

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

Reserved on: 25.07.2016
Pronounced on: 07.09.2016

+ **RFA (OS) 92/2015, C.M. APPL.21739/2015**

FUTURISTIC SOLUTIONS LTD.

..... Appellant

Through : Sh. Anil Airi, Sr. Advocate with Sh.
Rohit. P. Ranjan and Sh. Himanshu Kapoor,
Advocates.

Versus

NIRMAL PROMOTERS (P) LTD. AND ORS.

..... Respondents

Through : Sh. Jinendra Jain and Sh. Shekhar Raj
Sharma, Advocates, for Respondent No.1.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This is an unsuccessful plaintiff's appeal, against dismissal of its suit for specific performance of an agreement to purchase farmland property. A learned Single Judge of this Court dismissed the suit, by judgment and decree dated 30.07.2015.

2. The suit claim by the appellant-plaintiff (hereafter "Futuristic") was premised on an Agreement to Sell/ Memorandum of Understanding (MoU) dated 24.05.2005. Futuristic claimed that the first defendant (hereafter "Nirmal") agreed- through the second and third defendants (the fathers of fourth and fifth defendants respectively), to sell an agricultural farm

measuring 12 *bighas* and 8 *biswas*, as per the mutation dated 21.09.1993, located in village Ghitorni, New Delhi (approximately 12350 sq. yd, hereafter "suit property"). The fourth and fifth respondents were shareholders and Directors of Nirmal. Futuristic claimed that the second and third defendant acted for and on behalf of Nirmal. The suit alleged that the total agreed consideration for the suit property was ₹ 2,37,50,000/-. Of the total price a sum of ₹5 lakhs was paid to second and third defendants into the account of Nirmal, on the date of entering into of the MoU, i.e.24.05.2005. Futuristic alleged breach of the agreement by Nirmal, in its refusal to sell the suit property although it (the plaintiff, Futuristic) was ready with the balance ₹ 2,32,50,000/- by the first week of July, 2005 at the time of signing of the sale deed. According to Futuristic, Nirmal deliberately breached the agreement because it failed to secure the necessary NOC (No objection certificate) for sale of the property from the concerned authority under the Delhi (Restrictions on Transfer of Land) Act, 1972 (hereafter 'the 1972 Act'). The suit further alleged that Nirmal took untenable excuses that it did not have the original title documents of the suit property with it.

3. Nirmal, in its written statement, denied that the MoU dated 24.05.2005 was at all entered into on its behalf by the second and third defendants. That the said two defendants signed the MoU was not denied. Nirmal, however, stated that the said two defendants were neither its shareholders nor directors; in their personal capacity as fathers of the two shareholder directors, they could only generally discuss terms of the sale of the suit property. They, however, were not empowered to enter into the agreement to sell. The plaintiff's financial capacity for completing the sale transaction was, in any event, doubted. Nirmal's pleadings were also that the

fourth and fifth defendants transferred their shareholding to the Singh Group comprising Sh. Kiranjit Singh, Sh. Manvajit Singh and Dr. Sunita Singh on 31.12.2005. The Singh Group further transferred the shareholding to Rajesh Jain Group, being the family members of Sh. Rajesh Jain. Nirmal, therefore, sought dismissal of the suit. During the proceedings, the second and third defendants did not appear and were set down *ex-parte*. The fourth and fifth defendants reflected Nirmal's stand, in their written statement.

4. In the suit, the following issues were framed on 09.08.2007.

"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."*

5. The MoU was exhibited as Ex. PW-1/2; in addition, the plaintiff relied on the letter dated 03.09.2005 (Ex.PW1/15) of the second and third defendant to Nirmal, the letter dated 13.09.2005 (Ex.PW1/29) of the said defendants to Mr. Mandeep Sandhu (Managing Director of the plaintiff) and a legal notice dated 09.09.2005 sent on behalf of Nirmal (part of the bunch of documents exhibited collectively as Ex. DW-1/P-1 (Colly)) addressed to Sh. Arun Batta, Advocate, the lawyer of an earlier proposed purchaser of the suit property, Shri. Prit Pal Singh Paul. The parties also led oral evidence.

6. On whether there was a valid and binding MoU, in terms of which Nirmal had to sell the property to Futuristic, the learned Single Judge concluded that the entire evidence did not add up to establishing that the second and third defendants could enter into any binding contract on behalf of Nirmal. It was held that at best, the said defendants could negotiate with and discuss the possibility of an agreement to sell the property, but were, in the absence of any authorization by the company, incapable of binding it. The learned Single Judge rejected as unconvincing the said defendants' assertions in their letters. He also rejected the submission that Nirmal was acting in bad faith and entering into speculative transactions, as its past conduct in entering into an agreement to sell with a third party, not disclosing that agreement to Futuristic, etc. exposed it. The learned Single Judge further ruled that the evidence showed that even the MoU did not amount to a binding contract, because it revealed no *consensus ad idem* with

respect to a crucial aspect, i.e the obligation of one or the other party to secure an NOC under the 1972 Act. It was lastly held that the plaintiff failed to prove its financial capacity and, therefore, did not establish that it was in fact ready and willing to perform its part of the bargain by paying the required amount, assuming there was a binding contract to purchase the suit property.

7. Mr. Anil Airi, learned senior counsel, argues that the impugned judgment is in error inasmuch as it proceeds to hold that there was no valid and binding contract between the parties. Stressing that Ex. PW-1/2 was cast in unequivocal terms, learned counsel pointed out that Nirmal had in fact appropriated the sum of ₹5 lakhs taken by the second and third defendants at the time of signing the MoU. It was contended that the binding nature of the MoU was further reinforced by the fact that the cheque for the amount was cashed by and credited into Nirmal's account. It was argued that the learned Single Judge also failed to appreciate the letter dated -09.09.2005 Ex DW-1/Pl (Colly) issued by Nirmal which had admitted that second and third defendants were its authorized representatives and also the factum of receiving ₹5 lakhs from Futuristic. In these circumstances, Nirmal, the defendant could not have resiled from its binding commitment, and sought shelter under the alleged lack of authorization of the second and third defendants. Counsel relied on the judgments reported as *Chairman, Life Insurance Corporation*¹; *Surendra Nath Roy*²; *The Hukum Chand Insurance Co. Ltd*³; *K. Appa Rao*⁴ and *Chukles Kohli*⁵ to say that there is authority for

¹*Chairman, Life Insurance Corporation v Rajiv Kumar Bhasker* 2005 (6) SCC 188

²*Surendra Nath Roy v Kedar Nath Bose* 161 IC 224

³*The Hukum chand Insurance Co. Ltd v The Bank of Baroda* AIR 1977 Kar. 204

the proposition that when the principal implicitly ratifies the acts of its agent, representing to be one such, it is bound by them. Since Nirmal did not ever expressly repudiate the contract, but rather retained the benefit: i.e. the ₹ 5 lakh given by Futuristic, it could not say that the second and third defendants did not possess the authority to bind it. Reliance was also placed on Sections 197-198 of the Contract Act.

8. It was next argued that the findings in the impugned judgment that the agreement was even otherwise unenforceable as it lacked *consensus ad idem*, is erroneous because it assumed that silence with regard to the obligation of one or the other party with respect to obtaining NOC rendered the bargain inchoate. It was argued that obligation to secure NOC/necessary permission for the sale of the suit property is cast upon the seller not only by virtue of Section 55 of the Transfer of Property Act but also as per the provision of Delhi Land (Restriction on Transfer) Act, 1972 which specifically provides that it is the seller who has to obtain the permission from the concerned authorities. The entire discussion of the learned Single Judge and observations on this issue is erroneous. Counsel relied on the judgment in *Mrs. Chandnee Widya Vati Madden*⁶ to say that in the absence of any contractual stipulation in regard to the obligation of either party to obtain such permission, the law is that the owner has to make the necessary application and in its absence the decree for specific performance would not be refused.

9. It was also argued that the learned Single Judge failed to appreciate, that the occasion to make payment on the part of the purchaser, Futuristic,

⁴ *K. Appa Rao v Gopal Doss & Anr* (1945) 2 MLJ 363

⁵ *Chukles Kohli v Ravinder Singh* and 2012 (130) DRJ 32 (DB)

⁶ *Mrs. Chandnee Widya Vati Madden Vs. C.L. Katial & Others* AIR 1964 SC 978

would only arise on the happening of an event as per the agreement and in the present case no such event arose and further, Nirmal concealed a prior agreement executed by it, with a third party and that encumbrance was not removed by it. Consequently, its action had set at large the time for performance of the obligation and time was no more the essence of the contract.

10. Counsel relied on *Nathulal*⁷ where it was observed 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"

It was urged, in this context, that the testimonies of PW-2 and PW-3 were sufficient proof of the financial ability of the plaintiff, Futuristic, to garner the necessary funds to pay for the suit property. Learned counsel also submitted that the findings in the impugned judgment that ₹5 lakhs constituted a nominal amount, was unwarranted. He stressed that the court could not have imported its notions of adequacy of consideration or the appropriate stage(s) of payment, given that the parties had with mutual consent, agreed upon a time schedule.

11. The findings in the impugned judgment regarding damages, i.e that the plaintiff failed to show any rise in the price of the suit property from ₹2.37 crores to ₹4.37 crores in July 2005 ignored that from the admitted documents brought in the form of the MoU of the suit property with one Mr. Prit Pal Singh Paul in February 2005, the sale consideration shown was ₹1.83 crores

⁷*Nathulal v Phoolchand* 1969 (3) SCC 120

whereas in May 2005 the MoU with Futuristic was ₹2.37 crores. The increase of ₹54 lakhs in two months was proved. Moreover DW-1 in his deposition wrongly stated that he purchased the property for ₹4.5 crores in February 2006 meaning thereby that the price of the suit property increased phenomenally by ₹ 2.30 crores in just 8 months. Mr. Airi argued that these aspects were completely ignored and, therefore, the finding of the learned Single Judge on the question of damages is unsustainable. Given that the impugned judgment itself records that the cost of the suit property has spiralled to ₹50-100 crores, the denial of damages was completely erroneous.

12. Counsel for the respondents urged that the suit was bound to fail. A company, albeit a private one, had a juristic personality distinct from its shareholders and directors. The company could not, as owner, have parted with valuable property, unless its authorized and designated official or Director entered into a binding obligation on its behalf. It was argued that there was no documentary support for the assertion that the first two defendants could be said to have authority to bind Nirmal, the defendant company, to part with its property. They, at best, could negotiate with the plaintiff, Futuristic. However, they could not have entered into binding commitment on its behalf without the company Board's resolution and express authorization. It was argued that there was nothing on the record to suggest that Futuristic had ever represented that the second and third defendants could enter into binding transactions with it, on behalf of Nirmal. The latter being a corporate entity, could not be held responsible for the acts of agents whose limited authorization was to only negotiate for the purchase; there was no material or evidence to establish that they had the authority-express or implied of the company. Therefore, the submission that Nirmal

was bound by the principles of agency to the agreement to sell, is devoid of merit.

13. Learned counsel also argued that the findings contained in the impugned judgment with respect to lack of capacity and, therefore, cloud over Futuristic's statement that it was ready and willing to perform the contract, disentitled it to the decree sought. It was submitted that in this respect, the detailed discussion of the learned Single Judge in regard to issue nos. 4 and 5 conclude the issue against the plaintiff. Learned counsel relied upon the oral testimony on behalf of PWs-1, 2 and 3 as well as the documents filed in that regard. It was submitted that the three entities only agreed to provide loans to the tune of about ₹2.6 crores. Learned counsel highlighted that no attempt to authenticate the bank account statements of PWs-2 and 3 were made in any manner known to law. It was stated that this was despite the fact that the learned Single Judge notices that the law did not require that actual amounts should be in the accounts of the person claiming specific performance and had even cited authorities in that regard. Learned counsel also submitted that there is no infirmity with the findings of the learned Single Judge with respect to enforcement of the MoUs on the ground that it lacked the consensus *ad idem* because of omission to provide for certain delays.

Analysis and conclusions:

14. The following points arise for consideration:

(a) Whether the MoU of 24.05.2005 was entered into on behalf of Nirmal and whether the second and third respondents were authorized by it to enter into a binding transaction;

(b) *Whether there was no consensus ad idem between the parties, rendering the MoU unenforceable;*

(c) *Did the plaintiff prove that it was ready and willing to perform its part of the contract.*

Regarding Point (a)

15. This point is crucial for the decision of the case. The MoU reads as follows:

"This M.O.U is signed today the 24th May 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) to be 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"

16. The learned Single Judge found that the MoU was unenforceable because the second and third defendants were signatories to it, even though it mentioned Nirmal as the seller of the property. Here, there is no doubt as to the fact that Nirmal is a private company. It is a matter of record – emerging from the cross-examination of DW-2 - that Nirmal was incorporated on 23.06.1993. He also deposed that according to the annual return filed by the company for the period upto 30.09.2005, there were four shareholders -

Sanjay Ambwani, fourth defendant (with 349 shares); Manmohan (with 200 shares); Rishiraj Singh (with 10 shares) and Anup Jindal (with 400 shares). The said annual return was also marked as Ex.DW-2/2. Furthermore, in the cross-examination, DW-1 deposed that the second and third respondents were not authorized by Nirmal's board to enter into the agreement. He also denied the suggestion that the second respondent had the authority to enter into binding arrangements.

17. In answer to this evidence, it was argued on behalf of the appellant that as a third party outsider, Futuristic was not expected to be aware of Nirmal's inner functioning and that it was entitled to take, at face value, representations on its behalf by the second and third defendants. Futuristic relies on some judgments to this effect. The court would discuss these. The first is *Surendra Nath Roy (supra)* where the agreement to sell was denied by the owner Kedar Nath, contending that his son, Felu who concluded the transaction, had no authority to do so. The Calcutta High Court negated the owner's plea, after discussing the evidence - mostly in the form of correspondence, and payment through telegraphic money order. It was held that the

“The letter or at any rate the passage which has just been quoted lends support to the case made by the plaintiff that Kedar gave authority to his son Felu to deal with the matter of contract of sale in question. At any rate this letter acknowledges the existence of such a contract. This letter also shows as has been contended for on behalf of the appellant that there has been in any event ratification of the act of Felu by defendant No. 1. Dealing first with the question of implied authority it appears clear from this letter that Felu was given authority to complete the transaction in connection with the sale of Raja Bahadur's Haveli...

12. *The payment has been proved by the evidence to which reference has already been made including the evidence of the two pleaders of Barisal. The burden of proving this was undoubtedly on the plaintiff and he has discharged that burden by such evidence as he has given which we consider prima facie proof. It was open to the defendant to rebut the prima facie proof by production of the best evidence in the case. It might have been proved by the production of the jama kharach papers of defendant No. 1 that there was absence of any entry of the payment of Rs. 100. Notwithstanding the existence of" these jama kharach books they were not produced; and an unfavourable inference has to be drawn in respect of this payment against defendant No. 1 having regard to the admissions made by his agent Surendra."*

In *Chairman, Life Insurance Corporation (supra)*, the question for decision was whether upon failure of the employer, to deduct insurance premia amounts from an employee's salary, could lead to the insurer, validly disclaiming liability. The Supreme Court ruled that such liability could not be disclaimed, since the nature of the scheme – a statutory one, precluded the insured (the employee) from directly contacting the insurer. The court held that the employer's conduct resulted in its representation to valid and binding agency on behalf of the insurer, to its employee. Thus the insurer was held to be liable. In *Hukum Chand Insurance Co. Ltd (supra)*, the Karnataka High Court was to consider whether a Bank Loan/Cash Credit Indemnity Policy (Ex. P-6) dated 28.12.1967 was not binding upon the party, i.e the second defendant. The court overruled the disclaimer- which was premised on the ground that the person signing it was not authorized to do so. In so holding, the court considered the later correspondence, (1969) i.e two years later, referring to the terms of the policy and the circumstance that the party

utilized the amount. In *K. Appa Rao (supra)*, the Madras High Court had to consider the plea by an owner that the agent had no authority to sell his property. The owner had issued the following authorization to the agent, which led to the agreement in question, that had been breached:

“I hereby agree to give you brokerage of two per cent, that is Rs. 540 for negotiating and completing the sale of my bungalow No. 3, Vasu Street, Poonamallee High Road, Kilpauk, Madras, the same to be paid only on completing the transaction and as soon as the sale deed is registered provided the offer is for Rs. 27,000 nett, that is, all expenses to be borne by the purchaser. Time for this is up to 6th November, 1941, after which date this letter will be null and void.”

18. It is evident that in each case, there was clear evidence of previous authorization: in the form of materials and documents, which was also supported by conduct. Significantly, none of the cases cited involved a company or a corporate entity involved, or the question of sale of immovable assets of such company, without proper authorization under the Articles of Association, or a Board resolution. This court further notices that no attempt was made by the appellant to secure the presence of the second and third defendants in the court, for examination. They were parties to the proceedings; however, they did not file written statement. That apart, Futuristic nowhere states that it was in the dark as to the corporate existence and personality of Nirmal. Being a private company, it was conscious about the need for express authorization. A director or for that matter, a shareholder's obligations vis-à-vis the company and the responsibility to act

within the bounds of delegation or instruments in that regard, are clear. In *M/s. Dale & Carrington Invt (P) Ltd. & Another*⁸ it was held that:

“16. At this stage it may be appropriate to consider the legal position of Directors of companies registered under the Companies Act. A company is a juristic person and it acts through its Directors who are collectively referred to as the Board of Directors. An individual Director has no power to act on behalf of a company of which he is a Director unless by some resolution of the Board of Directors of the Company specific power is given to him/her. Whatever decisions are taken regarding running the affairs of the company, they are taken by the Board of Directors. The Directors of companies have been variously described as agents, trustees or representatives, but one thing is certain that the Directors act, on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company. They are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company. In a limited sense they are also trustees for the shareholders of the company. To the extent the power of the Directors are delineated in the Memorandum and Articles of Association of the company, the Directors are bound to act accordingly. As agents of the company they must act within the scope of their authority and must disclose that they are acting on behalf of the company. The fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company.”

Itself a company, Futuristic was aware- or at least is deemed to have been aware- that a binding agreement with another company could have been

⁸*M/s. Dale & Carrington Invt (P) Ltd. & Another v P.K. Prathapan & Others*, AIR 2004 (SC) 1624

arrived at only if there were authorization for that purpose. In this case, the MoU nowhere indicates that the second and third defendant were authorized to act for Nirmal.

19. There was evidence before the court that on 08.02.2005 another Agreement to Sell/MoU was entered into on behalf of Nirmal, not signed by the second and third defendants but by the Defendants Nos. 4 to 6. This was part of Ex. DW-1/P-1 (colly) and was entered into with one Prit Pal Singh Paul. The plaintiff, Futuristic, relied on the said MoU dated 08.02.2005 to say that in view of disputes with respect to it, Nirmal, was unable to enter into the sale deed with Futuristic. The learned Single Judge relied on this, to hold that the plaintiff Futuristic was aware that without proper authorization, the agreement relied on by it was unenforceable. That apart, the learned Single Judge also considered the documents relied on by Futuristic two letters of the second and third defendant to it, dated 03.09.2005 (Ex.PW1/15); dated 13.09.2005 (Ex.PW1/29) and a legal notice dated 09.09.2005 sent on behalf of Nirmal (part Ex. DW-1/P-1 (colly)) addressed to Sh. Arun Batta, Advocate, the lawyer of the earlier proposed purchaser Sh. Prit Pal Singh Paul. The learned Single Judge concluded- and we are of opinion, correctly, that the first two letters (Ex. PW-1/15 and PW-1/29) were letters written not by Nirmal, but by the second and third defendants *“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."This court holds, therefore, that in the absence of an authorization by the first defendant Nirmal, the MoU signed by the second and third defendants, ostensibly on its behalf was not binding upon it, because it purported to bind in a manner as to affect its property. This conclusion is also reinforced by the letter/ legal notice dated 09.09.2005 sent on behalf of Nirmal to Sh. Arun Batta, Advocate of Sh. Prit Pal Singh Paul, proposed purchaser under the previous MoU dated 08.02.2005. Para 3 of this reads as follows:

"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. "

This supports the conclusion that the second and third defendants were authorized to *negotiate* broad terms of the sale of the suit property but not to enter into the agreement to transfer Nirmal's property.

Re Point No. (b)

20. On this question, the learned Single Judge's conclusions were as follows:

“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 consensus 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.”

The appellant had relied on *Chandnee Vidya Wati Madden (supra)* where the Supreme Court had upheld a decree of the High Court, directing specific performance where the owner had omitted to obtain permission for the sale, which was required under law. The Court held:

“On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that the time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction. In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract.”

The above judgment has been the consistent authority, having been cited and applied in subsequent rulings (such as for instance, in *R.C. Chandiok*⁹ and *Gaya Prasad*¹⁰). This rule was again reiterated by the Supreme Court, in *Vishwa Nath Sharma*¹¹, where it was held as follows:

“The Privy council in Motilal v. Nanhelal, AIR 1930 P.C. 287, laid down that if the vendor had agreed to sell the property which can be transferred only with the sanction of some government authority, the court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming, to convey to the purchaser within a certain time.”

⁹*R.C. Chandiok v Chuni Lal Sabharwal* AIR 1971 SC 1238

¹⁰*Gaya Prasad vs Surendra Bahadur Singh*, AIR 1987 SC 925

¹¹*Vishwa Nath Sharma v Shyam Sankar Goela* 2007 (10) SCC 595

As a result, it is held that mere omission to provide which of the two- the vendor or the purchaser, had the responsibility to obtain a NOC did not render the MoU inchoate or enforceable or justify a conclusion that there was no *consensus ad idem* between the parties. The responsibility of obtaining the NOC was clearly upon the party obliged to do so, in accordance with law. The conclusion of the learned Single Judge on this point is, therefore, unsound and consequently reversed.

Point No. (c)

21. On this point, the plaintiff, Futuristic, relied on the depositions of Sh. Mandeep Singh Sandhu as PW-1 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). The documentary evidence sought to establish that M/s Rajni Construction, M/s Home Developers (P) Ltd., Mishry Holdings Limited and Futuristic Remedies Ltd had agreed to provide loans of ₹40 lakhs, ₹1.5 crores, ₹70 lakhs and ₹20 lakhs respectively to Futuristic in July, 2005 so that it make the balance payment of ₹ 2,32,50,000/- to Nirmal. The discussion in the impugned judgment is to the following effect:

“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.”

As is quite evident, the plaintiff had heavily relied on the unmarked statements of account, of the two concerns, whose functionaries had deposed before the court. The conclusions of the learned Single Judge that such evidence – without recourse to the provisions of either the Indian Evidence Act, or the Banker’s Book Evidence Act, which required a certificate from the banker, cannot be faulted. If there is a mandate that something can be proved in a particular way or not at all, then that principle applies universally in all cases. As a result, the submissions of Futuristic, based on those documents, were correctly rejected. Furthermore, there was nothing on record to show the financial soundness of the concerns, or that they could have reasonably given the credit, or advances, on the date the specific performance would have been ordered. It is well known that the obligation to prove readiness and willingness extends to the date of the decree. This court

also finds no force in the submission that the defendant/Nirmal never contended that the plaintiff was not ready and willing to perform its part of the contract and that consequently, the court was wrong in holding so. We are afraid the obligation to prove readiness and willingness is a legal one and not based on the contract between the parties. This obligation has been spelt out in *N.P. Thirugnanam*¹²; *Pushparani S. Sundaram*¹³; *Manjunath Anandappa*¹⁴ and *Man Kaur (Dead)*¹⁵. In *N.P. Thirugnanam (supra)*, the Court held as follows:

"The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."

¹²*N.P. Thirugnanam v R. Jagan Mohan Rao* AIR 1996 SC 116

¹³*Pushparani S. Sundaram v Pauline Manomani James* 2002 (9) SCC 582

¹⁴*Manjunath Anandappa v Tammansa* 2003 (10) SCC 390

¹⁵*Man Kaur (Dead) v Hartar Singh Santha* 2010 (1) SCC 512

22. Having regard to the objective circumstances and the evidence led, this court is of the opinion that no infirmity can be found with the learned Single Judge's analysis and conclusions on the question of readiness and willingness. As a result, on this point, the findings in the impugned judgment are affirmed.

23. The foregoing analysis would show that on Point Nos (a) and (c) this court has agreed with the findings of the learned Single Judge; the findings on Point No. (b) about the MoU being an inchoate document have not been concurred with. However, the reversal of that finding would not affect the ultimate outcome of this appeal, in view of the findings on the other points. Resultantly, the appeal fails and is dismissed but without order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

SEPTEMBER 7, 2016