensation decided accordingly by the courts for each case separately, depending on the magnitude of the breach. This exercise is to be undertaken for each of the several cases viz non- delivery, delay in delivery of different lengths, acceding to a buyers desire to exit the project if delay is beyond a certain point and other forms of breach which may arise of this sort. Compensation is not something a developer decides!

In several of the cases, the allottees had to pay rent for alternative accommodation in the interim period due to delay in delivery while simultaneously paying the instalments for the project (Belaire) and/or interest on the loans taken to pay for the project. Note the convenience of this arrangement for builders who get a cheap and easy source of additional finance for their projects and the hardship to buyers. DLF acquired a cheap and easy means of financing its project since it paid very low rates of interest in the event of delay in delivery.

4 Implications for Abuse of Dominance Case

We have suggested in Section 3 that the above case is a classical case of exploiting incomplete contracts as suggested by the theory and accordingly suggested the lines to proceed on to find a remedy. As already noted and is well known, the CCI held that DLF was dominant in the relevant market and that the imposition of the various clauses in the ABA on apartment buyers constituted an abuse of dominance.

Where does the analysis of the previous section leave the antitrust case? Part of the problems facing the analysis of the case arose due to poorly written contracts which had the effect of obscuring the anticompetitive harm, if any. Apart from the incompleteness of contracts, as already noted, the ABA contains a lot of statements which are very obviously in contravention of the Contracts Act. (Dar, op cit and above) The Buyers Agreement requires a thorough revision to make it compliant first with the Contract Act. After this is done it will be observed that there is very little in the contract that can be construed as anticompetitive.

To see this we classify the complaints (1-30) in the original main order according to the statute they violate. To elucidate recall the allegations made by the BOA (Belaire Owners Association) as summarised in the original order (of 12.08.2011, paragraphs 1-30) against DLF, HUDA and DTCP. We classify these according to the statute they violate; the Contracts Act 1872 (CA72), Competition Act 2002 (CA02), Haryana Apartment Ownership Act 1983 (HAOA), HUDA 1979, and the Consumer Protection Act (COPRA 1986).

Firstly, the bulk of complaints violate the Contracts Act (23 out of 30); their nature has been pointed out at length earlier Dar, ibid. DLF left unspecified the product contracted for by reserving to itself exclusive and sole discretion to change the number of zones and their earmarked use from residential to commercial (Representation E). Similarly, the land of 6.67 acres allotted to MS apartments could be reduced unilaterally (Rep F). Clause 32 allowed DLF to unilaterally amend the apartment area, super area (also in clause 1.5), common areas and facilities, clubs and the nature of fittings and equipments. All the above clauses violate the Contracts Act.

Most of these, various representations, give unilateral power to amend several clauses of the contract at will without requiring the acquiescence of the buyer, which of course violated the very notion of an agreement. For instance that DLF may change the layout plan of Phase V, or even of the land on which the project Belaire was to be put up. (Representations C-F). While many of these can be easily remedied by simply being struck off in most cases, some fundamental parts of the contract, relating to the ownership and incompleteness thereto will require a little more work. For instance how to contract for density of use of the club or the garden? Or the balance between roof rights owned by DLF and the land underneath owned by the apartment owners? Or the right to the landscape which the complex originally had (now altered substantially by the development of a new project, Camellias)?

If breach of contract occurred, on either side, highly unequal penalties with easy conditions for DLF and stringent conditions for the allottee were made. The latter thus described the agreement as abusive, one sided and unfair. This holds for practically all aspects of the agreement, for delay in delivery (clause 8), retaining of 10% of sale price as earnest money, refunds should the allottee wish to exit, all of which reflect the balance of power loaded in DLF's favour.

Allegation 2.2.3 states that the ABA (Apartment Buyers Agreement) gave the absolute right to reject and refuse to execute any ABA unilaterally. This is a clear violation of the CA02, Section 3(4), a refusal to deal, if it has the effect of an appreciable adverse effect on competition.

When the number of floors was increased from 19 to 29, the payment schedule was revised based upon the increase in number of floors, but there was no decrease in price paid by existing allottees whose rates were based on 19 floors. Moreover, discounts were given to prospective new buyers of Rs 500 per sq ft (Complaint 2.2.23) as a marketing device while older buyers had

been given a discount of Rs 250 per sq ft. In practice as stated earlier, there would likely be economies of scale in building the 10 extra floors so this pricing does not reflect costs, and thus maybe price discrimination, an anticompetitive practice under Section 4 of the CA02 and therefore potentially illegal.

Among the allegations only the above two concern the CA02. Two other practices, tying in sale of power and that the maintenance contract could be executed exclusively by DLF at that time, may have been potential abuses of dominance but were not mentioned in the complaints.

A third set of allegations (2.2.20, 2.2.26, 2.2.30) involve the infringement of State laws. The increase in floors from 19 to 29, with price paid by existing allottees unchanged despite compression of common areas violates the HAOA, 1983. It was alleged that FAR (Floor to Area Ratio) and population density per person violated HUDA (Haryana Urban Development Authority) Regulations 1979. Finally indignation was expressed that HUDA and DTCP (Department of Town and Country Planning) had allotted land, given licenses, permissions and clearances to DLF violating several other statutes.

DTCP denied that DLF had violated the HAOA 1983, which they enforced or that any building plans had been approved beyond permissible FAR and Density per acre. Re common areas, it stated that proportionate share of the ownership of the property was governed by provisions of the HAOA and was not the sole discretion of the colonizer. In brief, that this set of allegations was unfounded. (see order of 12/8/2011)

HUDA stated that the matter did not come under their jurisdiction at all; licenses for Group Housing complexes developed by private colonizers was granted by the Director, Town and Country Planning. The decision to grant sanction/approval of Building Plans/ Layouts of DLF was obtained from DTCP.

Consumer protection laws may have been violated. The whole case has brought many disturbing aspects of the organised real estate sector in India to light. Like concealment of information from buyers and lack of transparency; that the project was going to be delayed DLF was well aware of but kept this information from buyers. Another is retaining 10% of the sale price as earnest money the logic of which is obscure. The case of Pankaj Mohindroo, an apartment buyer, deserves special mention. DLF cancelled his allotment for alleged nonpayment of installments and unilaterally forfeited Rs 51 lakh despite his having made regular payment of Rs 1.29 crore! In addition to being a refusal to deal, there may be other violations of the Contracts Act in this action.

The BOA then went on to assert that violation of all these statutes, the CA 72, the CA02 and the State laws was made possible due to DLF's dominant position (its market power), and thus constituted an abuse of dominance under the Competition Act 02, violating 4(2)(a)(i)!!

As stated, there is exactly one clear violation of the CA02 among the allegations. The single other clause which maybe an anticompetitive (2.2.3) abuse of dominance, needs further investigation. Bulk of the violations are of acts other than the CA02. The conclusion is that no abuse of dominance has been established so far!!

Suppose for a moment that all violations mentioned (1-30) were possible only due to the alleged dominance of DLF. If so, other builders operating in Gurgaon who do not have substantial market power (are not dominant) should not be able to write such clauses in their agreements. But it seems the entire organised builder community uses similar clauses in their agreements! This shows the kind of builder buyer agreements currently in use have nothing to with market power or its absence. Rather use of such one sided and arbitrary agreements reflects misuse of power made possible by an element

common to all builders, namely an expensive, slow and weak judiciary relative to the unorganized and weak consumer. Not surprisingly the initial case against DLF was filed by a relatively affluent set of apartment owners, the Belaire Owners Association and others (Magnolias, Park Place). The contracts in use have very little to do with the market power of individual firms but are rather designed to benefit the entire builder lobby who can raise cheap finances from customers for their projects and delay giving the completed projects to customers who end up losing a considerable sum. It should be remembered that investment in housing is generally the single largest investment a middle class household makes over the course of their lives and accounts for the bulk of their savings. It is this savings which the builder lobby is eating into by the use of such contracts.

While we have expressed our view that DLF has not committed any abuse of dominance, it is interesting to speculate whether all the builders in the organized sector taken as a whole can be accused of a collective abuse of dominance in their formulation of Apartment Buyers Agreements which are all remarkably similar and especially the clauses where the treatment between builders and buyers for non performance of their duties is totally asymmetric. This implies that for an apartment buyer, there is no competition among builders as to the kind of contracts they write for individual buyers! They all delay delivery of the project, write similar builder buyer agreements because it is to their advantage and buyers suffer financially as mentioned earlier. No builder deviates from this kind of contract since it is in their collective interest not to. More perniciously, perhaps this has been collectively decided in their trade association meetings which is why it maybe a collective abuse of dominance by builders in the organized sector!

This is a widespread phenomenon across North India where builders make promises, collect money from buyers for their projects and then delay delivery for substantial periods of time beyond the promised timeline for delivery, generally 3-4 years. Even the payments to be made for non delivery by the stipulated time frequently doesn't take place till such time as the court intervenes. There is even a fear that builders divert some of the funds invested in one project to other projects. All this is only possible because litigation is expensive, cumbersome and there is a lot of pendency so that legal actions take time. Unfortunately collective abuse of dominance is not yet prohibited under the Competition Act 2002 but there are proposals to amend the Act to forbid such practises.

Unfortunately collective abuse of dominance is not yet prohibited under the Competition Act 2002 but there are proposals to amend the Act to forbid such practises.

5. Jurisdiction and History of the DLF Case

In this section we make a few remarks on the subject of jurisdiction in the original order and conclude. As we have shown in the previous section, bulk of the complaints concern the Contracts Act 1872, some involve State Housing laws. The agencies enforcing State Housing laws have absolved DLF of violations (see Sec 4). W have seen in the previous section that there is precisely one violation of the CA02 so far and that is a Section 3 violation (refusal to deal) and there is perhaps one concrete illustration of this (the case of Pankaj Mohindroo). The other complaint which may be a case of price discrimination, a possible violation of Section 4 of the CA02

has been described in Section 4 above but it remains to be determined whether it was indeed anticompetitive. The complaints which fall within the purview of the CA02 need to be addressed by the agency, the CCI. Complaints lying outside their jurisdiction need to be handled by the relevant agency (for violations of the Contracts Act, the courts). Owing to the nature of the agreement and the complaints, anticompetitive harm has been obscured.

In the original CCI order under the issue of jurisdiction, the bulk discussion is in response to two claims of DLF; firstly since the provision of an apartment was neither the sale of a good or service, the CA02 did not apply to the transaction and secondly the transaction date was prior to passage of the CA02. Since DLF raised these issues CCI was obliged to deal with them. But the important jurisdictional issues pointed out above have not been touched upon at all.

For interested readers we cite some of the important milestones in the case. The original case was filed by BOA in 2010. The CCI came out with its first main order on 12/8/11 ordering DLF to cease and desist from formulating and imposing unfair conditions in its agreements with buyers in Gurgaon and to suitably modify unfair conditions on its buyers within 3 months. DLF appealed to the appellate tribunal (Competition Appellate Tribunal (COMPAT)) asking what modifications were needed. COMPAT sent it back to the CCI seeking clarification. After a few more such iterations, the CCI finally came out with a supplementary order on Jan 3rd 2013 where they suggested modifications in the agreement to make it conform with the State Act on Housing which was forwarded to DLF. This too DLF appealed against with COMPAT stating that the order went well beyond the charter of the CCI. On 19th May, 2014, Competition Appellate Tribunal (COMPAT) approved the Competition Commission of India (CCI) supplementary order (of Jan 3rd, 2013) regarding the DLF case and upheld the original CCI penalty (Rs 630 crore). The company appealed to the apex court, the Supreme Court where the case is presently still under review awaiting final decision.

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