

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.109 of 2023

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1. Archana Mukherjee @ Archana Mukherji, Daughter of Late Dr. Prasun Kumar Banerji @ Dr. Parshun Kumar Banerjee, At present R/o 27/B, Rollen Road, Kolkata, West Bengal, permanent R/o Mohalla- Bank Road, P.S Gandhi Maidan, District- Patna (as per the address given in the Plaint and Decree) whereas the appellant no. 1 is resident of 160 / C, Block G, New Alipore, P.S. New Alipore, Kolkata- 700053 and appellant no. 2 is resident of 2/4, Shanti Niketan, P.S. Chanakyapuri, New Delhi- 110021.
 2. Chandana Chaterjee @ Chandana Chatterji, Daughter of Late Dr. Prasun Kumar Banerji @ Dr. Parshun Kumar Banerjee, At present R/o 27/B, Rollen Road, Kolkata, West Bengal, permanent R/o Mohalla- Bank Road, P.S Gandhi Maidan, District- Patna (as per the address given in the Plaint and Decree) whereas the appellant no. 1 is resident of 160 / C, Block G, New Alipore, P.S. New Alipore, Kolkata- 700053 and appellant no. 2 is resident of 2/4, Shanti Niketan, P.S. Chanakyapuri, New Delhi- 110021.

... ... Appellant/s

Versus

1. Madhumesh Choudhary S/o Sri Tarkeshwar Prasad Choudhary, R/o- AwaranChoudhary Market, Ashok Rajpath, P.S. Pirbahore, Town and District- Patna.
2. Praveen Kumar Banerjee @ Dr. Prabir Kumar Banerji @ (since deceased in 2018), Son of Late Dr. Prasun Kumar Banerjee @ Parshun Kumar Banerjee, At present resident of 27B, 5th Floor, Roland Road, Kolkata- 700020.
3. Mrs. Soumi Banerji, Wife of Late Dr. Prabir Kumar Banerji, At present resident of 27B, 5th Floor, Roland Road, Kolkata- 700020.
4. Mrs. Preeta Banerji, Daughter of Late Dr. Prabir Kumar Banerji, C/o Mrs. Soumi Banerji, At present resident of 27B, 5th Floor, Roland Road, Kolkata- 700020.
5. Deep Banerji, Son of Late Dr. Prabir Kumar Banerji, C/o Mrs. Soumi Banerji, At present resident of 27B, 5th Floor, Roland Road, Kolkata- 700020.
6. Vandana Chaterjee, Daughter of Late Parshun Kumar Banerjee @ Dr. Prasun Kumar Banerji, At present resident of 27B, Rollen Road, Kolkata, West Bengal, permanent R/o Mohalla- Bank Road, P.S. Gandhi Maidan, District- Patna (as per the address given in the Plaint and Decree).
7. Name not known, Daughter of Late Parshun Kumar Banerjee @ Dr. Prasun Kumar Banerji, At present resident of 27B, Rollen Road, Kolkata, West

Bengal, permanent R/o Mohalla- Bank Road, P.S. Gandhi Maidan, District-Patna (as per the address given in the Plaint and Decree).

8. Name not known, Daughter of Late Parshun Kumar Banerjee @ Dr. Prasun Kumar Banerji, At present resident of 27B, Rollen Road, Kolkata, West Bengal, permanent R/o Mohalla- Bank Road, P.S. Gandhi Maidan, District-Patna (as per the address given in the Plaint and Decree).
9. Name not known, W/o Late Parshun Kumar Banerjee @ Dr. Prasun Kumar Banerji, At present resident of 27B, Rollen Road, Kolkata, West Bengal, permanent R/o Mohalla- Bank Road, P.S. Gandhi Maidan, District-Patna (as per the address given in the Plaint and Decree).

... ... Respondent/s

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Code Of Civil Procedure, 1908—Order XLI Rule 5 read with Section 151—father of the appellants entered into an agreement for sale of the suit property with the plaintiff— suit property which is a valuable piece of land, there is some building over the suit land and as per the appellants, the same is being used as their residential house while as per the respondents, it is being used for commercial purpose—before the trial court, the plaintiff could not have produced any chit of paper regarding the payment consideration amount which is claimed to have been paid by him as a part of the consideration amount to the proposed seller—if the execution and registration of the sale deed in respect of suit property is allowed to be completed during the pendency of this appeal then there would be a great possibility of transfer of the suit property to others and it is a settled position of law that an appeal is considered to be continuation of suit and the subject matter of the dispute must be kept safe till attaining the finality of the issue by way of Judgment—Court finds justful to accept the prayer made by the appellants, hence, the operation of the judgment and decree impugned as well as all the execution proceedings having started in the light of the said judgment and decree are stayed till further order.

(Paras 13, 14)

AIR 2004 SC 1596; 2001 (1) PLJR 661; 1982 (3) SCC 484; 2024 (3) PLJR (SC) 343—Referred to.

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9. Name not known, W/o Late Parshun Kumar Banerjee @ Dr. Prasun Kumar



... .. Respondent/s

For the Appellant/s	:	Mr. Amit Shrivastava, Sr. Adv. Mr. Sajal Kumar Sinha, Adv. Mr. Girish Pandey, Adv.
For the Respondent/s	:	Mr. Syed Firoz Raza, Sr. Adv. Mr. Azhar Hussain, Adv.
For the Resp. 2(a)	:	Mr. Rohitabh Das, Adv.
For the Resp. 2(b)	:	Mr. Sushil Kumar Singh, Adv.

9 27-02-2025

Re : I.A. No. 04 of 2025

The instant matter has been taken up in the light of the direction given by the Civil Motion Bench of this Court to the Listing Section to list this matter before this Bench on 27.02.2025 at the top.

2. In this interlocutory application, the appellants, who were defendants before the trial court, have made a prayer under Order 41 Rule 5 read with section 151 of the Code of Civil Procedure, 1908 (in short 'C.P.C.') for staying the proceeding in the Execution Case No. 767/2023 having arisen in the light of judgment and decree which have been challenged in this appeal.

3. The appellants were defendants and the respondent No. 1 was the sole plaintiff before the trial court and the defendant Praveen Kumar Banerjee, who was made as



respondent No. 2 in this appeal, died before the filing of the appeal, so, his legal heirs were made as proposed respondents Nos. 2(a) to 2(c) and the defendant Vandana Chaterjee has been made as respondent No. 3 in this appeal.

4. The instant matter relates to the specific performance of contract and the case of the plaintiff/respondent No. 1 is based on a deed of agreement for sale of suit property and his suit was decreed and the execution process has been started as per the appellants' counsel and the same is at final stage.

5. Mr. Amit Shrivastava, learned senior counsel appearing for the appellants submits that as per the case of plaintiff, one namely, Dr. Parsun Kumar Banerji @ Prashun Kumar Banerjee (in short 'P.K. Banerjee' and now deceased), father of the appellants entered into an agreement for sale of the suit property with the plaintiff on 24.02.2008 and the consideration amount for the sale was fixed as Rs. 3,60,00,000/- (Rupees Three Crores and Sixty Lakhs) and the suit property is described in Schedule 1 of the plaint. As per the pleading of the plaintiff, he had paid Rs. 2,02,00,000/- (Rupees Two Crores and Two Lakhs) to the father of the appellants by way of advance money on different dates for purchasing the suit property and as



per the disputed deed of agreement for sale, the suit property was to be transferred by executing and registering the sale deed till 31.12.2010 but the case of the plaintiff is completely false and is based on a forged document which is claimed to be a deed of agreement for sale and in this regard, there are some strong circumstances. Firstly, the deed of agreement is said to have been prepared on a non-judicial stamp of Rs. 50/- which is in itself highly suspicious as upon it, the date relating to the issuance of said stamp is not visible. Secondly, in the deed, it is mentioned that the advance money of consideration being Rs. 2,02,00,000/- (Rupees Two Crores and Two Lakhs) was paid by the plaintiff to the proposed seller (father of the appellants) on different dates but in this regard, the said statement in the deed is completely vague as no particular date or place, where the said payments were made, has been disclosed and the most important thing is that before the trial court, plaintiff's witnesses including P.W.-3, namely, Ramesh Jyoti, a so-called witness of the execution of the deed of agreement, deposed that the entire amount of Rs. 2,02,00,000/- was given on one occasion while in this regard, a contradictory statement is mentioned and made in the disputed deed as well as in the evidence of plaintiff himself. Thirdly, the deed in question is not a registered document and



has no signature of any family member of the proposed seller, Late P.K. Banerjee, while as per the case of the plaintiff, the deed was prepared at the residential place of proposed seller situated in Kolkata but very surprisingly, no attempt was taken by the plaintiff to get the signature of any family member of late P.K. Banerjee and all the witnesses shown on the deed are very interested in the plaintiff and in this regard, their evidence may be perused. Fourthly, the stamp paper of the disputed deed is said to have been issued in Patna but the same was used in Kolkata. Fifthly, it is an admitted position that the plaintiff failed to give any receipt of the payment of Rs. 2,02,00,000/- (Rupees Two Crores and Two Lakhs) which is claimed to have been given by him to late P.K. Banerjee (proposed seller) on different occasions which generally does not happen in such type of transactions where the consideration amount for purchasing the piece of land is very high. Sixthly, the learned trial court highly placed reliance upon the evidence of a handwriting expert of the Forensic Science Laboratory Department but it is an admitted position that the comparison of the purported signature of late P.K. Banerjee being available on the disputed deed was made with his so claimed undisputed signature being available on the scanned copy of a sale deed



(Exhibit- '1') which is said to have been executed by late P.K. Banerjee on earlier occasion which in itself makes the expert's opinion highly doubtful and further, it is settled principle of law that the direct evidence will prevail upon the expert's opinion. Seventhly, in view of a transaction in respect of a valuable property through unregistered document, the past conduct of one, who claims his interest in such property on the basis of such deed, is considered to be very relevant and in this matter, the plaintiff's past conduct is not good as he has remained an accused in a case of cheating and forgery with another Bengali family regarding which a case was lodged and the pendency of such case has been accepted by the plaintiff himself in his evidence. Eighthly, as per the plaintiff's case, the advance paid money, a part of the consideration amount, was Rs. 2,02,00,000/- (Rupees Two Crores and Two Lakhs) and the same was given in cash on different occasions to the father of the appellants but regarding the source of getting or collecting such huge amount by the plaintiff, he did not give satisfactory answer before the trial court when he was cross-examined on the said point and in this regard, his evidence may be perused. Ninthly, the suit property is an ancestral property which is an admitted position and the appellants/defendants are having their



respective share in the suit property as being family members of late P.K. Banerjee but none of them was made a party to the disputed deed of agreement for sale and if specific performance of the contract of sale is completed by execution and registration of the sale deed then the interest of the appellants and other legal heirs of late P.K. Banerjee would adversely be affected. Late P.K. Banerjee was a renowned doctor having properties at several places, so, there was no need for him to make a proposal for selling his valuable and important property to the plaintiff as admittedly there is a house of the appellants over the suit land in which they reside. Tenthly, the plaintiff took the plea in his pleading that a notice had been sent to the legal heirs of the proposed seller by registered post on 27.07.2010 showing the plaintiff's continuous readiness and willingness to perform the rest part of the contract but before the trial court neither the said notice's copy nor registered post receipt was produced in evidence by the plaintiff which confirms the fabrication of a false story by the plaintiff.

6. Learned counsel further submits that an appeal is considered to be continuation of the suit and a decree becomes executable only when the same is finally affirmed by the court of appeal. But in present time, the learned executing court has



arrived at final stage of execution despite the impugned judgment and decree being under challenge in this appeal. In support of this submission, learned counsel has placed reliance upon the judgment of the Hon'ble Apex Court passed in the case of **Union of India & Others vs. West Coast Paper Mills Ltd. and Another** reported in **AIR 2004 SC 1596**.

7. Learned counsel further submits that it is settled view of this Court that the execution proceeding with respect to a residential house should not be started when an appeal against the decree involving such house is pending. In support of this submission, learned counsel has placed reliance upon the judgment of Hon'ble Division Bench of this Court passed in the case of **Smt. Tej Rani Devi & Ors. vs. Smt. Indira Devi & Ors.** reported in **2001 (1) PLJR 661** and the relevant paragraph No. '5' upon which reliance has been placed is being reproduced as under:-

“5. Learned counsel then contended that although the execution proceeding is with respect to a residential house, but the appellants are not residing in that house and therefore, the execution proceeding is not maintainable. On the other hand, learned counsel pointed out that in the plaint itself as well as the petition for execution filed on behalf of the respondents, it was already admitted that the



appellants are in possession of the house in question. In the circumstance, the decree is being executed in the execution proceeding with respect to residential house and having regard to the well settled views of this Court, we feel inclined that the execution proceeding should remain stayed with respect to the house in question. In this connection we may refer to the order dated 21.11.2000, when after hearing both the parties, the interim order was passed in these words:—

“In the meantime, the appellants shall not be evicted from the house standing over the disputed land and the execution of decree with respect to other portion of any other property, if any, shall proceed.””

It is further submitted that during the pendency of the appeal, the operation of an order having serious civil consequences must be suspended and in this regard, a proper judicial approach is required and in the present matter, serious civil consequences will arise if the execution and registration of the sale deed take place as thereafter, there would be a great possibility of civil actions against the possession of the appellants who are keeping their peaceful possession on the house situated over the land in question. In support of this submission, learned counsel has placed reliance upon the



judgment of the Hon'ble Apex Court passed in the case of **Mool Chand Yadav and Another vs. Raja Buland Sugar Company Limited, Rampur and Others** reported in **1982 (3) SCC 484** and the relevant paragraph No. '4' upon which reliance has been placed is being reproduced as under:-

"4. We heard Mr S.N. Kacker, learned counsel for the appellants, and the respondents appeared by Caveat through Mr. Manoj Swarup, Advocate. We are not inclined to examine any contention on merits at present, but we would like to take notice of the emerging situation if the operation of the order under appeal is not suspended during the pendency of the appeal. If the FAFO is allowed obviously Mool Chand Yadav would be entitled to continue in possession. Now, if the order is not suspended in order to avoid any action in contempt pending the appeal, Mool Chand Yadav would have to vacate the room and hand over the possession to the respondents in obedience to the Court's order. We are in full agreement with Mr. Manoj Swarup, learned Advocate for respondents, that the Court's order cannot be flouted and even a covert disrespect to Court's order cannot be tolerated. But if orders are challenged and the appeals are pending, one cannot permit a swinging pendulum continuously taking place during the pendency of the appeal. Mr. Manoj Swarup may be wholly right in submitting



that there is intentional flouting of the Court's order. We are not interdicting that finding. But judicial approach requires that during the pendency of the appeal the operation of an order having serious civil consequences must be suspended. More so when appeal is admitted. Previous history of litigation cannot be overlooked. And it is not seriously disputed that the whole of the building, Hari Bhawan, except one room in dispute is in possession of the Corporation. We accordingly suspend the operation of the Order dated August 6, 1982 directing the appellants to hand over the possession of the room to the respondents till the disposal of the first appeal against that order pending in the High Court of Allahabad. Mr. Manoj Swarup requests that both the earlier and later appeals should be heard together as early as possible. We order accordingly and request the High Court if it considers proper in its own discretion to hear both the appeals as expeditiously as possible in order to avoid the continuance of the boiling situation. The appeal stands disposed of. There shall be no order as to costs.”

It is further submitted that while dealing with a matter of specific performance of contract, with regard to sale of a land, the Hon’ble Apex Court took into account that the concerned



deed of agreement for sale was not signed by the co-owners and upheld the judgment of the High Court by which the judgment and decree passed by the trial court were set aside and in that matter, the trial court had decreed the suit of the plaintiff filed for specific performance of contract. In support of this submission, learned counsel has placed reliance upon the judgment of the Hon'ble Apex Court passed in the case of **Rajesh Kumar vs. Anand Kumar & Ors.** reported in **2024 (3) PLJR (SC) 343** and the relevant paragraph No. '6' upon which reliance has been placed is being reproduced as under:-

“6. Admittedly, the initial agreement dated 26.09.1995 was executed by Defendant no. 1-Gajay Bahadur Bakshi. It is the case of the appellant/plaintiff that Gajay Bahadur Bakshi was the Power of Attorney Holder of Defendant nos. 2 to 11, the other co-owners/coparceners of the suit property. However, the agreement itself nowhere states that Gajay Bahadur Bakshi has executed the agreement as Attorney Holder of Defendant nos. 2 to 11. On the contrary, it is mentioned in the agreement that Gajay Bahadur Bakshi would be responsible for getting the sale deed executed and registered by all the co-owners or co-khatedars at the time of registration. Neither the names of all the co-owners/coparceners/co-khatedars are mentioned in the agreement, thus, the High Court



is right in finding that all the co-owners have not signed the agreement. The subsequent endorsement of receipt of additional amount of Rs. 40,000/- is also not signed by all the co-parceners. The same is the condition with the 3rd agreement dated 26.12.1996 and the extension endorsement dated 27.03.1997 and 23.04.1997. Significantly, the so-called power of attorney pleaded in the plaint through which the defendant nos. 2 to 11 authorised defendant no. 1 to execute the agreement, have not been produced and proved in the Trial Court. Thus, neither in the agreement nor in course of trial the power of attorney is proved by tendering the same in evidence. Hence, in the absence of evidence, the High Court rightly held that the agreement is not signed by all the co-owners.”

8. It is lastly submitted by appellants’ counsel that the trial court’s conduct did not remain up to the mark as after the admission of this appeal, when the trial court’s record was called for by this Court, more than ten months period was taken in sending the trial court’s record to this Court then a complaint was made before the then Hon’ble Chief Justice of this Court, upon which an action might have been taken against the Presiding Officer of the trial court as per his information and during the trial, the written argument was filed by the contesting



defendants in which reference of several judgments of this Court as well as the Hon'ble Apex Court was given but nowhere any discussion of the principle laid down in those judgments was made in the impugned judgment and the said written argument is available with the trial court's record and the same may be perused.

9. On the other hand, Mr. Syed Firoz Raza, learned senior counsel appearing for the contesting respondent No. 1/plaintiff vehemently opposes this petition with making the submissions that the appellants have lost the Title Suit filed for specific performance of contract by the respondent No. 1 and it is settled position of law that while deciding the issue of specific performance of contract, the title or possession over the land in question is not to be looked into and the main points for consideration remain as to the execution of an agreement, part payment of consideration amount or readiness to pay the same and further willingness to perform the rest part of the agreement and in this matter, D.W.-1 Chandana Chatarjee, daughter of late P.K. Banerjee accepted her father's signature being available on the deed in question which in itself proves the execution of the deed of agreement and further, all the grounds raised by the appellants before this Court can only be looked into at the time



of final hearing of this appeal and a proper decision on the said grounds can only be made after going through all the evidences of both the parties and their pleadings.

10. Learned counsel further submits that the contradiction pointed out by appellants' counsel with regard to the payment of part consideration amount in between the evidence of plaintiff and his witnesses is minor and ignorable and the most important thing is that the handwriting expert of FSL department has compared the disputed signature of late P.K. Banerjee being available on the deed of agreement (Ext. -2) with his undisputed signature being available on other sale deed (Ext.-1) and as per his opinion, the signatures upon both the documents matched. Further, the plaintiff himself as well as his one witness, P.W.-3, Ramesh Jyoti, who signed on the deed of agreement as a witness, fully proved the said deed before the trial court and the criminal case which is said to have been lodged against the respondent No. 1 by an other person is still pending and merely by the said case, the past conduct of the respondent can not be deemed to be questionable and the same can not be made a ground for disbelieving a written agreement.

11. It is further submitted that by the execution of the sale deed, there would not be any substantial loss to the



appellants till delivery of the possession is affected, so, the execution proceeding should not be stayed. In support of this submission, learned counsel has placed reliance upon this Court's order passed in **F.A. No. 51 of 2022**.

12. Learned counsel lastly submits that the suit property in question is not a residential house rather it is a commercial building being used by chartered accountants and the respondent, who is a decree holder, has already deposited Rs. 1,58,00,000/- (Rupees One Crore and Fifty Eight Lakhs) through challan in the Execution Case No. 767/2023 and a large sum of Rs. 1,56,15,500/- (Rupees One Crore Fifty Six Lakhs Fifteen Thousand Five Hundred) has also been deposited through challan for the registration of the sale deed, so, in the said situation, if the execution and registration of the sale deed is stopped or stayed, an irreparable loss will cause to the respondent.

13. I have heard both the sides and for limited purpose to decide the instant application have gone through the impugned judgment and pleadings of both the parties as well as evidences adduced by them before the trial court. The suit property which is a valuable piece of land is situated in Patna and admittedly, there is some building over the suit land and as



per the appellants, the same is being used as their residential house while as per the respondents, it is being used for commercial purpose. And the aforesaid grounds taken by the appellants are relevant and important in this appeal though a proper conclusion can only be made after thorough examining the evidences of both the parties in the light of their pleadings but one thing is quite clear that before the trial court, the plaintiff could not have produced any chit of paper regarding the payment of Rs. 2,02,00,000/- (Rupees Two Crores and Two Lakhs) which is claimed to have been paid by him as a part of the consideration amount to the proposed seller (P.K. Banerjee) who was a renowned doctor of his locality and further the appellants' advocate has pointed out a serious contradiction in between the plaintiff's pleading and the oral evidence of his important witness of deed regarding the dates or day of payment of the part of consideration amount. If the execution and registration of the sale deed in respect of suit property is allowed to be completed during the pendency of this appeal then there would be a great possibility of transfer of the suit property to others and it is a settled position of law that an appeal is considered to be continuation of suit and the subject matter of the dispute must be kept safe till attaining the finality of the



issue by way of judgment. Accordingly, this Court finds justful to accept the prayer made by the appellants. Hence, the operation of the judgment and decree impugned as well as all the execution proceedings having started in the light of the said judgment and decree are hereby stayed till further order of this Court.

14. In result, I.A. No. 04 of 2025 stands allowed.

F.A. No. 109 of 2023

15. List this appeal under appropriate heading on its turn.

(Shailendra Singh, J)

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