V.N. BHARAT

v.

D.D.A. AND ANR.

(Civil Appeal No. 1373 of 2006)

SEPTEMBER 2, 2008

[ALTAMAS KABIR AND MARKANDEY KATJU, JJ.]

Evidence Act, 1872: s.114(f) – Presumption as to service – Demand letter allegedly issued by DDA – Receipt of, denied by the allottee – Held: Presumption under s.114(f) is rebuttable presumption – On denial of receipt, allottee discharged his onus – Onus shifted to DDA to prove service, which it failed to discharge.

Monopolies and Restrictive Trade Practices Act, 1969: Unfair trade practice – Allotment of flat – Cancellation of, on account of non-compliance of demand letter – Restoration of allotment demanding fresh allotment charges – Challenge against – Held: DDA failed to prove that service of demand notice was effected on the allottee – Therefore original allotment continued – Restoration of allotment would not amount to fresh or new allotment – Hence, demand of fresh allotment charges amounted to unfair trade practice.

Appellant applied for the allotment of SFS flats. In terms of the Scheme, the first four instalments were to be paid after every six months and for the fifth and final instalment, fresh demand letter was to be issued separately. The appellant paid the first four instalments and was allotted a specific flat.

Respondent-DDA issued a show cause notice asking appellant to explain as to why he had failed to make payment of Rs.1,63,512/-, towards the fifth and final installment. Without replying to the show-cause notice, the appellant informed the DDA that he had never received

A any demand letter from the DDA for making payment of the fifth and final installment. The appellant accordingly, requested the DDA to issue a demand letter indicating the amount of the fifth instalment so that he could take over possession of the flat. Subsequently, on 8.5.1998, the B appellant received a letter from the DDA dated 22.4.1998, informing him that a demand letter had been issued on 11.9.1996. According to the appellant, the said letter was never tendered to him, rather in the letter dated 22.4.1998, sent by DDA it was stated that another demand letter was C in process and would be issued in due course.

Appellant, however on 6.5.1998 had paid the fifth and final installment to the DDA by a pay-order for a sum of Rs.1,63,512/-, being the amount mentioned in the show cause notice dated 10.9.1997, even prior to the receipt of D the DDA's letter dated 22.4.1998 on 8.5.1998.

Thereafter, on 26.5.1998, the appellant filed a complaint against DDA-respondent under s.36(B) and s.12-A of the Monopolies and Restrictive Trade Practices Act, 1969, before the Commission alleging unfair trade prac- E tice by the DDA on various grounds, and praying for registration of the sale deed by the DDA in his favour.

The Commission held that the allegations of unfair trade practice on the part of the respondent-DDA, was not F proved. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. Except for the statutory presumption under s.114(f) of the Evidence Act, there is no other material G to suggest that the demand notice had actually been received by the appellant. The assertion of service of notice on account of such presumption has been denied by the appellant as a result whereof onus of proving service shifted back to the respondent. The respondent-DDA has not led any other evidence in support of the presumption H

of service. In such circumstances, it has to be held that such service had not been effected. Therefore, when on the appellant's application for restoration of the allotment, the allotment was restored, the only conclusion that can be arrived at is that the earlier allotment continued as no cancellation and/or termination had, in fact, taken place in terms of the Scheme. [Paras 18, 19] [1130,D-G]

1.2. There is no definite finding by the Commission on the question of service of the demand notice. On the other hand, the Commission presumed that the appellant must have had knowledge of the allotment which had been widely publicised in leading newspapers. According to the Commission, it was for the appellant to have made inquiries relating to completion of the construction and it should have waited for a demand notice to have been sent to him. The Commission also erred in placing the onus of proof of service of the demand notice on the appellant, since except for denial there is nothing else that the appellant could have produced to prove a negative fact. The presumption under s.114(f) of the Evidence Act is a rebuttable presumption and on denial of receipt of the Registered letter from DDA, the appellant discharged his onus and the onus reverted back to the respondent to prove such service by either examining the postal authorities or obtaining a certificate from them showing that the registered article had been delivered to and had been received by the appellant. It is on a mistaken understanding of the provisions of s.114(f) of the Evidence Act that the Commission came to the erroneous conclusion that the allegation of unfair trade practice on the part of the respondent authority had not been proved. From the material on record it is quite clear that the respondent authority was unable to prove that service of the demand notice for the fifth and final installment had been effected on the appellant. [Para 20] [1130,H; 1131,A-E]

1.3. Once it is established that the notice of demand

for the fifth and final installment had not been received by the appellant, the other consequences, namely, automatic termination and fresh allotment, cannot follow. In any event, the restoration of the allotment did not amount to a fresh allotment on the basis of which the fresh demand notice could have been issued. The respondents are directed to accept the sum of Rs.1,63,512/-, which had been deposited by the appellant prior to receipt of the demand notice, together with interest, if any, accrued thereupon, in full and final settlement of their dues in respect of the flat allotted to the appellant and to hand over possession thereof to the appellant. [Paras 21, 23] [1131,F-G; 1132,B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1373 of 2006

From the final Judgment and Order dated 17.1.2006 of the Monopolics & Restrictive Trade Practices Commission in UTPE 146/1998

Ravindra Shrivastava, Arun Kumar Beriwal, Kunal Verma, Rajul Shrivastav, Supriya Jain, Krishan Kumar and Anup Jain for the Appellant.

Monika Tripathy Pandey and Rohit Sharma for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The appellant applied for registration in respect of a Category-II flat under the 1985 Sixth Self-Financing Housing Registration Scheme, advertised by the Delhi Development Authority (hereinafter referred to as the "DDA"). As per the scheme, the flats to be constructed on a Multi-storied basis was expected to be ready within a period of two years. In clause 10 of the Scheme, the method of payment has been provided for as follows:-

"After a person has been allotted a flat he/she would be called upon to make the payments as per the following schedule:

25% (including the amount paid as registration deposit) as initial deposit on allotment/allocation. A

20% after six months

25% after next six months

20% after next six months B

10% when required to take over possession.

The Demand-cum-allotment letter, whenever issued to the allottees will indicate the prescribed dates by which payments shall have to be made in regard to the first four C instalments as mentioned above. For the fifth and final installment, a fresh demand letter will be issued separately and which may also include the possible increase in the cost of the flat."

D

2. As far as the first four installments are concerned, there is no difficulty since such payments had undisputedly been made by the appellant. The problem arose in connection with the payment of the fifth and final instalment in respect of which a fresh demand letter was to be separately issued, which could include a possible escalation towards the cost of the flat. E

3. Clause 13 of the Scheme provided that the allotment of specific flats would be made on the basis of "draw of lots" to be held by the DDA when the flats were completed. It was also stipulated that all persons registered under the Scheme, F irrespective of the date on which they were registered, would be treated at par with each other.

4. Admittedly, the appellant had applied for registration of a semi-finished flat on payment of Rs.10,000/- towards registration deposit in respect of the same. On 6th December, G 1991 the appellant was allotted a flat at Dwarka, Sector 3, Pocket-II, First Floor in Category-II and allotment letter was also issued to him by the DDA on 31st December, 1991, wherein the schedule for payment of the first four installments was given. As indicated hereinabove, between 31st January, 1992 and H

A 20th October, 1993, the appellant paid all the four installments in accordance with the demands made by DDA.

5. As will appear from the materials on record the appellant, despite being allotted a specific flat, did not make payment of the fifth and final instalment within 15 days of the B receipt of the allotment letter as stipulated in the terms and conditions of the Self-Financing Scheme. This resulted in the issuance of a show-cause notice by the DDA, which was received by the appellant on 10th September, 1997, asking him to explain as to why he had failed to make payment of the C amount of Rs.1,63,512/- by 31st December, 1996, towards the fifth and final installment. Without replying to the show-cause notice, the appellant by a letter dated 19th November, 1997, informed the DDA that he had never received any demand letter from the DDA for making payment of the fifth and final D installment. The appellant accordingly, requested the DDA to issue a demand letter indicating the amount of the fifth instalment so that he could take over possession of the flat in question. Subsequently, on 8th May, 1998, the appellant received a letter from the DDA dated 22nd April, 1998, informing him that a E demand letter had been issued on 11th September, 1996. According to the appellant, the said letter had never been tendered to him. In fact, in the letter dated 22nd April, 1998, sent by DDA it was stated that another demand letter was in process and would be issued in due course.

F 6. It is the case of the appellant that on 6th May, 1998, he paid the fifth and final installment to the DDA by a pay-order for a sum of Rs.1,63,512/-, being the amount mentioned in the show cause notice dated 10th September, 1997, even prior to the receipt of the DDA's letter dated 22nd April, 1998 on 8th G May, 1998.

7. Thereafter, on 26th May, 1998, the appellant filed a complaint against the respondents herein under Section 36(B) and Section 12-A of the Monopolies and Restrictive Trade Practices Act, 1969, (hereinafter referred to as the "MRTP Act, H

1969") before the Monopolies and Restrictive Trade Practices Commission alleging unfair trade practice by the DDA on various grounds. The appellant prayed for registration of the sale deed by the DDA in his favour and also for compensation of Rs.2 lacs. A

8. While disposing of the appellant's application under Section 12-A of the MRTP Act, the Commission directed the respondent not to hand over the possession of the flat in question to any one and not to dispose of the same in any way until the conclusion of the inquiry under Section 36(B) of the Act. On an interpretation of clause 4 of the Self-Financing Scheme, the Commission came to the conclusion that the allegations of unfair trade practice on the part of the respondent authority, had not been proved. The notice of inquiry was, therefore, discharged and the interim order issued under Section 12-A of the Act was vacated. The present appeal is directed against the aforesaid order of the Commission. B C D

9. Mr. R. Srivastava, learned senior advocate appearing for the appellant, submitted that the Commission had erred in upholding the contention of the Respondent that since the initial allotment had been cancelled, even the revival of the earlier proposal to make an allotment in favour of the appellant would have to be in the nature of a fresh allotment. Mr. Srivastava submitted that pursuant to the representation made by the appellant for restoration of the allotment of the flat in question at the current cost, the DDA issued a letter dated 22nd April, 1998, informing him that a fresh demand letter for the final installment would be issued to him in due course. The said representation was made after the appellant had received the show-cause notice dated 10th September, 1997, from the DDA. However, the appellant deposited the amount as was mentioned in the show-cause notice before receiving the fresh demand letter, which was allegedly issued on 16th June, 1998. The definite case of the appellant, however, is that the same was not received by him and was returned undelivered to the postal authorities. Mr. Srivastava reiterated the submissions which E F G H

had been made before the Commission to the effect that the restoration of the allotment, which was said to have been automatically cancelled, being a continuation of the initial allotment, it could not be said to be a new allotment which entailed payment of fresh transfer fees. Mr. Srivastava pointed out that while the demand in respect of the fifth and final installment was Rs.1,63,512/-, in the fresh demand letter for the fifth and final installment the net amount payable was shown to be Rs.4,43,336/-.

10. Mr. Srivastava submitted that since the demand notice for the fifth and final installment had not been received by the appellant, the question of paying the amount in the demand notice within a stipulated time did not arise. He submitted that it is only after the show-cause notice was received, that the appellant became aware of the demand of Rs.1,63,512/- which was immediately deposited by the appellant. It is only thereafter, that the appellant was informed that he would be required to pay not the amount as mentioned in the show- cause notice, but a further sum of Rs.4,43,336/-on account of the fresh allotment of the flat made in his favour. Mr. Srivastava submitted that the question of fresh allotment did not arise having regard to the fact that even in the show-cause notice dated 10th September, 1997, it had been indicated that cause should be shown as to why the allotment should not be cancelled for breach of the terms and conditions of such allegations. In the show-cause notice it was also mentioned that in case the reply was not to the satisfaction of the DDA, the allotment would be cancelled and the amount of penalty and interest charges would be adjusted against the deposit made by the appellant and the balance money would be refunded to him. Mr. Srivastava pointed out that without termination of the appellant's allotment of 22nd April, 1997, the DDA wrote to the appellant as follows :-

"DELHI DEVELOPMENT AUTHORITY

F.177(691)/91/sfs/11/43 22.4.1998

FROM :

P.L. Arora,
Accounts Officer,

SFS- I,
D- Block, 3rd Floor,
Vikas Sadan.

To

Sh. Vishwanath Bharat,
H.No. 539, Gali No. 5-A
Gibind Puri (Kalkaji)
New Delhi – 19

Sub.: For issue of the 5th & final demand letter

Please refer to your letter dated 9.2.1998 and subsequent letter dated 12.2.1998 on the subject cited above. In the connection it is informed that 5th and final demand letter was issued to you vide this office letter dated 11.9.96 through Regd. Post RL 2911 which has not been returned undelivered to this office so far.

However the matter for issue of another demand letter is in process and will be issued in due course.

Sd/-
(PL Arora)
Sr. Accounts Officer/SFS/II"

11. Mr. Srivastava pointed out that even in the said letter it had been indicated that a fresh demand letter was in process and would be issued in due course. It was urged that the contents of the said letter clearly supports the claim of the appellant that the fifth and final demand was to be made on the basis that it was with reference to the allotment which had already been made in the appellant's favour.

12. In fact, Mr. Srivastava concluded on the note that the only point for decision in this appeal is whether alleged cancellation of the appellant's original allotment could on revival

A be said to be a fresh allotment which entailed payment of fresh allotment charges. According to Mr. Srivastava, since at no point of time had the respondent treated the appellant's allotment to be cancelled, the issue being raised on behalf of the respondent DDA was untenable and had erroneously been B accepted by the Commission.

13. Ms. Manika Tripathy Pandey, learned advocate appearing for the DDA, however, reiterated that after an allotment is cancelled, there can only be a fresh allotment and the question of revival of a dead proposal could not arise. Ms. C Tripathy emphatically relied on clause 4 of the Scheme which indicates the procedure to be followed in the matter of allotment of flats and the same is reproduced hereinbelow :-

> "The estimated cost of the flat as given in this letter is provisional and is subject to revision on the completion of D the flat. Any price difference between the estimated cost and the cost as it works out on completion as per costing formula in vogue would have to be paid alongwith the fifth and final instalment. No definite time by which the construction, of the flats will be completed can be indicated E at this stage. Normally it takes 2 ½ years period for completion of the project. Sometimes, due to unforeseenable reasons completion of project may get delayed. For delay beyond 30th month upto 36th month till the issue of demand letter for fifth and final instalment the F allottee shall be paid interest @ 7% per annum and beyond 36th month interest will be paid 10% on his/her deposit.
>
> The specific flat number will be allotted through draw of lots. The date and time for the draw will be announced through the leading newspapers. The demand letters for G fifth and final instalment indicating the number of flat allotted, the amount payable, documents to be furnished and formalities to be completed for taking over the possession will be sent by RAD post to the allottee at the address on record with the DDA within one month from H

the date of draw of letter for allotment of specific flat number. Failure to furnish all the requisite documents within a period of 120 days from the date of issue of the demand letter for fifth and final instalment will result in automatic cancellation of the allotment." A

14. Ms. Tripathy submitted that the allotment of flats by the DDA was to be done in two phases. In the first phase the estimated cost of the flat is given on a provisional basis and subject to revision on the completion of the flat. No definite time period was indicated but it has been mentioned that it takes about 2 ½ years to complete the project, which period could also stretch upto 36 months. For delay beyond the 30th upto the 36th month, till the issue of demand letter for the fifth and final instalment, the allottee shall be paid interest @ 7% per annum and beyond 36th months interest will be paid @ 10% on the deposit of the applicant. In the second phase, on the basis of a 'draw of lots' a specific flat number would be allotted and the demand letter for the fifth and final installment indicating the number of the flat allotted, the amount payable, documents to be furnished and formalities to be completed for taking over possession would be sent by Registered post with acknowledgement due to the allottee at the address on record with the DDA, within one month from the date of the draw for allotment of a specific flat number. Ms. Tripathy laid stress on the condition that failure to furnish all the requisite documents within a period of 120 days from the date of issue of the demand letter for the fifth and final installment would result in automatic cancellation of the allotment. B C D E F

15. Ms. Tripathy contended that having remained silent despite having received the demand notice as also the show-cause notice, which led to the termination of the appellant's allotment, the appellant waited for 2 ½ years before making payment of the purported balance when, in fact, the amount had to be calculated on the basis that the restoration was, in fact, a fresh allotment. G

H

A 16. Ms. Tripathy urged that since the notice of demand in respect of fifth and final installment had been duly sent to the appellant by Registered Post with acknowledgement due at the address given by him, there would be a statutory presumption under Section 114(f) of the Evidence Act that the B demand notice had been duly served on the appellant. Ms. Tripathy urged that the Commission rightly dealt with the matter and no ground had been made out on behalf of the appellant for interference with the same.

17. As will be evident from what has been mentioned C hereinbefore, the real controversy in this appeal appears to be whether the demand letter dated 10th September, 1996, for payment of the fifth and final installment had, in fact, been received by the appellant and as to whether non-compliance with the same resulted in termination of the appellant's allotment D and whether the restoration of such allotment on a representation made by the appellant would amount to a fresh or new allotment.

18. As submitted by Ms. Tripathy, except for the statutory presumption under Section 114(f) of the Evidence Act, there is no other material to suggest that the demand notice had actually E been received by the appellant.

19. The assertion of service of notice on account of such presumption has been denied by the appellant as a result whereof onus of proving service shifted back to the respondent. F The respondent DDA has not led any other evidence in support of the presumption of service. In such circumstances, it has to be held that such service had not been effected. Therefore, when on the appellant's application for restoration of the allotment, the allotment was restored, the only conclusion that G can be arrived at is that the earlier allotment continued as no cancellation and/or termination had, in fact, taken place in terms of clause 4 of the Scheme in question.

20. As far as the MRTP Commission is concerned, there is no definite finding on the question of service of the demand H notice. On the other hand, the Commission presumed that the

appellant must have had knowledge of the allotment which had been widely publicised in leading newspapers. According to the Commission, it was for the appellant to have made inquiries relating to completion of the construction and it should have waited for a demand notice to have been sent to him. In our view, the Commission also erred in placing the onus of proof of service of the demand notice on the appellant, since except for denial there is nothing else that the appellant could have produced to prove a negative fact. As we have indicated hereinbefore, the presumption under Section 114(f) of the Evidence Act is a rebuttable presumption and on denial of receipt of the Registered letter from DDA the appellant discharged his onus and the onus reverted back to the respondent to prove such service by either examining the postal authorities or obtaining a certificate from them showing that the registered article had been delivered to and had been received by the appellant. It is on a mistaken understanding of the provisions of Section 114(f) of the Evidence Act that the Commission came to the erroneous conclusion that the allegation of unfair trade practice on the part of the respondent authority had not been proved. In our view, from the material on record it is quite clear that the respondent authority was unable to prove that service of the demand notice for the fifth and final installment had been effected on the appellant.

21. Once it is established that the notice of demand for the fifth and final installment had not been received by the appellant, the other consequences, as indicated by Ms. Tripathy, namely, automatic termination and fresh allotment, cannot follow. In any event, in our view, the restoration of the allotment did not amount to a fresh allotment on the basis of which the fresh demand notice could have been issued.

22. Having regard to what has been stated hereinabove, in our view the MRTP Commission erred in law in shifting the onus of proof of service of the demand notice on the appellant and in discharging the notice of inquiry and vacating the interim order issued under Section 12-A of the M.R.T.P. Act. The

A allegation of unfair trade practice on the part of the respondent authority stands established. The decision of the Commission is, therefore, liable to be set aside.

23. The appeal is, therefore, allowed. The judgment of the MRTP Commission impugned in this Appeal is set aside. The B respondents are directed to accept the sum of Rs.1,63,512/-, which had been deposited by the appellant prior to receipt of the demand notice, together with interest, if any, accrued thereupon, in full and final settlement of their dues in respect of the flat allotted to the appellant and to hand over possession C thereof to the appellant within a month from the date of receipt of a copy of this order.

24. Having regard to the facts of the case, the parties will bear their own costs.

D D.G. Appeal allowed.