IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-6212-2014 (O&M)
Reserved on:- 12.07.2023
Pronounced on:- 21.07.2023

Shiv Charan
....Appellant

Versus

Rupesh Kumar
...Respondent

CORAM:- HON'BLE MS. JUSTICE AMARJOT BHATTI

Present:- Mr. Sunil Chadha, Sr. Advocate with
Mr. Tara Dutt, Advocate
for the appellant.

Mr. Puneet Jindal, Senior Advocate with
Ms. Malvi Aggarwal, Advocate
for the respondent.

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AMARJOT BHATTI, J.

1. The appellant/defendant – Shiv Charan has filed Regular Second Appeal against impugned judgment and decree dated 14.08.2014 passed by learned Additional District Judge, Ludhiana vide which learned Additional District Judge, Ludhiana dismissed the appeal preferred by Shiv Charan – appellant/defendant and the judgment and decree dated 26.04.2012 passed by learned Civil Judge (Junior Division), Ludhiana in favour of Rupesh Kumar – respondent/plaintiff was upheld.

2. Rupesh Kumar – respondent/plaintiff had filed suit for possession by way of specific performance of agreement dated 18.01.2008, directing the defendant to execute the sale deed in his favour regarding a portion of House No. B-XVIII-3675 measuring 102 Sq. Yd. consisting of two shops, one room, kitchen, court-yard duly fitted with electricity, water supply, sewerage and shutters on the two shops comprising in Khasra No.

66//22/2, Khata No. 37/47 situated in the revenue estate of Village Taraf Karbara, known as Model Gram Road, Ludhiana, after receiving the balance sale consideration of Rs. 33,50,000/- alongwith the relief of permanent injunction restraining the defendant from alienating or creating any encumbrance either himself or through agents etc. as detailed in the head note of the plaint.

3. The plaintiff submitted that defendant is the owner of the aforesaid property which he had agreed to sell in his favour vide agreement dated 18.01.2008 for a total sale consideration of Rs. 44,50,000/-. The defendant had received earnest money of Rs. 11,00,000/- in the presence of marginal witnesses and he agreed to execute the sale deed on or before 30.06.2008. It was agreed by the defendant that the house which was mortgaged with UCO Bank, Chaurha Bazar, Ludhiana, he will produce No Due Certificate from the bank after making payment of entire outstanding loan amount. He would also produce TS-1, original sale deed and cleared title in the shape of Jamabandi before 30.06.2008 and would execute the sale deed in favour of the plaintiff. On 30.06.2008 and 01.07.2008 were declared holidays by the State Government and the plaintiff requested the defendant orally to execute the sale deed on 02.07.2008. On this date, the defendant got his presence marked before the concerned authority where he was present with balance sale consideration and money required for other expenses as per the terms of agreement dated 18.01.2008 but the defendant did not turn up to perform his part of agreement to sell. The plaintiff inquired from the bank and came to know that the defendant did not clear the loan amount. He repeatedly requested the defendant to clear the bank loan and to execute the sale deed in his favour. On 15.07.2008, he served legal notice upon the defendant through

his counsel requesting to clear the loan of the bank, to get TS-1 from M.C Ludhiana, No Due Certificate from the bank and to execute the sale deed in his favour on or before 29.07.2008. The plaintiff received reply to the legal notice dated 15.07.2008 (inadvertently the date of agreement was mentioned wrongly as 11.01.2008) through his counsel Sh. L.S. Rai, Advocate in which he intimated that property in question was free from lien, charges and encumbrances and that the plaintiff was not having sufficient funds to get the sale deed executed. In the said reply, the defendant admitted the execution of agreement as well as receipt of Rs. 11,00,000/- as earnest money. The defendant instead of executing the sale deed filed caveat in the Court. He further came to know from reliable sources that the defendant was trying to dispose off the property by way of sale to some other persons. The plaintiff was always ready and willing and he is still ready and willing to perform his part of agreement. On 29.07.2008, the plaintiff remained present before the concerned authority with balance sale consideration alongwith two cheques for a sum of Rs. 15,00,000/- and another for a sum of Rs. 5,00,000/- alongwith cash amount but despite this, the defendant did not come forward to perform his part of agreement dated 18.01.2008. Ultimately, the plaintiff filed the present suit.

4. Notice of the suit was given to the defendant who appeared in this case and filed the written statement taking the stand that the suit is not maintainable; the plaintiff did not come to the Court with clean hands; he has been estopped by his own act and conduct from filing the present suit. It was alleged that the plaintiff himself failed to perform his part of contract. He failed to make payment of balance sale consideration to the answering defendant by the stipulated date and on that account, the default is committed by the plaintiff. Therefore, the agreement stands cancelled

and the earnest money paid by the plaintiff stood forfeited. Therefore, the plaintiff has no locus standi to file the present suit. The time was essence of the contract and on account of default committed by him, the agreement stands cancelled. In fact, on the basis of agreement and on the assurance of plaintiff, the defendant had entered into agreement to purchase a house near his parental house from one Gurcharan Singh s/o Piara Singh. The agreement was executed on 29.02.2008. The plaintiff was unable to arrange the balance amount, therefore, the earnest money i.e. Rs. 8,00,000/- of the defendant was forfeited. On the merits of the case, the execution of agreement dated 18.01.2008 and payment of Rs. 11,00,000/- as earnest money is not disputed. The rest of the facts are wrong and denied. The agreement in question is already cancelled and the money paid by the plaintiff to the defendant under this agreement is forfeited on account of default committed by the plaintiff. The answering defendant was always ready and willing to perform his part of contract. It is denied that on 30.06.2008 and 01.07.2008 were declared holidays by the State Government. It is further denied that on 02.07.2008, the plaintiff was present before the concerned authority with balance sale consideration to perform his part of agreement dated 18.01.2008. Rather the defendant was present in the office of Sub Registrar, Ludhiana on 30.06.2008 and 01.07.2008 and got an affidavit attested in token of his readiness and willingness to perform his part of agreement. It is denied that the plaintiff inquired from the bank regarding the clearance of loan or he requested him to clear the same for the purpose of execution of sale deed in his favour. It is denied that the plaintiff was present to perform his part of agreement to sell on 29.07.2008 or he was ready with the cheques or cash amount as alleged by him. By denying all the facts stated by the plaintiff, it is alleged that the plaintiff has no cause of action to file the present suit. The suit filed by him is false, frivolous and just to harass the answering defendant. It was prayed that the suit filed by the plaintiff may be dismissed.

5. In replication, the plaintiff denied the facts stated in the written statement and reiterated his claim in the plaint.

6. From the pleadings of the parties, following issues were framed by the trial Court on 03.12.2008:-

(1) Whether plaintiff is entitled to possession by way of specific performance of the agreement dated 18.01.2008? OPP

(2) Whether the plaintiff is entitled to permanent injunction as prayed for? OPP

(3) Whether the suit of the plaintiff is not maintainable? OPD

(4) Whether the plaintiff has not come to the Court with clean hands and has suppressed material facts from the Court? OPD

(5) Relief.

7. In order to prove the suit, the respondent-plaintiff Rupesh Kumar examined himself as PW-1. He also examined Chaman Lal as PW2. Thereafter, learned counsel for the plaintiff closed the evidence.

8. In order to rebut the case of the respondent-plaintiff, the appellant-defendant Shiv Charan himself stepped into the witness box as DW-3. He also examined Bittu Kumar as DW-1, Satish Kumar as DW-2 and Gurcharan Singh as DW-4. Thereafter, defendant closed the evidence.

9. After hearing the arguments advanced by learned counsel for both the parties, the suit filed by the respondent-plaintiff was decreed with costs and defendant was directed to get the sale deed executed and registered in favour of the plaintiff on receipt of balance sale consideration vide impugned judgment and decree dated 26.04.2012. Feeling aggrieved of this judgment and decree, the defendant Shiv Charan filed Civil Appeal

No. 89 dated 29.05.2012 which was dismissed vide judgment and decree dated 14.08.2014. Feeling aggrieved of this judgment and decree, the present regular second appeal has been filed.

10. The learned counsel for the appellant/defendant argued that both the Courts below have failed to consider the terms of agreement to sell dated 18.01.2008 nor the evidence led by the parties have been rightly considered. The execution of agreement to sell dated 18.01.2008 Ex.P-1 is not disputed. The matter in controversy is whether the plaintiff was ready and willing to perform his part of agreement in question. As per the terms of agreement to sell dated 18.01.2008 Ex.P-1, the date fixed for the execution and registration of sale deed was up to 30.06.2008. On 30.06.2008, it was Monday and on 01.07.2008, it was Tuesday. The respondent/plaintiff miserably failed to prove on record that on these two days there was a holiday. Therefore, it is the respondent/plaintiff who failed to come forward to get the sale deed executed in his favour on payment of balance sale consideration up to 30.06.2008. The respondent/plaintiff claimed that he appeared before Executive Magistrate, Ludhiana on 02.07.2008 and got his presence marked by way of affidavit attested by the Executive Magistrate, Ludhiana. In fact, 02.07.2008 was never the date scheduled for the execution of sale deed. Even if for the sake of arguments it is considered that on 30.06.2008 there were elections of Nagar Panchayat, Gram Panchayat and Municipal Councils, even then the respondent/plaintiff was required to get the sale deed executed on the next working day i.e. 01.07.2008. However, in the present case, the respondent/plaintiff allegedly got his presence marked on 02.07.2008 on his own. To support his arguments, the learned counsel for the appellant/defendant has relied upon the authority cited in ***2014(1) R.C.R.***

***(Civil) 236 of the Hon'ble Supreme Court of India, case titled* "I.S. Sikandar (D) By LRs Versus K. Subramani and others"** in which the judgment cited in ***1993(2) R.R.R. 46, case titled* "Smt. Chand Rani (dead) by LRs Versus Smt. Kamal Rani (dead) by LRs"** was relied upon where it was explained as follows :-

> "*19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."*

In the case in hand, there was specific recital in agreement to sell dated 18.01.2008 Ex.P-1 vide which the date fixed for execution of registration of sale deed was on or before 30.06.2008. Therefore, the respondent/plaintiff was bound to perform his part of agreement to sell as per the terms and conditions of aforesaid agreement to sell dated 18.01.2008 Ex.P-1.

Learned counsel for the appellant/defendant secondly raised the issue that the respondent/plaintiff was not having the funds ready with him to perform his part of agreement to sell dated 18.01.2008. As per the terms of aforesaid agreement, the total sale consideration was to the tune of Rs. 44,50,000/-, out of which earnest money of Rs. 11,00,000/- was paid and the sale deed was to be executed on the payment of balance sale consideration of Rs. 33,50,000/-. The respondent/plaintiff did not come forward on the date fixed, as he was not ready with the funds to perform his part of agreement to sell. The learned counsel for the appellant/defendant has put reliance on the judgment of **Karnataka High Court (DB) cited in *2016 AIR CC 470, case titled* "<u>Smt. Chandrakanthamma and others Versus B. Ramakrishnaiah</u>"**, where it was explained as follows :-

> *"19... not only the plaintiff has to aver his readiness and willingness but he must prove his readiness and willingness by such acceptable evidence on record. The Explanation makes it clear, in proving his readiness and willingness, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money. But nonetheless, when he is called upon to prove in a Court of law his readiness and willingness, he must prove by acceptable evidence that on the day he was expected to pay the balance sale consideration agreed upon, either he had ready funds or from where he would have raised the funds as on that day. Raising of the funds or source of funds subsequent to the date of the suit would not prove the plaintiff's readiness and willingness to perform his part of the contract in terms of the contract agreed upon."*

On this point, he has relied upon another authority cited in ***2011(1) AD(Delhi) 623, case titled* "<u>Thakur Dass Verma & Anr Versus Shri Haridas Chand</u>"**, where it was again explained that "*issue of readiness and willingness is not to be decided on the date of the decree but on the date of the performance which was required under the subject agreement to sell.*"

The learned counsel for the appellant/defendant referred to the contents of affidavit dated 02.07.2008 Ex.P-4 in which there is no reference that Rupesh Kumar was having balance sale consideration in his possession to perform his part of agreement to sell. Thereafter, the respondent/plaintiff issued notice dated 15.07.2008 Ex.P-5 in which he again fixed the date for execution and registration of sale deed as

29.07.2008. The aforesaid legal notice was duly replied by the appellant/defendant through his counsel. The reply dated 19.07.2008 to the notice is Ex.P-6 in which it was specifically mentioned that Shiv Charan was present in the office of Sub Registrar, Ludhiana on 01.07.2008 to perform his part of agreement to sell but it was respondent/plaintiff who did not turn up for getting the sale deed executed and registered, therefore, as per the terms and conditions of agreement, the respondent/plaintiff cannot recover the amount from the appellant/defendant received as earnest money and it was further replied that the appellant/defendant will take legal action (both in civil and criminal law) against the respondent/plaintiff. Once there was breach on the part of respondent/plaintiff to perform his part of agreement to sell dated 18.01.2008, thereafter the same could not be enforced. The counsel for appellant/defendant pointed out that in between 02.07.2008 till 15.07.2008, the respondent/plaintiff did not take any action towards the performance of agreement to sell dated 18.01.2008. The counsel for appellant/defendant referred to the affidavit dated 29.07.2008 Ex.P4/A. Again in this affidavit, there is no recital that the respondent/plaintiff was ready with balance sale consideration. The learned counsel for the appellant/defendant referred to the photostat copy of one cheque bearing No. 193895 dated 29.07.2008 Mark-A to a sum of Rs. 15,00,000/- and regarding the cheque of Rs. 5,00,000/- of ICICI Bank, no copy of cheque is produced on the file. The respondent/plaintiff Rupesh Kumar examined as PW-1 during cross-examination conceded that he has not produced statement of account of the aforesaid banks to establish that he was having sufficient balance in his account to honor the said cheques. The respondent/plaintiff did not produce any record on the file to show that he was having sufficient funds to the tune of Rs. 33,50,000/- as balance sale consideration to perform his part of agreement to sell dated 18.01.2008. Therefore, the respondent/plaintiff was neither ready nor willing to perform his part of agreement to sell dated 18.01.2008 Ex.P-1 as per its settled terms and conditions.

The learned counsel for the appellant/defendant pointed out that after the execution of agreement to sell dated 18.01.2008 Ex.P-1, he entered into another agreement to purchase property from one Gurcharan Singh. However, on account of non-performance of agreement to sell on the part of respondent/plaintiff he could not honour the terms and conditions of agreement to purchase another property from Gurcharan Singh and his earnest money was also forfeited. To support this argument, Gurcharan Singh DW-4 has also stepped into the witness box. It is argued that on account of the conduct of respondent/plaintiff, the present appellant/defendant has suffered great loss. At this stage, the respondent/plaintiff wrongly deposited money with UCO Bank to get the property released from mortgage and the balance sale consideration is paid before the Executing Court and in return the Executing Court has got the sale deed executed in favour of respondent/plaintiff in a wrongful manner. It is pointed out that the execution of impugned judgment and decree was stayed as per order dated 17.12.2014. The said order was not extended inadvertently and taking undue benefit of the same, the sale deed has been got executed from the Executing Court. It is argued that it was respondent/plaintiff who was not ready and willing to perform his part of agreement to sell. Both the Courts below have failed to consider this fact and the suit filed by the plaintiff Rupesh Kumar was wrongly decreed and the appeal preferred by the present appellant was also wrongly declined by the First Appellate Court. It is prayed that the judgment passed by the trial Court as well as the impugned judgment passed by the First Appellate Court dated 14.08.2014 may be set aside by accepting the present appeal and the suit filed by the respondent-plaintiff seeking possession by way of specific performance of agreement to sell dated 18.01.2008 may be dismissed.

11. The learned counsel for the respondent/plaintiff argued that the facts of the case and the evidence on record were rightly considered by the Court of learned Civil Judge (Junior Division), Ludhiana and the suit filed by the plaintiff was rightly decreed vide judgment and decree dated 26.04.2012 and the appeal preferred by the appellant/defendant Shiv Charan was also rightly dismissed vide judgment and decree dated 14.08.2014 passed by learned Additional District Judge, Ludhiana. The execution of agreement to sell dated 18.01.2008 Ex.P-1 and its terms and conditions are not disputed by the appellant/defendant. The respondent/plaintiff was always ready and willing to perform his part of agreement to sell and it was the appellant/defendant who was not ready and willing to perform his part of agreement to sell. It is conceded that the date fixed for execution and registration of sale deed was up to 30.06.2008. However, on 30.06.2008, a Gazetted Holiday was declared on account of general elections of Municipal Councils, Nagar Panchayat and the Court can take judicial notice of the fact that on 01.07.2008 the officers were busy to wind up their work of elections which took place on 30.06.2008. The appellant/defendant have failed to lead any evidence on record to dispute the aforesaid facts. The appellant/defendant claimed that he got his presence marked on 01.07.2008. He has relied upon one affidavit dated 01.07.2008. The stamp paper was purchased from a stamp

vendor of New Courts Complex, Ludhiana on 26.06.2008 much prior to the date fixed and it was got attested from a Notary Public, Ludhiana on 01.07.2008. The appellant/defendant never got his presence marked by getting his affidavit attested from Executive Magistrate, Ludhiana where the sale deed was to be executed and registered. There is nothing on record to show that the appellant/defendant performed his part of the terms of agreement to sell dated 18.01.2008. Admittedly, the property was mortgaged with UCO Bank, Chaurha Bazar Branch, Ludhiana. The said property was never redeemed nor there was entry in the revenue record. The original title deed was never received from the bank nor TS-1 certificate was procured from the Corporation. The counsel for respondent/plaintiff argued that in reply dated 19.07.2008 to the legal notice Ex.P-6, it was wrongly mentioned that the property was free from lien, charge and encumbrances. The respondent/plaintiff was always ready and willing to perform his part of agreement to sell. He was having the balance sale consideration and other charges required for the execution and registration of sale deed. When the appellant/defendant did not turn up to perform his part of agreement to sell on 02.07.2008, he served legal notice dated 15.07.2008 through registered post. The legal notice is Ex.P-5 and the postal receipts are Ex.P-7 and Ex.P-8. The reply to the legal notice was sent in order to avoid performance of his own part of agreement to sell. On 29.07.2008, the respondent/plaintiff again got his presence marked by way of affidavit attested by Executive Magistrate, Ludhiana, which is Ex.P4/A. The appellant/defendant did not come forward to perform his part of agreement to sell and thereafter, the suit seeking possession by way of specific performance of agreement to sell was promptly filed on 04.08.2008.

The learned counsel for the respondent/plaintiff further pointed out that the loan amount was not cleared by the appellant/defendant Shiv Charan. Therefore, UCO Bank, Chaurha Bazar Branch, Ludhiana issued publication to put the property on sale, as a result, during the pendency of first appeal the respondent/plaintiff filed application under Order 1 Rule 10 read with Section 151 of CPC to implead UCO Bank, Chaurha Bazar Branch, Ludhiana as party to the case with further prayer that they may be directed to receive the amount of Rs. 21,51,500/- against the account of appellant with the direction to the bank to release the document either to the appellant or to produce the same before the Court. Later on, the Senior Manager, UCO Bank received the draft for a sum of Rs. 21,51,500/- dated 23.01.2013 in favour of Shiv Medicos and the application under Order 1 Rule 10 of CPC was not pressed for having become infructuous. It is argued that at this stage after depositing balance sale consideration, the sale deed has been got executed in the execution proceedings. It was appellant/defendant who did not take any step to clear the encumbrance on the property nor he was ever ready and willing to perform his part of agreement to sell. In support of his arguments, learned counsel for the respondent/plaintiff has put reliance on the authority cited in ***2014(sup) CivCC 113 of the Coordinate Bench, in case titled*** **"Amar Singh and another Versus Surjit Kaur and another"**, *where in a similar case on the point of readiness and willingness to perform the agreement to sell in case vendor failed to redeem the land or mortgage, it cannot be said that he was ready and willing to perform his part of contract. It was further explained that in these circumstances, it hardly matters if the plaintiff did not appear before the Sub Registrar on the date fixed for execution and registration of sale deed because the land* *was still under mortgage with the society. It was held that the fault lied with the appellants in that case*.

The counsel for respondent/plaintiff further referred to the documents produced by way of additional evidence i.e. the copy of plaint titled "Shiv Charan Versus Rupesh Kumar", RBT No. 1861 filed on 13.03.2009, seeking declaration that the agreement to sell dated 18.01.2008 regarding the property in question stood cancelled, rescinded and the earnest money paid by the defendant to the plaintiff under this agreement to sell stood forfeited. The copy of plaint is Ex.P-7. The copy of written statement is Ex.P-8 and Shiv Charan by making statement in the Court withdrew the case on 08.02.2012, which is Ex.P-9. Thereafter, he filed application that the suit may not be dismissed as withdrawn and he may be allowed to continue with the suit which is Ex.P-10. The application dated 24.03.2012 Ex.P-10 was declined by learned Civil Judge (Junior Division), Ludhiana vide order dated 21.01.2013, which is Ex.P-11. The grounds of appeal preferred against this order is Ex.P-12 and the same was dismissed by learned Additional District Judge, Ludhiana vide order dated 25.04.2014, which is Ex.P-13. The defendant Shiv Charan during his cross-examination admitted that he never served any legal notice to the plaintiff regarding cancellation of agreement to sell dated 18.01.2008 or forfeiture of earnest money. The civil suit filed by him was withdrawn, therefore, now the appellant/defendant cannot take the stand that the agreement to sell dated 18.01.2008 Ex.P-1 stood cancelled or the earnest money was forfeited. Therefore, considering the evidence on record, the civil suit filed by the respondent/plaintiff was rightly decreed and the appeal preferred by the appellant/defendant before First Appellate Court was also rightly dismissed vide judgment and decree dated 14.08.2014.

The Regular Second Appeal preferred by the appellant/defendant is without merits. The facts of the case and the evidence on record were rightly considered. The learned counsel for the respondent/plaintiff has relied upon authority of ***The Hon'ble Supreme of India, cited in 2019(3) R.C.R.(Civil) 877*****, case titled "<u>Randhi Kaur Versus Prithvi Pal Singh & Ors.</u>"**, where it was held that "*framing of substantial question of law are not required in second appeal but jurisdiction of High Court is not to reverse findings of facts in terms of Section 41 of Punjab Court Act, 1918. In fact, the jurisdiction of High Court in second appeal is circumscribed by the provisions of Section 41 of the Punjab Act.*" It is prayed that the present appeal preferred by the appellant/defendant may be dismissed.

12. I have considered the arguments advanced before me and I have also carefully considered the evidence produced on record by both the parties. Rupesh Kumar – plaintiff had filed suit for possession by way of specific performance of agreement dated 18.01.2008 pertaining to a portion of House No. B-XVIII-3675 measuring 102 Sq. Yd., consisting of two shops, one room, kitchen, courtyard, electricity connection, water supply, sewerage with shutters to the shops situated in the revenue estate of Village Taraf Karbara, area Model Gram Road, Ludhiana as detailed in the head note of the plaint alongwith the relief of permanent injunction restraining the defendant Shiv Charan i.e. the appellant in this case from alienating or creating any encumbrance either himself or through anybody else as detailed in the head note of the plaint.

In the case in hand, the execution of agreement to sell dated 18.01.2008 Ex.P-1 as well as its terms and conditions are admitted by both the parties. The appellant/defendant Shiv Charan has also admitted the receipt of Rs. 11,00,000/- as earnest money, out of the total sale consideration of Rs. 44,50,000/-. The date fixed for the execution and registration of sale deed was on or before 30.06.2008 on the payment of balance sale consideration by the purchaser Rupesh Kumar i.e. the respondent/plaintiff in this case. There were certain conditions which were to be fulfilled by appellant/defendant and certain conditions were meant for the respondent/plaintiff. The matter in controversy is whether the plaintiff Rupesh Kumar i.e. the vendee was ready and willing to perform his part of agreement to sell dated 18.01.2008 and to further ascertain as which party committed breach of the terms and conditions of agreement to sell dated 18.01.2008 Ex.P-1. As referred above, the date fixed for the execution and registration of the sale deed was on or before 30.06.2008. The respondent/plaintiff/vendee Rupesh Kumar claimed that 30.06.2008 and 01.07.2008 were declared holidays, therefore, he had orally requested the appellant/defendant to come in the office of Sub Registrar Ludhiana for the execution and registration of sale deed on 02.07.2008. The appellant/defendant has merely denied this fact in the written statement. However, no evidence is led either by the plaintiff or the defendant regarding this controversy. On the first date of hearing in this appeal on 17.12.2014, it was submitted by the learned counsel for the appellant/defendant that 30.06.2008 was declared holiday on account of General Elections of Municipal Councils, Gram Panchayats, Nagar Panchayats, whereas, 01.07.2008 was a working day. Therefore, it is a fact that on 30.06.2008, nobody came forward for the execution and registration of sale deed.

The appellant/defendant has relied upon one affidavit dated 01.07.2008 Ex.D-4, according to which he claimed that to mark his presence, he got executed one affidavit duly attested by the Notary Public dated 01.07.2008. The learned Courts below rightly appreciated that the stamp paper of this affidavit was purchased from a stamp vendor of New Courts Complex, Ludhiana on 26.06.2008 that is much prior to the date fixed and it was got attested from a Notary Public, Ludhiana and attested by Mr. Sanjay Vashishta, Advocate from Court Complex, Ludhiana. There is nothing on record to show that on 01.07.2008, the appellant/defendant ever visited in the office of Executive Magistrate, Ludhiana where the sale deed was to be executed and registered. Therefore, the affidavit relied upon by the appellant/defendant cannot be safely relied upon.

On the other hand, the counsel for respondent/plaintiff claimed that he had orally told the vendor (appellant/defendant in this case) to appear in the office of Sub Registrar, Ludhiana on 02.07.2008 for the execution and registration of the sale deed. It has come in the cross-examination of Rupesh Kumar PW-1 that the defendant and his family was known to him for the last about 6 years. The house of plaintiff was situated at a distance of about 2 kms. Since, both the parties were known to each other, therefore, the version stated by the respondent/plaintiff that he orally told the appellant/defendant to appear before the office of Sub Registrar, Ludhiana on 02.07.2008 cannot be doubted. Apart from this, on this date, he got prepared affidavit dated 02.07.2008 which was duly attested by Executive Magistrate, Ludhiana, which is Ex.P-4. Thereafter, when the appellant/defendant did not come forward to execute and register the sale deed as per the terms of agreement to sell dated 18.01.2008 Ex.P-1, he served legal notice through his counsel dated 15.07.2008, which is Ex.P-5. The postal receipts are Ex.P-7 and Ex.-P8. It is also matter of record that the appellant/defendant gave reply dated 19.07.2008, which is Ex.P-6. In the aforesaid legal notice dated 15.07.2008 Ex.P-5, the appellant/defendant was called upon to come to the office of Sub Registrar, Ludhiana on or before 29.07.2008 for the execution and registration of sale deed as per agreement to sell dated 18.01.2008. Even on that day, the respondent/plaintiff was present in the office of Sub Registrar and when the appellant/defendant did not turn up, he again got his presence marked by way of affidavit Ex.P4/A, duly attested by the then Executive Magistrate, Ludhiana. Ultimately, the respondent/plaintiff filed the present suit on 04.08.2008. The aforeasid record clearly indicates that the respondent/plaintiff was calling upon the appellant/defendant to perform his part of agreement to sell but he failed.

13. It is the case of respondent/plaintiff that on 30.06.2008 (Monday) and 01.07.2008 (Tuesday) were holidays, therefore, he had orally told the appellant/defendant to come on 02.07.2008 in the office of Sub Registrar, Ludhiana for the execution and registration of sale deed. The learned counsel for the appellant/defendant while filing this appeal himself conceded that 30.06.2008 was declared holiday on account of General Elections of Municipal Councils, Gram Panchayats, Nagar Panchayats. The learned counsel for the respondent/plaintiff argued that the judicial notice can be taken to the fact that on the next date, after the elections, the officers must be busy to finish their work and other formalities. Therefore, the actual working day was 02.07.2008. Even if for the sake of arguments, it is considered that on 01.07.2008, it was a working day and the respondent/plaintiff should have come for the execution and registration of the sale deed, even then no fruitful result could have been achieved. There are other terms and conditions in the agreement to sell dated 18.01.2008 Ex.P1 which were to be fulfilled by the appellant/defendant. It is specifically mentioned in the agreement to sell

dated 18.01.2008 Ex.P-1 that the property was mortgaged with UCO Bank, Chaurha Bazar Branch, Ludhiana and for this reason the appellant/defendant was to procure No Due Certificate from the bank on payment of whole of the outstanding amount. Secondly, he was to procure TS-1 certificate from Corporation. Thirdly, to procure original title deed and lastly the title deed in the shape of Jamabandi before 30.06.2008 then the sale deed could have been executed by the appellant/defendant in favour of respondent/plaintiff. It is mentioned in the affidavit Ex.D-4 that the suit property is exclusively owned and possessed by Shiv Charan appellant/defendant and it was free from all sorts of liens, charges and encumbrances. However, in order to fortify this claim, no evidence is led by the appellant/defendant. The record on file shows otherwise as it has come on record during the pendency of Civil Appeal before learned Additional District Judge when application was filed by the respondent/plaintiff under Order 1 Rule 10 of CPC for impleading UCO Bank, Chaurha Bazar Branch, Ludhiana as respondent No. 2, since the property was advertised for putting it on auction. Later on, Mr. A.P.Bansal, Senior Manager, UCO Bank, Chaurha Bazar, Ludhiana appeared in the Court on 24.01.2013 and received a bank draft of Rs. 21,51,500/- dated 23.01.2013 in favour of Shiv Medicos and thereafter, the application to implead the bank as a party in the appeal was not pressed for. The aforesaid fact clearly indicates that the appellant/defendant did not take any step to pay the outstanding amount to UCO Bank, Chaurha Bazar Branch, Ludhiana as per the terms of agreement to sell dated 18.01.2008. This fact indicates that the appellant/defendant had no intention to honor the terms of agreement to sell dated 18.01.2008 Ex.P-1. Therefore, he was never ready or willing to perform his part of agreement to sell. On the contrary, the respondent/plaintiff was always ready and willing to perform his part of agreement to sell dated 18.01.2008 Ex.P-1. As referred above, he filed this suit seeking possession by way of specific performance of agreement dated 18.01.2008 promptly. It is not necessary for the purchaser to carry the amount in cash or to show his bank balance to the vendor. Firstly, it was for the appellant/defendant to come present in the office of Sub Registrar, Ludhiana after fulfilling the terms and conditions of agreement to sell and then on the receipt of balance sale consideration, he was to execute and register the sale deed in favour of the vendee. But in the case in hand, the present appellant/defendant never came forward to perform his part of agreement to sell. The respondent/plaintiff was always vigilant about the charge which was there on the property. He had already paid earnest money of Rs. 11,00,000/- and thereafter, when the property was put on auction by the bank for the recovery of amount, he presented draft of Rs. 21,51,500/- on behalf of Shiv Medicos to get the property redeemed. Under these circumstances, the financial status of the respondent/plaintiff or readiness and willingness on his part cannot be doubted.

14. The learned counsel for the appellant/defendant pointed out that the breach was committed by the respondent/plaintiff, therefore, the agreement to sell dated 18.01.2008 Ex.P-1 was cancelled and the earnest money was forfeited. This fact was duly mentioned in the reply dated 19.07.2008, which is Ex.P-6. To rebut this fact, learned counsel for the respondent/plaintiff has gone through the contents of the reply where it was nowhere specifically mentioned that the agreement to sell dated 18.01.2008 was cancelled or the earnest money was forfeited. Rather Shiv Charan – defendant as DW-3 during his cross-examination also conceded

that he did not give any notice to the plaintiff regarding cancellation of agreement to sell or forfeiture of earnest money paid by the plaintiff on the basis of agreement to sell dated 18.01.2008 Ex.P-1. The learned counsel for the respondent/plaintiff during the pendency of present appeal has tendered the copy of plaint RBT No. 1861 instituted on 13.03.2009 titled "Shiv Charan versus Rupesh Kumar", suit for declaration regarding cancellation of agreement to sell dated 18.01.2008 and regarding forfeiture of earnest money. The copy of plaint is Ex.P-7. The said suit was contested by Rupesh Kumar respondent/plaintiff. The copy of written statement is Ex.P-8. However, the said suit for declaration was dismissed as withdrawn by Shiv Charan appellant/defendant by making statement in the Court dated 08.02.2012 Ex.P-9. Subsequently, he filed application for the revival of civil suit. Copy of application is Ex.P-10 and it was declined vide order dated 21.01.2013, which is Annexure P-11 and the appeal preferred against this order was also declined vide order dated 25.04.2014, which is Ex.P-13. Therefore, the claim of appellant/defendant regarding cancellation of aforesaid agreement to sell or to forfeit the earnest money is without any basis.

15. The learned counsel for the appellant/defendant claimed that Shiv Charan suffered great loss as the plaintiff committed breach of the terms of agreement to sell dated 18.01.2008 as he had agreed to purchase another property from Gurcharan Singh by way of agreement to sell dated 29.02.2008, which is Ex.D2. In the written statement, it was alleged that as per that agreement to sell, he had given Rs. 8,00,000/- as earnest money which were forfeited, as the agreement to sell in favour of respondent/plaintiff could not be honored. The aforesaid agreement to sell allegedly executed by Gurcharan Singh is not subject matter of the present

case. As per the agreement to sell dated 18.01.2008 Ex.P1, the property which Shiv Charan had agreed to sell in favour of Rupesh Kumar was already subject to mortgage with UCO Bank, Chaurha Bazar Branch, Ludhiana. On the receipt of earnest money of Rs. 11,00,000/-, the appellant/defendant did not make any effort to pay the amount to UCO Bank in order to clear the outstanding amount so that to procure the original title deed from the bank. This further shows that the appellant/defendant had no intention to honor the agreement to sell dated 18.01.2008 right from the beginning as he himself conceded that he entered into another agreement to purchase property from Gurcharan Singh vide agreement dated 29.02.2008, which is Ex.D-2.

Therefore, considering the facts of the case and the evidence on record, it is clear that there was breach on the part of appellant/defendant to perform his part of agreement to sell dated 18.01.2008 Ex.P1. There is nothing on record to show that any material evidence or any aspect of the case has been ignored. The facts of the case and the evidence on record was rightly considered by the trial Court i.e. learned Civil Judge (Junior Division), Ludhiana and the suit filed by the respondent/plaintiff was rightly decreed vide judgment and decree dated 26.04.2012 and the appeal preferred by the appellant/defendant Shiv Charan was also rightly dismissed by learned Additional District Judge, Ludhiana vide impugned judgment and decree dated 14.08.2014.

Therefore, in view of my above discussion, I do not find any reason to interfere in the concurrent finding of the two Courts below in favour of the respondent/plaintiff. With these observations, finding no merits in the Regular Second Appeal filed by the appellant/defendant Shiv Charan, the same is accordingly dismissed. The original records received from the two Courts below be sent back to the concerned quarter.

Pending application(s) if any, also stands disposed of.

21.07.2023 **(AMARJOT BHATTI)**
lalit **JUDGE**

Whether speaking/reasoned: Yes
Whether reportable: Yes/No