

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) No. 146/2006**
%

30th July, 2015

M/S FUTURISTIC SOLUTIONS LIMITED Plaintiff

Through: Mr. Krishnendu Datta and Mr. Rohit
Priya Ranjan, Advocate.

versus

M/S NIRMAL PROMOTERS PRIVATE LTD & OTHERS
..... Defendants

Through: Mr. Jinendra Jain, Mr. Shekhar Raj
Sharma, Mr. Shaswat Bhardwaj, Mr.
Abhishek Jain and Mr. R.P. Kaushal,
Advocates for D-1.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This is a suit for specific performance of a stated Agreement to Sell/ Memorandum of Understanding (MOU) dated 24.5.2005. Plaintiff company, M/s Futuristic Solutions Limited is the proposed purchaser. Defendant no.1 company, M/s Nirmal Promoters Private Ltd is alleged to be the proposed seller. Defendant nos. 2 and 3 are the fathers of defendant nos. 4 and 5 respectively. Defendant nos. 4 and 5 are the shareholders and

Directors of the defendant no.1 company. Defendant nos. 2 and 3 as per the plaintiff are said to have been acting for and on behalf of the defendant no.1 company and as per the directions of defendant nos. 4 and 5. The suit property is an agricultural farm measuring 12 bighas and 8 biswas, as per the mutation dated 21.9.1993, located in village Ghitorni, New Delhi (approximately 12350 sq yds). Total price payable for the suit property as per the plaintiff was a sum of Rs. 2,37,50,000/-. Of the total price a sum of Rs.5 lacs was paid as per the plaintiff to the defendants no.2 and 3 for the defendant no.1 company on the date of entering into of the MOU on 24.5.2005. The case of the plaintiff is that the defendant no.1 company committed breach of the contract by refusing to sell the suit property to the plaintiff although plaintiff was ready with the balance amount of Rs.2,32,50,000/- by the first week of July, 2005 when the sale deed was to be executed. As per the plaintiff the defendant no.1 had committed deliberate breach by not selling the suit property to the plaintiff. The breach of the defendant no.1 is also said to exist because defendant no.1 failed to take the necessary NOC for sale of the property from the concerned authority under the Delhi (Restrictions on Transfer) Act, 1972 (hereinafter referred to as 'the 1972 Act'). As per the plaintiff, defendant no.1 also breached the contract by failing to sell the suit property to the plaintiff by

giving excuses that defendant no.1 did not have the original title documents of the suit property with it.

2. Defendant no.1 has contested the suit. Defendant no.1 has denied that any Agreement to Sell/MOU dated 24.5.2005 was at all entered into on its behalf by the defendant nos. 2 and 3 with the plaintiff. No doubt, defendant nos. 2 and 3 have signed the MOU/Agreement to Sell dated 24.5.2005, however, the defendant no.1's case is that they not being the shareholders or Directors of the defendant no.1 company but only being fathers of defendant nos. 4 and 5, only had a right to broadly discuss the terms of the sale of the suit property, but they had no right/power to enter into the agreement to sell itself. It is also denied that the defendant no.1 is guilty of breach of the contract and it is stated that though there was no agreement to sell, and, even assuming there is an agreement to sell, it is pleaded that the plaintiff has failed to show its financial capacity for completing the sale transaction.

It is noted that it has come on record in terms of the pleadings of the defendant no.1 and evidence led by the parties that shareholding of the defendant no.1 company was transferred from the group representing defendant nos. 4 to 6 to one Sh. Kiranjit Singh, Sh. Manvajit Singh and Dr.

Gunita Singh Group on 31.12.2005 and this Singh Group further transferred the shareholding to the present shareholders being the Rajesh Jain Group, being the family members of Sh. Rajesh Jain. Defendant no.1 has prayed for dismissal of the suit. Defendant nos. 2 and 3 have not appeared in the suit and have remained *ex parte*.

3. Defendant nos. 4 to 6 in the suit have filed their written statement and have taken up the defence as taken up by the defendant no.1.

4. I may note that since defendant no.1 is a company and a legal entity, therefore, though shareholding of the defendant no.1 company has been transferred from defendant nos. 4 to 6 to the Singh Group and then to the Jain Group, however, such subsequent shareholders have not been arrayed as defendants in the suit.

5. In the suit, the following issues were framed on 9.8.2007.

“1) Whether defendant Nos. 2 & 3 acting on behalf of defendant no.1 signed a document titled MOU dated 24th May, 2005 and agreed to sell the agricultural land with building thereon situated at Khasra No.630 admeasuring 12 bighas and 8 biswas located in village Ghitorni, New Delhi for a total sale price of Rs. 2,37,50,000/- to the plaintiff, if so to what effect? OPP

2) Whether the plaint has been signed, verified and instituted by a duly authorised person on behalf of plaintiff? OPP

- 3) Whether the MOU dated 24th May, 2005 is not an agreement to sell as alleged by defendant No. 1? OPD
- 4) Whether the plaintiff was ready and willing to perform his part of obligation under the agreement? OPP
- 5) Whether the plaintiff is entitled to a decree of specific performance of the MOU/Agreement to Sell dated 24th May, 2005, if so, on what terms and conditions? OPP
- 6) Whether the plaintiff in alternative is entitled to a decree for damages in the sum of Rs.2 crores against the defendant Nos. 1 to 6? OPP
- 7) Whether the plaintiff is entitled for interest, if so, on what amount, at what rate and for what period? OPP
- 8) Whether the plaintiff is entitled for a decree of permanent injunction against the defendants? OPP
- 9) If the Memorandum of Understanding is the agreement to sell whether the time was the essence of the agreement as alleged by defendants? OPD
- 10) Relief.”

Let me now deal with each of the aforesaid issues.

6. **Issue Nos. 1 and 3**

- 1) Whether defendant Nos. 2 & 3 acting on behalf of defendant no.1 signed a document titled MOU dated 24th May, 2005 and agreed to sell the agricultural land with building thereon situated at Khasra No.630 admeasuring 12 bighas and 8 biswas located in village Ghitorni, New Delhi for a total sale price of Rs. 2,37,50,000/- to the plaintiff, if so to what effect? OPP
- 3) Whether the MOU dated 24th May, 2005 is not an agreement to sell as alleged by defendant No. 1? OPD

7. The first and crucial question to be decided is whether at all the MOU dated 24.5.2005 was entered into for and on behalf of the defendant no.1 company and that whether the defendant nos. 2 and 3 were authorized by the defendant no.1 or the defendants no. 4 to 6 to enter into the Agreement to Sell/MOU. There is also the related issue as to whether at all the MOU dated 24.5.2005 is an agreement to sell which is complete as per law i.e whether all the terms as required of an agreement to sell are agreed to and comprised in this MOU dated 24.5.2005. At this stage, let us therefore examine the language of this MOU dated 24.5.2005, Ex.PW1/2, and which reads as under:-

“This M.O.U is signed today the 24th May’s between the Nirmal Promoters (P) Ltd C-1/6, Krishna Nagar, Delhi and M/s Futuristic Solution Ltd M-50, M Block Market, G.K.-I, New Delhi for the sale of an agricultural farm with building etc. measuring 12 Bighas and 8 Biswas (as per mutation dated 21.3.93) located at village Ghitorni, New Delhi belonging to Nirmal Promoters (P) Ltd to Futuristic Solutions Ltd. at the following terms and conditions.

Total sale price---Rs. 2,37,50000/-

(Rs.Two crores thirty seven lacs and fifty thousand only)

tobe paid within 45 days i.e. by 8th July’ 05

- a) Rs five lacs only paid dated 24.5.05 by cheque No. 878010 for Rs.4,00,000/- and 878011 for Rs. 1,00,000/-

- b) Rs. Twenty five lacs would be paid by 3rd July' 05
- c) Balance payment would be made by 8th July' 05"

8. A reading of the aforesaid document shows that the property is identified, sale price is specified, and the time of balance payment of the sale price is also provided. Therefore though ordinarily this document can be taken as an agreement to sell, however, there is one very crucial aspect which is missing/lacking in the present MOU dated 24.5.2005, and because of which it cannot be said that there was a contract which is complete and that there is *concensus ad idem* for all the terms between the parties. The essential term lacking in this document is as to who would take the necessary permission/NOC from the requisite authority under the 1972 Act, and without which prior permission, sale deed could not have been executed with respect to the suit property.

9. Admittedly, the MOU is silent as to who has to perform the obligation to obtain the NOC/permission, and surely therefore the document is uncertain in this regard. The requisite NOC/permission is purely as per the contract of the parties, either to be obtained by the proposed seller or by the proposed buyer, by incurring time and expenditure for the purpose. Counsel for the plaintiff has argued that it is the defendant no.1 who is guilty of

breach of contract because the defendant no.1 has failed to take the necessary permission, but this argument presumes that the defendant no.1 under the MOU had the contractual obligation to take the necessary permission. It is an agreed position that taking of prior permission from the competent authority was a prerequisite for entering into the sale deed, and once that is so, *consensus ad idem* with respect to this aspect of taking permission, the MOU dated 24.5.2005 in my opinion is inchoate and is not a legally complete contract to sell as per Section 2(h) of the Indian Contract Act, 1872. Once there is an obligation to be performed, and there is no certainty as to who is to perform the same by spending time and incurring expenditure etc for obtaining the same, it has to be held that the MOU dated 24.5.2005 is not an agreement enforceable in law vide Section 2(h) of the Indian Contract Act. Once the document is not a complete agreement to sell, there cannot be specific performance of such an inchoate document.

10. Another reason for holding that the MOU dated 24.5.2005 is not an enforceable agreement to sell between the plaintiff and the defendant no.1 is that admittedly the signatories to this MOU dated 24.5.2005 are defendant nos. 2 and 3, and they are not proved to have been authorized by the defendant no.1 or the defendants no. 4 to 6 to enter into the agreement to

sell. The defendant nos. 2 and 3 are not in any manner connected to the defendant no.1 company, in that neither they are shareholders nor they are directors nor principal officers nor employees etc of the defendant no.1 company. Under the doctrine of indoor management under the Companies Act, 2013 with respect to a company, the principal officers and directors no doubt may as per the facts of a case be said to be *prima facie* authorized to enter into transactions on behalf of the company, however, a person who is not a principal officer or director of a company, cannot without specific authorization be said to be authorized to enter into transactions on behalf of the company. Not only there is no law that parents or relatives of shareholders/directors/principal officers of a company can enter into transactions on behalf of the company, the facts of the present case will show that when earlier on 8.2.2005 a proper Agreement to Sell/MOU was entered into on behalf of the defendant no.1 company, such an Agreement to Sell/MOU was not signed by the defendant nos. 2 and 3, and the same was signed by persons who were the shareholders and directors i.e by the defendants no. 4 to 6 herein. This earlier document signed on behalf of the defendant no.1 company is the earlier Agreement to Sell/MOU dated 8.2.2005, filed as one of the documents to an entire bunch of documents Ex. DW-1/P-1 (colly). This Agreement to Sell/MOU was entered into by the

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defendant no.1 company with one Sh. Prit Pal Singh Paul and this Agreement to Sell/MOU is signed only by the defendants no. 4 to 6 in the present suit namely Sh. Sanjay Ambwani, Sh. Anup Jindal and Smt. Madhu Mittal i.e not by the defendant nos. 2 and 3 who are the fathers of defendant nos. 4 and 5 respectively. I may note that this document being the Agreement to Sell/MOU dated 8.2.2005 has been relied upon on behalf of the plaintiff itself to argue that the defendant no.1 in view of disputes as regards this Agreement to Sell/MOU dated 8.2.2005 was unable to enter into the sale deed with the plaintiff company.

11(i). Learned counsel for the plaintiff has sought to place reliance upon three documents to argue that the defendant nos. 2 and 3 were authorized to act on behalf of the defendant no.1 company, and in this behalf attention has been drawn on behalf of the plaintiff, of this Court to the letter dated 3.9.2005 (Ex.PW1/15) of defendant nos. 2 and 3 to the plaintiff, letter dated 13.9.2005 (Ex.PW1/29) of defendants no. 2 and 3 to Mr. Mandeep Sandhu who is the Managing Director of the plaintiff and a legal notice dated 9.9.2005 sent on behalf of defendant no.1 (part of the bunch of documents exhibited collectively as Ex. DW-1/P-1 (colly)) addressed to Sh.

Arun Batta, Advocate, the lawyer of the earlier proposed purchaser Sh. Prit Pal Singh Paul.

(ii) Let us therefore examine as to whether these three documents being the letters dated 3.9.2005 (Ex.PW 1/15), 13.9.2005 (Ex.PW1/29) and legal notice 9.9.2005 (part of Ex.DW-1/P-1 (colly)) are such documents relying on which the plaintiff can succeed in establishing that the defendant nos. 2 and 3 were authorized on behalf of the defendant no.1 company to enter into the subject Agreement to Sell/MOU for the suit property.

12. So far as the letters dated 3.9.2005 and 13.9.2005 are concerned, these are letters written not by the defendant no.1, but they are written by defendant nos. 2 and 3 themselves and therefore surely by *suo moto* actions of defendants no.2 and 3 calling themselves authorized to act for the defendant no.1 company, cannot make them as attorneys or representatives or authorized in any manner by or on behalf of the defendant no.1. Such letters of defendants no. 2 and 3 are not sufficient in law or fact to hold that defendant nos.2 and 3 were authorized to enter into an Agreement to Sell/MOU on behalf of the defendant no.1 company for the suit property. In fact and law what would show that the defendant nos. 2 and 3 could have validly acted on behalf of the defendant no.1 company, would

be by means of a document either of the defendant no.1 company or a document which is signed by the defendant nos. 4 to 6, and not a *suo moto* document of the defendants no. 2 and 3 themselves claiming on their own to represent the defendant no.1 company. Therefore, in my opinion, letters dated 3.9.2005 and 13.9.2005 of the defendant nos. 2 and 3 will not help the plaintiff to prove that defendant no. 1 had authorized defendant nos. 2 and 3 to act on defendant no.1's behalf to enter into an Agreement to Sell/MOU of the suit property.

13(i) Whatever doubt which remains that defendant nos. 2 and 3 were never authorized by the defendant no.1 or the defendant nos. 4 to 6 to enter into an Agreement to Sell/MOU with respect to the suit property, the same is removed on a reference to the third document relied upon by the plaintiff being the legal notice dated 9.9.2005 sent on behalf of the defendant no.1 company to Sh. Arun Batta, Advocate of Sh. Prit Pal Singh Paul, proposed purchaser under the Agreement to Sell/MOU dated 8.2.2005. Para 3 of this legal notice dated 9.9.2005 is relevant and this para 3 reads as under:-

“3. That during the period of dispute when the company had rescinded the MOU dated 8.2.05 on account of default by your client, that the two persons known to and authorized by the company to hold preliminary negotiations on the broad terms of

sale of the farm with prospective buyers, had taken a token money as Rs. 5 lacs from Mr. Mandeep Sandhu for finalization of the deal and execution of agreement by him with the company. However, Mr. Sandhu never contacted, the said token money of Rs.5 lacs had been returned at that time itself. While your notice is being replied it is made clear that there is no agreement whatsoever between the company and the said Mr. Mandeep Sandhu in the respect of the said farm situated in Khasra No. 630 of Village Ghitorni, New Delhi. ”

(underlining added)

(ii) A reading of the aforesaid para 3 of the legal notice dated 9.9.2005 clearly shows that the case of the defendant no.1 has always been that the defendant nos. 2 and 3 were only authorized to hold preliminary negotiations on broad terms of the sale of the suit property i.e defendant nos. 2 and 3 had no right whatsoever to finalize an agreement to sell for and on behalf of the defendant no. 1 company with respect to the suit property. And, as already stated above, even with Sh. Prit Pal Singh Paul, the proposed purchaser under the earlier Agreement to Sell/MOU dated 8.2.2005, the Agreement to Sell/MOU dated 8.2.2005 was only signed by defendant nos. 4 to 6 and not by defendant nos. 2 and 3.

(iii) It may be noted that there was a subsequent amendment dated 11.7.2005 to the Agreement to Sell/MOU dated 8.2.2005 (again part of Ex.DW-1/P-1 (colly)), of defendant no.1 with Sh. Prit Pal Singh Paul, and

even this document dated 11.7.2005 was signed on behalf of defendant no.1, not by defendant nos. 2 and 3, but only by defendant nos. 4 to 6.

14. Clearly therefore, plaintiff has failed to prove that so called Agreement to Sell dated 24.5.2005 was an agreement to sell which the defendant no.1 had authorized defendant nos. 2 and 3 to enter into on its behalf with respect to the suit land. I therefore hold that defendant nos. 2 and 3 never had any power or authorization whatsoever to enter into a legally binding agreement to sell with the plaintiff on behalf of the defendant no.1 company with respect to the suit property, and that the defendant nos.2 and 3 were only authorized to enter into broad terms of the agreement to sell. Also as stated above the MOU dated 24.5.2005 even lacks the *sine qua non* as regards *concensus ad idem* with respect to a very important aspect requiring time and money of the parties i.e which will be the party to the contract who would have the contractual obligation to obtain the necessary permission/NOC from the competent authority under the 1972 Act. Issue nos. 1 & 3 are therefore decided in favour of the defendant no.1 and against the plaintiff.

15. **Issue No.2**

“Whether the plaint has been signed, verified and instituted by a duly authorised person on behalf of plaintiff? OPP”

This issue is not pressed on behalf of the defendant no.1 and therefore is decided in favour of the plaintiff.

16. **Issue Nos.4 and 5**

“4) Whether the plaintiff was ready and willing to perform his part of obligation under the agreement? OPP

5) Whether the plaintiff is entitled to a decree of specific performance of the MOU/Agreement to Sell dated 24th May, 2005, if so, on what terms and conditions? OPP ”

Under the twin issues no. 4 and 5 this aspect will have to be discussed that assuming that the MOU dated 24.5.2005 is an agreement to sell, whether it is the defendant no.1 who is guilty of breach of contract or it is the plaintiff who is guilty of breach. It will also have to be examined whether plaintiff was always ready and willing and confined to be ready and willing to perform its part of the contract and was therefore entitled to specific performance.

17 (i) In the earlier part of this judgment while dealing with issues no. 1 and 3 I have already opined that there was lack of *concensus ad idem* with regard to a crucial aspect as to who was to take the necessary permission

from the requisite authority under the 1972 Act and it is hence held that there is no legally enforceable contract to sell the suit property to the plaintiff. But now let us discuss that assuming there is a contract being an agreement to sell, it is contended on behalf of the plaintiff that it is the defendant no.1 who had to take the necessary permission and by failing to do so it is the defendant no.1 who is guilty of breach.

(ii) In my opinion, once it is the plaintiff who asserts so in spite of the Agreement to Sell/MOU dated 24.5.2005 being silent in this regard, it is then upon the plaintiff to establish and prove to the satisfaction of this Court on preponderance of probabilities that it is the defendant no.1 who had to take the necessary permission and not the plaintiff. In this regard however except a self-serving statement of the plaintiff in the pleadings of the plaintiff and the affidavit by way of evidence of Sh. Mandeep Sandhu, the Managing Director of the plaintiff company, there is no other evidence whatsoever which is led to prove that the obligation of obtaining the permission from the requisite authorities was upon the defendant no.1. In the light of such fragile evidence led on behalf of the plaintiff, in my opinion, the plaintiff has failed to discharge the onus that it was the defendant no.1 who had to take the necessary permission.

18. Learned counsel for the plaintiff has argued by placing reliance upon averments made in the pleadings of defendant no. 1 that defendant no.1 has nowhere pleaded and contended that it was ready and willing to execute the sale deed and that it is not stated by the defendant no.1 that the plaintiff had to take the necessary permission, however, in my opinion, since the defendant no.1 has denied the existence, validity and completeness of the MOU dated 24.5.2005, hence the defendant no.1 could not have in its pleadings or evidence come up with the stand that it was the plaintiff which had to obtain the necessary permission. Thus the defendant no.1 rightly and wisely did not plead and lead such evidence because if defendant no.1 would have done so, the defendant no.1 would have impliedly accepted the validity of the actions of defendants no. 2 and 3 of entering into the MOU dated 24.5.2005 with the plaintiff on behalf of the defendant no.1 company.

19. Therefore in my opinion there is no credible evidence led by the plaintiff for this Court to hold in favour of the plaintiff that the defendant no.1 had to obtain the necessary permission and hence it is the defendant no.1 who is guilty of breach of contract in not obtaining the requisite permission. Similarly, the issue with respect to original title documents not being with the defendant no.1 would also accordingly stand disposed of

against the plaintiff because the defendant no.1 did not have to deal with this aspect either in its pleadings or respond to any such evidence which has been led on behalf of the plaintiff in this case.

20. In the opinion of this Court, therefore, the plaintiff has failed to prove that it was the defendant no.1 who is guilty of breach of contract in not taking the requisite permission of the competent authority under the 1972 Act because no credible evidence, much less in the form of a document or an admission of the defendant no.1, has been filed and proved on record that it is the defendant no.1 who had to obtain the necessary permission. As per the agreed terms and facts of each case, qua such transactions in Delhi, either the proposed buyer or the proposed seller, can and does approach the requisite authority for taking the necessary permission under the 1972 Act by spending the necessary time, money and energy. It is therefore held that the plaintiff has failed to prove that even assuming the MOU dated 24.5.2005 was an agreement to sell entered into by the defendant no.1 with the plaintiff, it is the defendant no.1 who has committed breach of contract.

21. On the aspect of readiness and willingness i.e the financial capacity of the plaintiff, evidence has been led by the plaintiff of Sh. Mandeep Singh Sandhu as PW1 and two other entities, M/s Home

Developers (P) Ltd. and M/s Rajni Construction as PW2 (Sh. Yogesh Gupta) and PW3 (Sh. Virender Dhingra) respectively. As per the documents which have been filed on behalf of the plaintiff and the evidence which is led of PW1-Sh. Mandeep Singh, PW2-Sh. Yogesh Gupta and PW3-Sh. Virender Dhingra, it has been endeavored to be shown and proved that four entities namely M/s Rajni Construction, M/s Home Developers (P) Ltd., Mishry Holdings Limited and Futuristic Remedies Limited had agreed to provide loans of Rs.40 lacs, Rs.1.5 crores, Rs.70 lacs and Rs.20 lacs respectively to the plaintiff in July, 2005 so that the plaintiff is in a position to make the balance payment of Rs. 2,32,50,000/- to the defendant no.1. Let us examine that whether this evidence led and the documents proved show the financial capacity of the plaintiff to perform its part of the obligation that the plaintiff was ready and willing to execute the sale deed and had the balance funds of Rs.2,32,50,000 to discharge the onus on the plaintiff in this regard.

22. On this aspect the first important point which is to be noted is that the plaintiff alongwith the statements of PW1, PW2 and PW3 as examinations-in-chief, has unfortunately failed to legally prove the bank accounts of M/s Rajni Construction, M/s Home Developers (P) Ltd., Mishry Holdings Limited and Futuristic Remedies Limited inasmuch as only

photocopies of the statements of bank accounts were filed. These documents were first exhibited but they were thereafter de-exhibited on objection of the defendant no.1 since the statements of bank accounts filed were not certified under the Bankers' Book Evidence Act, 1891. Plaintiff's Advocate has thereafter taken no steps to summon, file and prove the certified copies of these bank accounts, photocopies of which were filed and de-exhibited, and therefore except the self-serving statements of PW1, PW2 and PW3 alongwith the certificates on the letter heads of M/s Rajni Construction, M/s Home Developers (P) Ltd., Mishry Holdings Limited and Futuristic Remedies Limited that they will give loan to the plaintiff, there is no document proved on record that these firms/companies in fact had monies in their bank accounts to make payments to the defendant no.1. No doubt, this argument which is accepted by this Court as raised by the defendant no.1 may appear to be technical in nature but the fact of the matter is that in commercial matters such as the present, there was never any handicap for the plaintiff to summon the bank accounts and its own witnesses so as to file and prove the certified copies under the Bankers' Book Evidence Act. Once the Indian Evidence Act, 1872 applies, and provisions of which have not been complied with by the plaintiff to prove the bank statements, to allow the plaintiff to argue that the photocopy of the statements of bank accounts

be looked into will be to allow the violation of relevant provisions of the Indian Evidence Act and which this Court cannot permit. The plaintiff having failed to comply with the law, in commercial matters such as the present, I would refuse to 'in equity' allow the plaintiff to rely on unexhibited statements of bank accounts to show the financial capacity of the four concerns stated above to give loans to the plaintiff.

23(i). I may note that the learned counsel for the plaintiff has placed reliance upon the judgment of the Supreme Court in the case of *Nathulal Vs. Phoolchand (1969) 3 SCC 120* that readiness and willingness with respect to financial capacity does not mean that actual monies must be there in the hands of the proposed buyer and it is enough that the proposed buyer has a capacity to garner the requisite funds, and which is also an aspect dealt with by a learned Single Judge of this Court in the judgment reported as *Raghunath Rai and another Vs. Jageshwar Prashad Sharma and another AIR 1999 Delhi 383*, however, both the judgments relied upon on behalf of the plaintiff have no application to the facts of the present case for the reasons stated hereinafter.

(ii) So far as the judgment in the case of *Raghunath Rai (supra)* is concerned, the same will not apply for two reasons. Firstly, because in that

case both the parties as per the agreement to sell itself had knowledge that the proposed buyer will make payment of the balance sale price after taking a loan from LIC. The second reason is that loan from LIC is much different than the loan from private persons inasmuch as loan from LIC has surety with respect to such amount being available with the proposed buyer and hence there can be weight attached to such evidence. Both these aspects are missing in the present case.

(iii) So far the judgment of the Supreme Court in the case of *Nathulal (supra)* is concerned, no doubt, a proposed buyer does not need to have actual liquid monies in his hands, and it is sufficient that he vouchsafes a scheme to show payment, however, still and undoubtedly a plaintiff has definitely to prove its financial capacity that it owns properties to generate the funds which have to be paid under the agreement to sell. In this case however no evidence has been led on behalf of the plaintiff that the plaintiff company has got assets to garner the balance price payable under the Agreement to Sell/MOU of Rs.2,32,50,000/-, and similarly no evidence has been filed of the Managing Director, Sh. Mandeep Singh Sandhu that he owns properties and hence has the financial capacity to pay the balance amount of Rs.2,32,50,000/-. In my opinion, the fact that the proposed buyer

may not have ready funds, and may not show liquidity in his hands, however the same does not mean that the plaintiff is not to lead evidence to show such amount of financial capacity to make available the requisite funds for payment under the agreement to sell. Liquidity of money and capacity to pay are two separate things and liquidity does not have to be proved but capacity to pay the sale price has definitely to be proved especially by showing properties (movable or immovable) available to the plaintiff for making payment of balance sale consideration. It cannot be the legal position in all the cases that since loans can be taken, in all the cases the financial capacity is to be taken as proved. If that is to be so taken then in all cases financial capacity/readiness and willingness can be automatically proved because every buyer can say that he can take a loan. What is to be seen is not only the credibility of the loan transactions but also the weight to be attached to such transactions from the properties/financial capacity of a proposed buyer to repay the loans from the properties owned by the proposed buyer in a case such as the present. In my opinion, the fact that the plaintiff has failed to prove any properties owned by it or its Managing Director, and they have the capacity to repay the loans taken for payment of the balance sale consideration, this is relevant to the aspect of having failed to prove the readiness and willingness, even if we ignore the technical

objection of the defendant no.1 and that this Court looks into the statements of bank accounts which have been filed on behalf of the plaintiff of the four concerns.

24. Therefore, in my opinion, convenient documents prepared of some concerns being ready to give loans to the plaintiff, does not necessarily oblige the Court to hold in favour of the proposed buyer with respect to the financial capacity to pay the balance sale consideration. Relevancy of evidence and the weight to be attached to evidence are two separate aspects. Evidence may be relevant, but, what is the weight which has to be attached by the courts to the evidence depends on the facts of each case. In my opinion, mere self-serving documents to show that plaintiff would be given loans by various concerns with respect to the balance amount of Rs.2,32,50,000/-, cannot be given weight in this case including because these days in a commercial world, even family members *inter se* do not easily give loans to each other and once the persons involved are strangers who only have commercial relations, surely the loans, if the same would have been granted to the plaintiff, the lenders would have insisted on securities, and which would be the properties of the plaintiff or of its Managing Director, and as stated above, neither the plaintiff nor its Managing Director

have proved what and how many properties they have to show the financial capacity to secure the loans or repay the loans. In my opinion, therefore, not much weight can be attached to the evidence on behalf of the plaintiff of the four concerns giving them loans to make payment of balance sale consideration and plaintiff on the basis of such weak documents/evidence as led in this case cannot be said to have discharged the onus of proof with respect to plaintiff's financial capacity to pay the balance sale consideration of Rs.2,32,50,000/-.

25. Learned counsel for the plaintiff has further argued that the plaintiff should be held ready and willing to perform the contract because nowhere any letter has been written by the defendant no.1 or any evidence has been led on behalf of the defendant no.1 that it is ready and willing to execute the sale deed, and hence the defendant no.1 is guilty of breach of contract and plaintiff therefore should not be held guilty of breach of contract, however, as already noted while deciding issues no.1 and 3, such arguments of the plaintiff cannot be accepted because defendant no.1 could never have taken up a stand that it was ready and willing to execute the sale deed inasmuch as the defendant no.1 has always consistently been maintaining that there was never an agreement to sell entered into on its

behalf with the plaintiff at any point of time by the defendant nos. 2 and 3, and much less that defendant nos. 2 and 3 had power to finalize the terms of the agreement to sell inasmuch as the entitlement of defendant nos. 2 and 3 was to only generally discuss the broad terms with respect to the agreement to sell. Therefore, the argument of the plaintiff is misconceived and rejected that this Court should hold that the defendant no.1 company is guilty of breach of contract and that the plaintiff was always ready and willing to perform its part of the contract. Issue no.4 is therefore decided against the plaintiff.

26. In my opinion, there is another reason why even assuming there was an Agreement to Sell/MOU dated 24.5.2005, and defendant no.1 was held guilty of breach of contract and plaintiff was ready and willing to perform the contract, that specific performance should not be decreed and this is because specific performance is a discretionary relief in terms of Section 20 of the Specific Relief Act, 1963 and in a case where the plaintiff has admittedly 'paid' only a minor sum of Rs.5 lacs out of the payable consideration of Rs.2,37,50,000/-, mere payment of this nominal amount of Rs. 5 lacs will not entitle the plaintiff to specific performance. I may also note that even this amount of Rs.5 lacs was returned by the defendant nos. 2

and 3 to the plaintiff and credited in the bank account of the plaintiff, though the plaintiff claims that defendant nos. 2 and 3 mischievously got credited the amount of Rs.5 lacs in the account of the plaintiff. Really, therefore, entire monies of the plaintiff have been always with the plaintiff and in any case only a nominal payment of Rs.5 lacs can be said to have been made by the proposed buyer/plaintiff to the proposed seller/defendant no.1. In these circumstances, no specific performance can be granted, and for this purpose learned counsel for defendant no.1 has rightly placed reliance upon a judgment of this Court in the case of ***Shri Jinesh Kumar Jain Vs. Smt. Iris Paintal & Ors.*** MANU/DE/3387/2012 (2012 ILR 5 Delhi 678). It is argued that this judgment of this Court in the case of ***Shri Jinesh Kumar Jain (supra)*** was taken in challenge before the Division Bench of this Court, and the Division Bench vide its judgment reported as ***Jinesh Kumar Jain Vs. Iris Paintal & Ors.*** RFA (OS) No. 75/2012 decided on 31.8.2012 MANU/DE/4554/2012 had dismissed the appeal. The relevant paras of the judgment of this Court in the case of ***Shri Jinesh Kumar Jain (supra)*** observing that where a person had only made a nominal payment (such as Rs.5 lacs in the present case) is not entitled to specific performance are paras 13 to 17 of the judgment and which paras read as under:-

“13. Sub-Section 3 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. Plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant to the agreement to sell or otherwise is in the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid i.e. less than substantial consideration is paid, (and for which a rough benchmark can be taken as 50% of the consideration), and/or plaintiff is not in possession of the subject land, I do not think that the plaintiff is entitled to the discretionary relief of specific performance.

14. The Supreme Court in the recent judgment of *Saradamani Kandappan vs. Mrs. S. Rajalakshmi*, MANU/SC/0717/2011: 2011 (12) SCC 18 has had an occasion to consider the aspect of payment of a nominal advance price by the plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Though in the facts of the case before the Supreme Court, it was the buyer who was found guilty of breach of contract, however, in my opinion, the observations of the Supreme Court in the said case are relevant not only because I have found in this case the plaintiff/ buyer guilty of breach of contract, but also because even assuming the plaintiff/buyer is not guilty of breach of contract, yet, Section 20 sub-Section 3 of the Specific Relief Act, 1963 as reproduced above clearly requires substantial acts on behalf of the plaintiff/proposed purchaser i.e. payment of substantial consideration. Paras 37 and 43 of the judgment in the case of *Saradamani Kandappan* (supra) are relevant and they read as under:

“37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a

circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and “non-readiness”. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.

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43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanandam.

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some

significance and therefore time/period prescribed cannot be ignored.

(ii) **The courts will apply greater scrutiny and strictness when considering whether the purchaser was “ready and willing” to perform his part of the contract.**

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also “frown” upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser.” (emphasis is mine)

15. A reading of the aforesaid paras shows that Courts have a bounden duty to take notice of galloping prices. Surely it cannot be disputed that the balance of convenience i.e. equity in the present case is more in favour of the defendants who have only received 10% of the consideration. If the hammer has to fall in the facts of the present case, in my opinion, it should fall more on the plaintiff than on the defendants inasmuch as today the defendants cannot on receiving of the balance consideration of `44,00,000/-, and even if exorbitant rate of interest is received thereon, purchase any equivalent property for this amount. Correspondingly, the plaintiff has had benefit of 90% of sale consideration remaining with him (assuming he has any) and which he could have utilized for purchase of assets including an immovable property. In specific performance suits a buyer need not have ready cash all the time and his financial capacity has to be seen and thus plaintiff can be said to have taken benefit of the 90% balance with him. It is well to be remembered at this stage that in a way that part of Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872 i.e. the

normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced. Thus for breach of contract the remedy of damages is always there and it is not that the buyer is remediless. However, for getting specific relief, the Specific Relief Act, 1963 while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation.

16. I have recently in the case titled as Laxmi Devi vs. Mahavir Singh being RFA No. 556/2011 decided on 1.5.2012 declined specific performance, one of the ground being payment of only nominal consideration under the agreement to sell. Para 11 of the said judgment reads as under:-

11. Besides the fact that respondent/plaintiff was guilty of breach of contract and was not ready and willing to perform his part of the contract lacking in financial capacity to pay the balance consideration, in my opinion, the facts of the present case also disentitle the respondent/plaintiff to the discretionary relief of specific performance. There are two reasons for declining the discretionary relief of specific performance. The first reason is that the Supreme Court has now on repeated occasions held that unless substantial consideration is paid out of the total amount of consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date. In the present case,

out of the total sale consideration of `5,60,000/-, only a sum of `1 lakh has been paid i.e. the sale consideration which is paid is only around 17% or so. In my opinion, by mere payment of 17% of the sale consideration, it cannot be said that the respondent/plaintiff has made out a case for grant of discretionary relief or specific performance

17. Therefore, whether we look from the point of view of Section 20 sub-Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of Saradamani Kandappan (*supra*) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted. In fact, on a rough estimation, the property prices would have galloped to at least between 30 to 50 times from 1988 till date. I take judicial notice of this that in the capital of our country, like in all other megapolis, on account of the increase in population and rapid urbanization, there is a phenomenal increase in the prices of urban immovable property.

I therefore hold and answer issue no. 5 against the plaintiff and in favour of the defendants holding that the plaintiff is not entitled to discretionary relief of specific performance.”

27. In view of the ratio of the judgment in the case of ***Shri Jinesh Kumar Jain (supra)***, in my opinion, the plaintiff is disentitled to the discretionary relief of specific performance not only because only a nominal amount has been paid but plaintiff assuming he had the balance available consideration with him, plaintiff could have used that monies for its business or for buying another property etc etc, and therefore, such cases of nominal payment have to be distinguished with those cases where substantial or

entire payment or most of the payment has been made by the proposed buyer to the proposed seller where courts favourably consider decreeing specific performance because the proposed seller has used and taken benefit of substantial amount or most of the sale price which was payable for the sale transaction in question. In the present case the plaintiff therefore is disentitled to seek the relief of specific performance.

28. One other reason for declining specific performance in the facts of the present case is that even before the suit was filed, third party rights had come into existence because shareholding in the defendant no. 1 company had been transferred by defendant nos. 4 to 6 to the Singh Group on 31.12.2005 and which position underwent a further transfer to the Jain Group in February, 2006, and which Jain Group continues to hold the shareholding of the defendant no.1 company as at present one.

29. I therefore hold issue nos. 4 and 5 in favour of the defendant no.1 and against the plaintiff, that plaintiff cannot be held to be ready and willing to perform the contract and is not entitled to the discretionary relief of specific performance.

30. **Issue No.6**

“Whether the plaintiff in alternative is entitled to a decree for damages in the sum of Rs.2 crores against the defendant Nos. 1 to 6? OPP”

This issue will stand decided against the plaintiff once it has clearly been held above that there is no agreement to sell and even if there is an agreement to sell, defendant no.1 has not breached the contract.

31. Even assuming for the sake of argument that there was an agreement to sell which was breached by the defendant no.1, even then this issue cannot be decided in favour of the plaintiff because damages are the damages which is the difference of the market price of a property on the date of the breach and market price of the suit property in July, 2005 has not been proved by the plaintiff. Admittedly, the date of performance fixed for the defendant for executing of the sale deed and for payment of the balance sale consideration was July, 2005, and the plaintiff therefore had to show rise in the prices from Rs.2,37,50,000/- to a higher amount of Rs.4,37,50,000/- in July, 2005 if the plaintiff had to claim the damages of Rs. 2 crores. Plaintiff has led no evidence whatsoever of any sale transactions in the concerned area in July, 2005 and counsel for the plaintiff has only argued qua this issue of damages on the basis of admissions made by the DW1 Sh. Rajesh Jain in his cross-examination that the property was transferred by the Sh. Kiranjit Singh

Group to the Rajesh Jain Group in February, 2006 for a sum of Rs.4.5 crores, but any transfer of the company as of February, 2006 cannot be taken as the value of the property in July, 2005 and which was the crucial period for determining the value of damages. Thus even assuming plaintiff was not entitled to discretionary relief of specific performance but was entitled to damages for the breach of contract by the defendant no.1, yet this issue is decided against the plaintiff and in favour of defendant no.1 because plaintiff has failed to discharge the onus by failing to lead evidence as to the value of the property in July, 2005.

32. **Issue No.7**

“Whether the plaintiff is entitled for interest, if so, on what amount, at what rate and for what period? OPP”

This issue of interest will be decided against the plaintiff in view of the decision of issue no.6 against the plaintiff.

33. **Issue No.8**

“Whether the plaintiff is entitled for a decree of permanent injunction against the defendants? OPP ”

In view of the decision of issue nos.1, 3, 4 and 5 in favour of the defendant no.1 and against the plaintiff, this issue will also stand decided against the plaintiff.

34. **Issue No. 9.**

“If the Memorandum of Understanding is the agreement to sell whether the time was the essence of the agreement as alleged by defendants? OPD”

In view of the decision of issue nos. 1 & 3, in favour of the defendant no.1 this issue is hence decided against the plaintiff.

35. Present is a classic case of an example of a salesman putting his foot in the door and not allowing the door to close of a home owner. ‘Salesman’ such as the plaintiff, and which is a company has put his foot in the door of the owner and not allowing the door to close, by claiming nominal payment of Rs.5 lacs for purchase of the suit property, now since 2005, i.e a period for over 10 years, has managed to involve the defendant no.1 in this litigation for which not only the defendant no.1’s property would have an encumbrance of existence of litigation, but also a huge amount would have been spent by the defendants including the defendant no.1 for these legal proceedings. Cases such as the present are filed in these times to only and only seek benefit of the galloping rise in prices by commercial people such as Sh. Mandeep Singh Sandhu, the Managing Director of the plaintiff company. Such persons speculate by filing litigation hoping that somehow or the other some benefit would be available. Unfortunately, as a

result of this, besides the defendants having been put to loss of time, money and energy in legal process, even the courts are unnecessarily burdened. I may state that after some preliminary hearing, counsel for the defendant no.1 on instructions from the defendant no.1 communicated that defendant no.1 was willing to pay to the plaintiff an amount up to Rs.15 to 20 lacs (taking this amount as return on investment of Rs.5 lacs in the year 2005), although not a single paisa of the plaintiff is with the defendant no.1 under the subject transaction, and which offer was made so as to curtail future litigation which would be caused to the defendant no.1 in future appellate tiers, but, counsel for the plaintiff on instructions states that the plaintiff was not ready to receive the amount offered by the defendant no.1, but in fact was ready to purchase the property at a 'higher' price i.e Rs.2.37 crores plus an amount of Rs.2.5 crores. Obviously, the actions of the plaintiff lack honesty and *bonafides* because it is well known that the area of the suit property being around 12,000 sq yds in village Ghitorni as of today even on a most conservative estimate would be valued between 50 crores to 100 crores. In view of the above, no settlement could be arrived at, and this Court after hearing of arguments has been invited to pass a judgment in the present case.

Relief:

36. In view of the above, the suit of the plaintiff is dismissed with actual costs. Defendant nos. 1 and 4 to 6 will file affidavits, supported by certificates of fees of its lawyers, with respect to the entire legal costs incurred by the defendant nos. 1 and 4 to 6 for the present case, and such costs will be the costs awarded in favour of the defendant nos.1 and 4 to 6 and against the plaintiff. The necessary affidavits supported by certificates of the lawyers stating that they have received the fees be filed within a period of four weeks from today. Decree sheet be prepared.

JULY 30, 2015
ib/godara

VALMIKI J. MEHTA, J