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RAJASTHAN HOUSING BOARD

v

SMT. PARVATI DEVI ETC.

MAY 3, 2000.

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[M.B. SHAH AND R.P. SETHI, JJ.]

Monopolies and Restrictive Trade Practices Act, 1969 :

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Section 36-A(1)(i) & (vi)—Unfair Trade Practices—Indulgence of—Housing Board—Delay in construction & Allotment of Houses—Demand for excess cost—Commission holding the Board guilty of unfair trade practice—Order passed without considering the terms & conditions of agreement and without any evidence on record—Validity of—Held, while deciding such a complaint it is obligatory on the Commission to find out whether the Board has adopted any unfair method or deceptive practice for the purpose of promoting sale, use or supply of any goods or services—The order passed without such finding is unsustainable and quashed—Matter remitted back to the Commission for fresh disposal in accordance with law.

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S. 2(o)(ii)—Restrictive Trade Practice—What amounts to—Held, an act which has no effect of preventing, distorting or restricting competition, is not restrictive trade practice.

Words & Phrases :

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“Unfair trade practice”—Meaning of—In the context of Section 36-A of the Monopolies and Restrictive Trade Practices Act, 1969.

“Restrictive trade practice”—Meaning and ingredients of—In the context of Section 2(o)(ii) of the Monopolies and Restrictive Trade Practices Act, 1969.

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Appellant-Board was engaged in constricting houses under various schemes. Respondent-buyers filed complaint before Monopolies and Restrictive Trade Practices Commission alleging that there was delay in construction of houses, demand for additional cost of construction and possession not handed over even after allotment. The Commission passed an order holding that the appellant-Board had indulged in Restrictive Trade Practices under Section 2(o)(ii) of the Monopolies and Restrictive

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Trade Practices Act, 1969 and unfair trade practice under S. 36-A(1)(i) & (vi) of the Act. Hence the present appeals.

On behalf of the appellant-Board, it was contended that the Commission without considering the terms & conditions agreed between the parties and without any evidence on record, gave a finding that the Board was engaged in unfair trade practices which was illegal and liable to be set aside; that the act of the Board apparently cannot be termed as a restrictive trade practice as it had no effect of preventing, distorting or restricting competition in any manner as provided under Section 2(o)(ii) of the Act.

Allowing the appeal, the Court

HELD : 1.1. The order passed by the Monopolies and Restrictive Trade Practices Commission holding that the appellant-Board has engaged in unfair trade practices under Section 36-A(1)(i) & (vi) of the Monopolies and Restrictive Trade Practices Act, 1969 is unsustainable and quashed. [944-G]

1.2. While considering an allegation of unfair trade practice under S. 36-A(1)(i) & (vi), the Commission is required to find out whether a particular act can be condemned as an unfair trade practice; whether representation contained a false statement and was misleading and what was the effect of such a representation made to the common man. The Commission has to find out whether the representation complained of, contains the element of misleading the buyer and whether buyers are misled or they are informed in advance that there is likelihood of delay in delivering the possession of constructed building and also increase in the cost. For this purpose, terms and conditions of the agreement are required to be examined by the Commission. Not only this, the Commission is required to consider whether the Board has adopted unfair method or deceptive practice for the purpose of promoting the sale, use or supply of any goods or for the provision of any services. Unless there is finding on this issue appellant Board cannot be penalised for unfair trade practice. In the instant case, the Commission has not considered the necessary evidence and has accepted the plea of the respondent in arriving at the conclusion that the appellant Board has indulged in unfair trade practice. [943-C-F; 944-F]

Nirma Industries Ltd. v. Director General of Investigation & Registration, [1997] 5 SCC 279, relied on.

A 2.1. The order passed by the Commission holding that the appellant-Board has indulged in restrictive trade practices attracting Section 2(o)(ii) of the Act and further directing the Board to file an affidavit to the effect that it will not repeat such practices in future is quashed and set aside.

[944-H; 945-A-B]

B 2.2. It appears that the Commission has considered that the acts of the Board would be covered by clause (ii) of S. 2(o) of the Act particularly last portion of the said clause namely, "services in such manner as to impose on the consumers unjustified costs". The Commission ought to have read the said part along with the main ingredient which requires that a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner would be restrictive trade practice and in particular which *inter alia*, tends to bring about manipulation of "services in such manner as to impose on the consumers unjustified costs". For this purpose no case is made out by the Respondents that the Board has prevented or restricted competition in any manner which affects the services in such a manner as to impose on consumers unjustified costs or restrictions. Section 2(o) will not be applicable in case where a trade practice has no effect, actual or probable of preventing, distorting or restricting competition in any manner. [940-B-D]

E *Mahindra and Mahindra Ltd. v. Union of India*, [1979] 2 SCC 529, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 14994 of 1996 Etc.

F From the Judgment and Order dated 30.5.96 of the M.R.T.P. Commission, Delhi in R.T.P.E. No. 100 of 1994.

B.D. Sharma for the Appellant.

K. Sharda Devi and Geetanjali Mohan for the Respondents.

G The Judgment of the Court was delivered by

H **SHAH, J.** These appeals are filed under Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the "MRTP Act") against the judgment and order dated 30.05.1996 of the Monopolies and Restrictive Trade Practices Commission, New Delhi (hereinafter referred to as "the MRTP Commission") passed in RTPE No. 100 of

1994 and UTPE/RTPE No.15 of 1994, whereby the Commission has held that appellant Rajasthan Housing Board has indulged in restrictive trade practices attracting Section 2(o)(ii) of the Act and in unfair trade practices covered by Section 36-A(1)(i) and (vi) of the MRTP Act. Admittedly, the Central Government has issued Notification under Section 3 of the MRTP Act on 27.9.1991 applying the provisions of the MRTP Act, to the appellant Board.

Before deciding the question involved, we would narrate few facts of each appeal.

CIVIL APPEAL NO.14994 OF 1996. (Arising out of RTPE No.100 of 1994)

It is admitted that the Rajasthan Housing Board is established under the provisions of Rajasthan Housing Board Act, 1970 and it builds houses and allots the same to persons who are registered with the Board under various schemes framed by it from time to time. The land is placed at the disposal of the Board by the State Government on payment being made by it and houses of different categories are constructed after securing loans from HUDCO and other agencies under the schemes known as Self Financing Schemes. It is stated that respondent got herself registered for the house being allotted to her in low income group category on 12.05.1983 and paid a sum of Rs.1800 as registration fee. It is also stated that the Board has issued a brochure for general registration, wherein certain conditions for registration, the amount of advance which was to be deposited by the applicant, the estimated cost of different categories of the house to be constructed and the amount of instalment money which was to be paid etc. were mentioned. It is also stated therein that the Board would try its best to make the house available within a period of four years from the date of registration and the applicant would be entitled to payment of interest on the amount deposited and also to refund of money with interest if the house was not allotted within stipulated period. It is further stated that by letter dated 27.4.1988 respondent was intimated that house had been reserved for her as a result of lottery drawn in that year and she was required to pay advance money in three instalments and if there was delay in payment of the said instalments, respondent was further required to pay interest @ 18 per cent p.a. by way of penalty. Thereafter by letter dated 29.2.1992 the respondent was intimated by the Board that total cost of house allotted to her had been worked out at Rs.57,500 and she should start making payment of the remaining amount by instalments @ Rs.715 per month from 15.4.1992.

A After receipt of the said letter respondent filed complaint before the
District Consumer Protection Forum, Jodhpur, which was withdrawn. There-
after, in the year 1993, respondent filed complaint under Section 36-A and
36-B of the MRTP Act before the MRTP Commission at New Delhi. In the
B said complaint, it was mentioned that action of the Board amounted to unfair
trade practice under Section 36-A(1) of the Act; even though the house was
allotted to the respondent on 29.11.1988 yet on account of unfair trade
practice, the possession of the house had not been given to her till 31.03.1993
and that as a result of the alleged unfair trade practice, respondent has
C suffered a monetary loss of Rs. 26,000. It was prayed that demand of Rs.
57,000 as the cost of the house and monthly instalment of Rs. 715 with
interest @ 14 per cent be set aside and it be declared that Board has indulged
in unfair trade practice and it may be restrained from indulging in such
practice.

D On show-cause notice being issued by the Commission, the Board filed
a reply raising a preliminary objection to the maintainability of the complaint
and also giving reply on merits. As the Commission was not satisfied with
the contentions raised by the Board, it started enquiry. The Commission by
its order dated 30.5.1996 held that the Board has indulged in restrictive trade
E practice as defined in Section 2(o)(ii) of the MRTP Act and directed the Board
to file an affidavit to the effect that it would not repeat the same. Against
that judgment, this appeal is filed.

*CIVIL APPEAL NO. 15096 OF 1996. (Arising out of UTPE/RTPE No.15
of 1994)*

F In this appeal, it is the case of respondent that the Board registered him
as applicant under Self-Financing Scheme and he deposited a sum of Rs.
10,000 at the time of initial registration with the Board. By letter dated
06.02.1988 the Board informed the respondent that a house, as opted by him,
had been reserved and he was asked to deposit the various instalments
G indicating amount and due dates. On 05.02.1992 the Board informed the
respondent that he should deposit a sum of Rs.1,10,714 as the remaining
amount towards the cost of house (measuring 12x18 mt.) that had been
allotted to him. The respondent was given three months time to deposit the
amount and take the possession of the house by 09.05.1992. It is stated that
H instead of depositing the amount he filed writ petition No. 2682 of 1992 in
the High Court of Rajasthan at Jodhpur challenging the demand for the

balance amount as alleged. During the pendency of the writ petition, respondent filed a complaint under Sections 36 and 37 of MRTP Act, 1969 stating therein that appellant Board had indulged in unfair trade practice by delaying the construction of the house and demanding additional cost of construction than the agreed amount of Rs.1,85,000. After receipt of the show-cause notice from the Commission, the Board filed a reply raising a preliminary objection as to the maintainability of the complaint and also denied allegations that Board had indulged in unfair trade practice. By the impugned order dated 30.5.1996, the Commission held that the Board has indulged in unfair trade practice and directed that applications filed by the respondent under Section 12-B of the MRTP Act would be heard by the Commission at a later stage. Aggrieved by the said order, the Board has preferred this appeal.

CONTENTIONS FOR DETERMINATION:-

- (A) Whether the order passed by the Commission that appellant has indulged in restrictive trade practice and further directions to file affidavit not to repeat such practices in future are at all justifiable?
- (B) Whether the decision rendered by the Commission in UTPE/RTPE No.15 of 1994 holding that appellant has indulged in restrictive and unfair trade practice attracting Section 2(o)(ii) and Section 36-A(1)(i) and (vi) of the MRTP Act is at all justifiable?

CONTENTION 'A'

The learned counsel for the appellant submitted that the finding given by the Commission that the Board indulged in restrictive trade practice as defined under Section 2(o)(ii) of the MRTP Act is, on the face of it, illegal and erroneous. It is apparent that the act of the respondent cannot be termed as restrictive trade practice which has or may have the effect of preventing, distorting or restrictive competition in any manner. Section 2(o) reads thus:-

“S.2(o) “restrictive trade practice” means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular,-

- (i) which tends to obstruct the flow of capital or resources into the

A stream of production, or

- (ii) which tends to bring about manipulation of prices, or conditions of delivery or to effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.”

B It appears that Commission has considered that the acts of the Board would be covered by clause (ii) particularly last portion of the said clause namely, “services in such manner as to impose on the consumers unjustified costs”. In our view, the Commission ought to have read the said part along with the main ingredient which requires that a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner would be restrictive trade practice and in particular which *inter alia*, tends to bring about manipulation of ‘services in such manner as to impose on the consumers unjustified costs’. For this purpose no case is made out by the respondents that the Board has prevented or restricted competition in any manner which affects the services in such a manner as to impose on consumers unjustified costs or restrictions. Section 2(o) will not be applicable in case where a trade practice has no effect, actual or probable of preventing, distorting or restricting competition in any manner.

E This question is considered in detail by this Court in *Mahindra and Mahindra Ltd. v. Union of India*, [1979] 2 SCC 529. In this case the Court observed (in para 14) that:

F “It is now settled law as a result of the decision of this Court in the *Telco case Tata Engineering & Locomotive Co. Ltd., Bombay v. Registrar of the Restrictive Trade Agreement, New Delhi*, [1977] 2 SCC 55 (Sic) that every trade practice which is in restraint of trade is not necessarily a restrictive trade practice. The definition of restrictive trade practice given in Section 2(o) is a pragmatic and result-oriented definition. It defines ‘restrictive trade practice’ to mean a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and in clauses (i) and (ii), particularises two specific instances of trade practices which fall within the category of restrictive trade practice. It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice. If a trade

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practice merely regulates and thereby promotes competition, it would not fall within the definition of restrictive trade practice, even though it may be, to some extent, in restraint of trade. Whenever, therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a priori reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition. This inquiry obviously cannot be in vacuo but it must depend on the existing constellation of economic facts and circumstances relating to the particular trade. The peculiar facts and features of the trade would be very much relevant in determining whether a particular trade practice has the actual or probable effect of diminishing or preventing competition and in the absence of any material showing these facts or features, it is difficult to see how a decision can be reached by the Commission that the particular trade practice is a restrictive trade practice.”

The Court further observed (in para 15) that:

“...It is possible that a trade practice which may prevent or diminish competition in a given constellation of economic facts and circumstances may, in a different constellation of economic facts and circumstances, be found to promote competition. It cannot be said that every restraint imposed by a trade practice necessarily prevents, distorts or restricts competition and is, therefore, a restrict trade practice... There may be trade practices which are such that by their inherent nature and inevitable effect they necessarily impair competition and in case of such trade practice, it would not be necessary to consider any other facts or circumstances, for they would be *per se* restrictive trade practices. Such would be the position in case of those trade practices which of necessity produce the prohibited effect in such an overwhelming proportion of cases that minute inquiry in every instance would be wasteful of judicial and administrative resources...”

(Emphasis supplied)

In the present case, there is no allegation or evidence to hold that the appellant has indulged in restrictive trade practice. In this view of the matter learned counsel for the respondents were not in a position to support the said

A finding. Hence, the direction given by the Commission that the appellant shall discontinue alleged restrictive trade practices and not repeat the same in future and shall file an affidavit in compliance within six weeks from the date of the order passed in both the matters requires to be set aside.

B *CONTENTION 'B'*

The learned counsel for the appellant next contended that without considering the terms and conditions agreed between the parties the Commission has given a finding that because of delay in constructing the building or handing over its possession or because of increase in the cost, it would amount to unfair trade practice. He further submitted that there is no evidence on record to justify the said finding and, therefore, the order passed by the Commission may be set aside. As against this, learned counsel for the respondent relied upon the provisions of Section 36-A(1)(ii) and (ix) of the MRTP Act for contending that respondent has made out a case for proceeding under the said provisions and, therefore, the Commission has rightly proceeded in the matter.

We would refer to Section 36-A (1)(ii) and (ix) of the MRTP Act, which reads as under:

E *"S.36-A. Definition of unfair trade practice.-*In this Part, unless the context otherwise requires, "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:-

F (1) The practice of making any statement, whether orally or in writing or by visible representation which,-

(ii) falsely represents that the services are of a particular standard, quality or grade;

G (ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been, or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or has been sold by sellers or provided by suppliers generally in the relevant market unless

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it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made.”

Considering the aforesaid provisions and allegations made against the Board, it appears that Commission was justified in proceeding with the matter. However, with regard to the claim made by the respondent in each case, the matter is still not decided by the Commission by considering the relevant documents. At the time of deciding the said matters, the Commission is required to go into the terms and conditions agreed between the parties and to find out whether the appellant has indulged in unfair trade practices so as to take any further action against the Board on the basis of the applications filed by the respondents in each case.

For deciding such question, the Commission has to find out whether a particular act can be condemned as an unfair trade practice; whether representation contained a false statement and was misleading and what was the effect of such a representation made to the common man. The issue cannot be resolved by merely holding that representation was made to hand over the possession within stipulated period and the same is not complied with or some lesser constructed area is given after the construction of the building. The Commission has to find out whether the representation, complained of, contains the element of misleading the buyer and whether buyers are misled or they are informed in advance that there is likelihood of delay in delivering the possession of constructed building and also increase in the cost. For this purpose, terms and conditions of the agreement are required to be examined by the Commission. Not only this, the Commission is required to consider whether the Board has adopted unfair method or deceptive practice for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services. Unless there is finding on this issue, appellant Board cannot be penalized for unfair trade practice.

This aspect is also considered by this Court in *Nirma Industries Ltd. v. Director General of Investigation & Registration*, [1997] 5 SCC 279 and the Court has held (in para 14) as under:-

“On careful analysis of unfair trade practice defined in Section 36-A, it is quite clear that the trade practice which is undertaken by the company for the purpose of promoting the sale, use or supply of any goods or for the provision of any service/services adopts one or

A more following practices and thereby causes loss or adopts one or
more of the following practices and thereby causes loss or injury to
the consumers of such goods or service whether by eliminating or
restricting competition or otherwise would amount to unfair trade
practice. The above key words used in Section 36-A while defining
B the unfair trade practices have laid emphasis on “thereby causes loss
or injury to the consumers of such goods or services whether by
eliminating or restricting competition or otherwise”. It must, there-
fore, follow that any such unfair trade practice which causes loss or
injury to the consumers of such goods or service either by eliminating
or restricting competition or otherwise would attract the penal con-
C sequences as provided under this Chapter. Each of the clauses
employed in Section 36-A is interwoven by use of the conjunction
and would indicate that before determining a trade practice being
unfair trade practice, the Commission has to be satisfied as to whether
the necessary ingredients contained therein are satisfied or not. The
D words “or otherwise” in Section 36-A assuming are of wider import
and would signify not only actual loss or injury suffered by consumers
but also would include probable or likelihood of consumers suffering
loss or injury in any form. But for that purpose also, there has to be
some cogent material before the Commission to support a finding of
unfair trade practice and any inferential finding would be contrary to
E Section 36-A of the Act. It is necessary for the Commission to call
upon the parties to substantiate the allegations. The burden of proof,
the nature of proof and adequacy thereof would depend upon the facts
and circumstances of each case.”

F In the present case, the Commission has not considered the necessary
evidence and has accepted the plea of the respondent in arriving at the
conclusion that the appellant Board has indulged in unfair trade practice. We
would again note that the Commission was not very clear about the appli-
cation of the provisions of Section 2(o)(ii) of the MRTP Act and it proceeded
G on the basis that the said Section is also applicable. Further, as there is no
proper finding of fact based on necessary evidence, we are of the opinion
that the impugned order dated 30th May, 1996 passed by the Commission
in UTPE/RTPE No.15 of 1994 holding that the appellant Board has indulged
in unfair trade practices under Section 36-A (1)(i) and (vi) of the MRTP Act
is unsustainable.

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In the result, the impugned order passed by the Commission in RTPE No.100 of 1994 holding that the appellant Board has indulged in restrictive trade practices attracting Section 2(o)(ii) of the MRTP Act and further direction is quashed and set aside. Similarly, the order passed by the Commission in UTPE/RTPE No.15 of 1994 holding that the appellant Board has indulged in restrictive and unfair trade practices as alleged attracting Sections 2(o)(ii) and 36-A (1)(i) and (vi) of the MRTP Act is quashed and set aside. The matters are remitted back to the Commission for disposal afresh in accordance with law after giving opportunity to both the parties to lead such evidence as they deem fit. The appeals are accordingly disposed of. In the circumstances of the case, parties are directed to bear their own costs.

S.V.K.

Appeals disposed of.

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