

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Competition Appeal (AT) No. 02 of 2018

IN THE MATTER OF:

Nikunj Sisondia

...Appellant

Vs

Earth Infrastructure Ltd. & Anr.

...Respondents

With

Competition Appeal (AT) No. 03 of 2018

IN THE MATTER OF:

Rashmi Raj

...Appellant

Vs

Earth Infrastructure Ltd. & Anr.

...Respondents

Present:

**For Appellant(s): Mr. Shiv Bhatt and Ms. Kumkum Bhatt,
Advocates.**

For Respondents: None.

ORDER

23.01.2018. Appellants Mrs. Nikunj Sisondiya (Appellant in Competition Appeal (AT) No. 02 of 2018) and Mrs. Rashmi Raj (Appellant in Competition Appeal (AT) No. 03 of 2018) filed information under Section 9(1)(a) of the Competition Act, 2002 (hereinafter referred to as 'Act') against M/s Earth Infrastructure Ltd. (Opposite Party No.1) and Plan Conversion Manager of said company (Opposite Party No.2) alleging contravention of provisions of Section 4 of the Act. The Competition Commission of India (hereinafter referred to as 'Commission') by common impugned order dated 24th August, 2017 ordered to

close the information in terms of provisions of Sub-section (2) of Section 26 of the Act, as no *prima facie* case of contravention of Section 4 was made out. The common impugned order dated 24th August, 2017 are under challenge in these appeals.

2. Both the appeals have been preferred after delay of 30 days for the reasons mentioned in the petition of condonation of delay. Taking the grounds stated there in and in view of the order we intend to pass, the delay is condoned.

3. The brief fact of the case is that both the informants booked retail shops in the commercial project of Earth Infra i.e. Earth Express One at Plot no. 1, Sector Tech Zone, Greater Noida (UP) with flexi payment plan in the year 2012 and has executed separate MoUs with Earth Infra. Subsequently, provisional allotment letters were also issued by Earth Infra in their favor which were followed by confirmation letters. According to Appellants, the Earth Infra has agreed to pay assured returns @ 12% every month to each of the informants until the possession of the unit allotted to the informants for booking of the retail shops is given. The informants having not receiving the payment towards assured returns since October, 2015, they filed information under Section 9(1)(a) of the Act.

4. Allegations of the Appellants is that the Opposite Parties are not abiding by the MoU executed with the Informants, resulting in financial losses. They are misusing their dominant position which is in violation of Section 4 of the Act. Both the Informants thereby requested the Commission to direct an enquiry under Section 26(1) of the Act. The Commission on hearing the parties and taking into consideration the materials on record, considered whether the allegations of dominance of Earth Infra is established and if so, whether the allegations of abuse of dominance is proved.

5. Taking into consideration the facts that in similar issues fell for consideration before the Commission in case no. 05 of 2016 (Mr. Mukul Kumar Govil and Others Vs ET Infra Developers Pvt. Ltd and Another) and Case No.06 of 2016 (Mrs. Anshoo Bansal Vs ET Infra Developers Pvt. Ltd. and Another), the Commission held that that real estate market can be broadly classified into two main segments i.e. residential and commercial. Residential segment can be further sub-categorized into residential apartments/ flats and plots. The sale of commercial units form a separate relevant product market, because the intention and factors considered while buying a commercial/ office unit are different from those considered while buying a residential flat or plot. The requirements and prospects of a consumer buying a commercial/office unit are also different from those of a consumer buying a residential flat or plot.

6. As regards relevant geographic market, the commission came to a definite conclusion that the consumer looking for a commercial/office unit in 'Noida and Greater Noida', may not prefer other areas. Thus, the relevant market is the market for "Provisions of services of development and sale of commercial space in Noida and Greater Noida".

7. In so far as Earth Infra's dominant position is concerned, the Appellants alleged misuse of its dominant position in not paying assured return @ 12% every month in terms of MoU. The underlying principle for assessing dominance of an enterprise being linked to the market power enjoyed by it, the commission came to a definite conclusion and held that no data has been provided by both the Informants in support of their assertion that Earth Infra is dominant in the relevant market. It further held that no document has been filed in support of assertion that Earth Infra is abusing their dominance. In absence of any *prima facie* case of contravention, Commission closed the application under Sub-section (2) of Section 26 of the Act.

8. Learned counsel appearing on behalf of the Appellant(s) referred to the MoU reached between the parties and submitted that the Respondents have violated the terms and conditions of the MoU regarding payment of assured return i.e. 12% of the total money. However, the Learned Counsel for the Appellants failed to bring on any evidence to suggest that Earth Infra has dominance in the relevant market i.e. Noida and Greater Noida. In absence of any such evidence, it cannot be held that Earth Infra has misused its dominant position.

9. We found no merit in these appeals. They are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no orders to costs.

(Justice S. J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member (Judicial)

am/gc