

**Obamma and Others Vs. Boraiah and Others**

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**Court : Karnataka**

**Decided On : Jul-11-2016**

**Judge : B. Veerappa**

**Appeal No. : R.S.A.No. 1595 of 2013**

**Appellant : Obamma and Others**

**Respondent : Boraiah and Others**

**Advocate for Def. : Sri. Shashidhara**

**Advocate for Pet/Ap. : Sri. B.M. Sidd**

**Judgement :**

(Prayer: This RSA is filed U/s. 100 of CPC against the judgement and decree dated 26.08.2013 passed in R.A. No. 7/2013 on the file of Senior Civil Judge, Challakere, dismissing the appeal and confirming against the Judgment and decree dated 05.12.2012 passed in FDP No. 1/2009 on the file of Principal Civil Judge, Challakere, allowing the petition filed under order 21 Rule 18 R/W Section 54 of CPC.)

1. This appeal is filed by the judgment debtor against the judgment and decree dated 26.8.2013 made in R.A. No. 7/2013 on the file of Senior Civil Judge, Challakere, confirming the final decree proceedings dated 5.12.2012 made in F.D.P. No. 1/2009 on the file of Principal Civil Judge, Challakere, allowing the

petition directing the office to draw final decree in pursuance of the preliminary decree in terms of the Commissioner s sketch.

2. The respondents who are the plaintiffs in O.S. No. 248/1975 filed a suit for partition and separate possession of half share. The suit came to be decreed, it was confirmed in the appeal in RA 24/1981. Aggrieved by the said judgment and decree of the Courts below, the present judgment debtors who are the respondents therein filed RSA No. 727/1991. The said appeal came to be dismissed on 2.6.1998 for non filing of paper books within the time.

3. In pursuance of the said judgment and decree, the decree holders filed F.D.P. 1/2009 under Order 20 Rule 18 r/w Section 54 of Code of Civil Procedure to pass the final decree. After considering the entire material on record and after framing necessary issues held that, after perusing the case papers, Court Commissioner was appointed to execute as per the preliminary decree. He visited suit properties and executed Commissioner warrant as per preliminary decree. Before that he has issued notice to the concerned parties and submitted his report to the Court. After filing the Commissioner s report, petitioners submit no objection to Commissioner s report, but the respondents filed objections to the Commissioner s report. Hence, summons was issued to Court Commissioner and he was examined as CW1. Commissioner report was marked as Ex.C1.

4. During the said proceedings, petitioners have not pressed the C schedule property. The Principal Civil Judge, Challakere in the Final Decree Proceedings had recorded a finding that the Court Commissioner partitioned the suit properties as per the preliminary decree . The conduct of the respondents shows that, they are intentionally avoiding executing the decree. The conduct of respondents is nothing but a violation of the decree passed by this Court. Hence, it is not permitted and also tolerated. Without having any legal defence, they avoiding the petitioners to get the final decree through the hands of this Court. Accordingly, Final Decree Proceedings was allowed on cost of Rs. 5,000/- and directed the office to draw final decree in pursuance of the preliminary decree. Commissioner sketch is also part and parcel of this final decree. Against the said order passed by the Final Decree Proceedings Court, the appellants Judgment debtors filed R.A.

7/2013 before the Senior Civil Judge, Challakere, who after hearing both the parties has dismissed the appeal. Hence, the present appeal is filed by the judgment debtors.

5. I have heard the learned counsel for the parties to the lis.

6. Sri B.M. Siddappa, learned counsel for the appellants vehemently contended that, the decree passed by the Court below is contrary to law and contrary to the amended provisions of Section 54 of the Code of Civil Procedure and contended that in view of the amendment of Section 54, the Court Commissioner has no jurisdiction to make a division, it is only the Court has to make a division. Therefore, he contended that, the impugned judgment and decree passed by the lower appellate Court confirming the order passed by the Final Decree Proceedings Court is contrary to Section 54 of the Code of Civil Procedure and are liable to be set aside.

7. Per contra, Sri Shashidhara, learned counsel for respondents 1 and 2 sought to justify the impugned judgment and decree of the Courts below and contended that, the respondents 1 and 2 are agree to take any of the either side of the share, even though he did not dispute the fact that division made by the Court Commissioner not the Court. Therefore, he sought to dismiss the appeal.

8. While admitting the present appeal, this Court framed the following substantial question of law:

Whether the Court below justified in allowing the Final Decree Proceedings mainly on the basis of the division made by the Court Commissioner in view of the provisions of Section 54 (amended) of the Code of Civil Procedure?

9. I have given my anxious consideration to the arguments advanced by the learned counsel for the parties to the lis. It is unfortunate case, where the decree was made as long back as in the year 1981. The suit filed in the year 1975. Though the decree was passed in the year 1981 and affirmed by this Court in RSA 727/1991, till today, the decree has not been implemented. It is the mistake committed by the Court for not making division of the suit properties as

contemplated under the amended provisions of Section 54 of the Code of Civil Procedure.

10. In view of the amendment of Section 54 of the Code of Civil Procedure, the shares or division shall be made by the Court in accordance with law, if any, on the basis of report of the revenue officer not below the rank of Tahsildar, which reads as under:

54. Partition of estate or separation of share: Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share of such an estate shall be made by the Court in accordance with the law if any, for the time being in force relating to the particular or the separate possession of shares, and if necessary on the report of a revenue officer, not below the rank of Tahsildar or such other person as the court may appoint as Commissioner in that behalf . (emphasis supplied)

11. In view of the amendment of Section 54 of Code of Civil Procedure by Act No. 36 of 1998 with effect from 1.2.2001, in all cases to which the amendment provision applies, the partition shall be made only by the Court and not by the revenue officer or the Commissioner . The Court if necessary on the report of the revenue officer not below the rank of the Tahsildar to enable to it to effect partition, it can be effect partition on such report and court commissioner cannot make a division. In the present case, admittedly, the division is made by the Court Commissioner and not by the Court. Therefore, the substantial question of law has to be answered in negative holding that the Final Decree Proceedings accepting the division made by the Court Commissioner is contrary to the amended provisions of Section 54 of the Code of Civil Procedure.

12. Admittedly, as could be seen from the impugned judgment and decree passed by the lower appellate Court, confirming the order passed by the Final Decree Proceedings, the division was effected by the Court Commissioner as stated in the order of the Final Decree Proceedings that, Court Commissioner partitioned the suit properties as per the preliminary decree .

13. In view of the aforesaid reasons, the judgment and decree of the lower appellate Court passed in R.A. No. 7/2013 dated 26.8.2013 on the file of Senior Civil Judge, Challakere, confirming the order dated 5.12.2012 allowing the Final Decree Proceedings on the basis of the division made by the Court Commissioner are set aside. The matter is remanded to the Principal Civil Judge, Challakere, with a direction to the trial Court to effect partition in accordance with the amended provisions of Section 54 of the Code of Civil Procedure.

14. Taking into consideration the matter is pending for last 37 years, though a decree was made in the year 1981 and confirmed by this Court in RSA 727/1991 on 2.6.1998, the trial Court shall dispose of the Final Decree Proceedings within two months from the date of receipt of copy of the order.

Accordingly, this appeal is disposed of.

Both the parties are directed to appear before the Final Decree Proceedings Court, Principal Civil Judge, Challakere on 4.8.2016.

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