

HIGH COURT OF JUDICATURE MADHYA PRADESH,
JABALPUR

WRIT PETITION NO.13470 OF 2016

Pramod Kumar Zohey

Vs.

Smt Smita Zohey

Present :-

Shri Rohit Jain, Advocate for the petitioner.

Shri D.R. Vishwakarma, Advocate for the respondent No.1.

Shri Adil Usmani, Advocate for the respondents No. 3 to 6.

Whether Approved for Reporting : Yes

Law Laid Down: (i) Procedure to be adopted by the Civil Court where the issue regarding court fees cannot be decided at the initial stage. Reference is made to Section 149 of CPC.

Significant Paragraph No.12

ORDER

(Passed on this the 17th day of August, 2017)

The petitioner/plaintiff has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 8.7.2016 passed by the III Additional Judge Class I to the Court of First Civil Judge, Class-I, Bhopal in RCS No.946-A/2015.

2. In brief the facts of the case are that the petitioner has filed a civil suit at Bhopal seeking declaration and permanent injunction against respondents No.1 to 6. The petitioner and the respondents No.1 and 2 are real brothers and sister. Their father Late Shri Govind Krishna Rao Zohey in his life time had made certain arrangements in respect of the property held by him through a Will in which the petitioner was given 1350 sq ft of constructed area whereas 360 sq ft was given to his daughter Smt Smita Zohey till her life time and thereafter the same was to devolve to the petitioner and the rest of

the area was bequeathed to respondent No.2, the brother of petitioner.

3. For execution of the aforesaid Will, a civil suit was filed at Bhopal and it was decreed on 22.9.2010 and the property was partitioned wherein the petitioner was given 1350 sq ft of constructed area and Smt. Smita Zopey was given 360 sq ft only for her life time as thereafter it was to devolve to the petitioner.

4. Subsequently the petitioner executed a power of attorney in favour of one Arjun Singh who is also the respondent No.3 herein whereby the petitioner had given him the power to sell the property in respect of his share only which is 1350 sq ft. for a period from 6.3.2014 to 31.3.2014. It is submitted by the petitioner that in the aforesaid power of attorney, there is no reference that the property belonging to respondent No.1 is also covered under the said power of attorney. It is further submitted by the petitioner that since the petitioner has no right in the property of respondent No.1 which is admeasuring 360 sq ft till her life time, hence this property was not given under the power of attorney. It is further submitted by the petitioner that the aforesaid property of Smt. Smita Zopey was sold by her to respondents No.4, 5 and 6 in which respondent No.3 Arjun Singh (Petitioner's power of attorney holder) consented as one of the signatory of the sale deed dated 7.3.2015.

5. The aforesaid sale deed dated 7.3.2015 was challenged by the petitioner in the Civil Suit No.946A/2015 wherein an application under Order 7 Rule 11 of CPC has been filed by the respondent No.1 for the dismissal of the suit on the ground of deficient court fee. The aforesaid application has been allowed by the learned Judge of the lower court with a direction to the petitioner to pay the ad valorem

court fee. The aforesaid order dated 8.7.2016 is under challenge before this Court.

6. The contention of learned counsel for the petitioner is that the petitioner had not given any power of attorney to respondent No.3 Arjun Singh to sell the property of respondent No.1 and the petitioner is not made a party in the aforesaid sale deed and as such the sale deed is null and void. Hence the learned Judge ought not to have passed the order for payment of ad valorem court fee.

7. It is further submitted by the learned counsel for the petitioner that the petitioner had given the power of attorney to respondent No.3 Arjun Singh for the area of 1350 sq ft which belongs to him only, hence on the basis of aforesaid power of attorney he should not have consented in the sale of his sister's share i.e. 360 sq ft which would have come to him after the death of his sister and since the sale is null and void and is liable to be set aside for which the ad valorem court fee is not payable. It is further submitted that even otherwise the life of power of attorney was hardly for one month from 6.3.2014 to 31.3.2014 which is mentioned on the front page of the power of attorney itself, hence in such circumstances when the petitioner was not party to the sale deed and since the same was tainted with the reason of fraud and coercion the petitioner is not entitled to pay ad valorem court fee. Learned counsel for the petitioner has also relied upon the Full Bench judgment of this Court in the case of **Sunil s/o Dev Kumar Radhelia and others vs Awadh Narayan and others, 2010(4) MPLJ 431.**

8. On the other hand, learned counsel for the respondents submitted that no illegality has been committed by the learned Judge

of the Trial Court in passing the impugned order and it is further submitted that it is wrong to say that the life of the power of attorney is for a period of one month only, in fact, in the body of the power of attorney in first para at the second page it is clearly mentioned that the same is valid for a period of one year from the date of its issue. Learned counsel for the respondents have relied upon the following judgments :

- (i) **Shanti Budhiya Vesta Patel and others vs Nirmala Jayprakash Tiwari and others, 2010 (3) MPLJ 625**
- (ii) **Tarun Malkapurkar vs Jitendra Agrawal and others, 2016(2) MPRD 449 : 2017 (2) MPLJ 600**
- (iii) **Ambika Prasad and others vs Shri Ram Shiromani @ Chandrika Prasad Dwivedi and another, 2011(3) MPLJ 184**
- (iv) **Suhrid Singh @ Sardool Singh vs Randhir Singh & Others (Civil Appeal Nos.2811-2813 of 2010 decided on 29.3.2010)**

9. Heard learned counsel for the parties and perused the record.

10. So far as the averments made in the plaint regarding the court fees and the relief claimed are concerned, the same read as under :

“11. यह कि वाद का मूल्यांकन रूपये 22,75,100/-रु. किया गया है जो कि पंजीकृत विक्रयपत्र मे विक्रय मूल्य दर्शाया गया है, वादी उक्त विक्रयपत्र में पक्षकार नहीं है ना ही वादी ने उक्त विक्रयपत्र पर हस्ताक्षर किये है, और ना ही वादी के अधिकृत अभिकर्ता ने विक्रयपत्र पर हस्ताक्षर किये है, इसलिये वादी देय न्यायशुल्क से मुक्त है, घोषणा हेतु नियत न्यायशुल्क 1000/- रु. पटाया जा रहा है। स्थायी निषेधाज्ञा हेतु मूल्यांकन 5000/- रु. किया गया है जिस पर 600/-

रु. न्यायशुल्क पटाया जा रहा है।

14. यह कि उपरोक्त परिस्थितियों में वादी माननीय न्यायालय से निम्नांकित प्रार्थना करता है :-

1. यह कि यह घोषित किया जावे कि प्रतिवादी क्र-1, 2 एवं 3 द्वारा प्रतिवादी क्र-4, 5 एवं 6 के पक्ष में किया गया विक्रयपत्र अवैध होकर वादी पर बन्धनकारी नहीं है, तदानुसार निर्णय एवं जयपत्र पारित किया जावे।
2. यह कि प्रतिवादी क्र-4, 5 एवं 6 को स्थायी निषेधाज्ञा द्वारा वादग्रस्त स्थान को किसी अन्य को विक्रय किये जाने से रोके जाने का निर्णय एवं जयपत्र पारित किया जावे।
3. यह कि वादी को प्रतिवादीगण से वाद व्यय दिलाया जावे।
4. यह कि अन्य कोई सहायता जो माननीय न्यायालय उचित समझे वादी को प्रतिवादीगण से दिलाये जाने का निर्णय पारित किया जावे।”

11. On perusal of the record, it is apparent that the petitioner had executed a power of attorney on 7.3.2014 and the alleged sale deed was executed on 5.3.2015. In the title of the power of attorney it is mentioned that it is valid for a period from 6.3.2014 to 31.3.2014 only and in respect of the petitioner's property ad-measuring 4000 sq ft and not in respect of 360 sq ft which belongs to the respondent No.1 till her life time although counsel for the respondents have argued that at page 2 it is mentioned that it is for a period of one year. The counsel for the petitioner has submitted that in the body of the power of attorney its validity of one year is mentioned due to a clerical mistake and the intention of the petitioner was to create a power of attorney for a period of one month only as it is specifically mentioned in the cause title of the said power of attorney. It is also a point to be considered that the petitioner had no right to sell the property of respondent No.1 ad-

measuring 360 sq ft which has been given to her through the Will of the father of the petitioner and was to remain with the respondent No.1 only till her life time and as such even the petitioner had no right to sell the same as has been rightly submitted by the counsel for the petitioner.

12. In the aforesaid factual background, this Court is of the considered opinion that *prima facie* the petitioner cannot be said to be an executant of the sale deed dated 5.3.2015 and thus saddling him with the ad valorem court fee would be unjustifiable at this stage. In the circumstances, the impugned order dated 8.7.2016 is liable to be quashed. Since the written statement is still to be filed by the respondents, they are at liberty to raise all the objections relating to the court fees in their written statement which shall be decided by the Court in accordance with law and evidence on record without being influenced by the observations made by this Court. Needless to say that powers under Section 149 of CPC which refers to power of the court to make up deficiency of court fees can be invoked by the Civil Court if the occasion so arises. Section 149 of CPC reads as under:-

“149. Power to make up deficiency of Court-fees.- Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.”

Thus, under the facts and circumstances of the case, the

parties are at liberty to contest the suit and lead evidence in respect of their claims and the Trial Court shall decide the issue of deficit court fees either as a preliminary one or at any subsequent stage.

13. So far as the judgments relied upon by the parties are concerned, the same are factually distinguishable and as such are not applicable under the facts and circumstances of the case.

14. Accordingly, the petition stands allowed to the extent as indicated herein above and the impugned order dated 8.7.2016 is hereby quashed.

(Subodh Abhyankar)
Judge
17 /08/2017

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