1996SCMR1430

[Supreme Court of Pakistan]

Present: Abdul Hafeez Memon and Muhammad Ilyas, JJ

Mst. JEWAN BIBI and 2 others---Petitioners

versus

INAYAT MASIH---Respondent

Civil Petition No.1032-L of 1996, decided on 21st May, 1996.

(On appeal from the order dated 18-12-1995 of the Lahore High Court passed in C.R. No.2593/95).

Civil Procedure Code (V of 1908)---

----O.XLI,- R. 27 & S.11---Constitution of Pakistan (1973), Art. 185(3)---Plea of res judicata---Defendants taking such plea but producing no evidence in support thereof---Trial Court decreed plaintiff's suit which decree was affirmed by all the Courts including the' High Court---Validity---Issue of res judicata was to be decided like any other issue; if there was no evidence in support of plea of res judicata raised by defendants, such issue could not be decided in their favour---Defendants were highly negligent right from the stage of Trial Court till approaching the Supreme Court in substantiating their plea of res judicata by producing adequate and convincing evidence---Defendants even did not apply before Appellate Court for permission to produce additional evidence-- Appellate Court could not of its own volition, order production of additional evidence---Additional evidence, however, could not be allowed to be produced to enable a party to fill up any lacuna in his case---Discretion of Court should not be exercised in favour of person who had remained indolent for years together in the matter of producing oral or documentary documents before Trial Court--Entire fault for non-production of evidence lay with defendants and they were to suffer consequence thereof---Courts below including the High Court could not be blamed for indolence of defendants---Defendants, thus, badly failed in making out case for grant of leave to appeal against judgment and decree of High Court---Leave to appeal was refused in circumstances.

Ch. Muhammad Ali, Advocate Supreme Court with Walayat Omar Chaudhry, Advocate-on-Record for Petitioners.
Nemo for Respondent.

Date of hearing: 20th May. 1996.

ORDER

MUHAMMAD ILYAS, J.---This petition has arisen out of a suit brought by the respondent, Inayat Masih against the petitioners, Mst. Jewan, etc., for possession of a house, alleging that he was owner thereof. The petitioners resisted the suit contending that it was owned by them and not by the respondent. They also pleaded res judicata. After the framing of issues, the respondent examined three witnesses to- prove his case. The petitioners, however, did not produce any evidence in 'rebuttal although they were given several adjournments, covering a period of about four years, to do so. It seems that they also stopped appearing in the suit with the result that ex parte decree was passed against them on the basis of the evidence produced by the respondent: Petitioners Went in appeal before an Additional District Judge but without success. The appellate judgment and decree were assailed by them by making revision petition before the Lahore High Court but it was dismissed by a Single Judge of the said High Court. Hence this petition .for leave to appeal against the judgment of the learned Judge in Chambers.

2. It was contended by learned counsel for the petitioners that the petitioners had placed on the record of the learned trial Court copy of plaint of an earlier suit brought by the predecessor-in-interest of the petitioners, Sadiq Masih against the respondent in respect of the house in dispute as well as the copies of the judgment and decree, passed in the said suit, in favour of their predecessor-in-interest. The argument proceeds that since the earlier suit also related to the ownership and possession of the house in dispute, decision in the previous suit attracted the principle of res judicata qua the suit giving rise to the instant petition. It was, however, frankly conceded by learned counsel for the petitioners that the said three documents, relating to the previous suit, were not produced in evidence by the petitioners during the pendency of the suit out of which this petition has arisen. Having made this disclosure, he contended that it was the duty of the trial Court as well, as that of the higher Courts, which have dealt with the instant dispute earlier, to take judicial notice of the said documents and decided the issue of res judicata against the respondents.

3.We have gone-through the documents in question. Obviously, they could not be taken into consideration because they were not part of the evidence. In other words, they could not be relied upon for recording a finding on the issue relating to res judicata. The petitioners have been grossly negligent in the matter of presenting their case. After the ex parte decree was passed against them, they did not make application for setting aside the said decree. Instead, they decided to go in appeal. Pefore the learned appellate Court, they did not make application for permission to produce the said documents as additional evidence, by invoking the provisions of rule 27 of Order XIII of the Code of Civil Procedure. No such effort was made by them even at the stage of revision before the learned High Court. As indicated earlier, they had four years to produce evidence before the learned trial Court but they did not care to do so. They did not even bother to tender the said documents in evidence by making a short statement. Valuable right that accrued in favour of the respondent due to the repeated failures of the petitioners to present their case squarely. It will be, to say the least, unfair to deprive the respondent of the right so earned by him and to allow premium to the petitioners for their culpable

negligence. As rightly observed by the learned Judge in Chamber, the issue of res judicata was to be decided like any other issue and if there was no evidence in support of the plea of res judicata, raised by the petitioners, the issue could not be decided in their favour. We allowed lot of time to learned counsel for the petitioners to make out a prima facie case for grant of leave but, alas, he was unable to do so.

4. As stated earlier, the petitioners were highly negligent right from the stage of trial Court till this time, in substantiating their plea of res judicata by producing adequate and convincing evidence. It can hardly be denied that for the purpose of doing justice, the learned Additional District Judge could, of his own violation, order the production of the documents in question as additional evidence and also allow the respondents to produce evidence in rebuttal thereof; but case-law is also well-settled on the point that additional evidence should not be allowed to be produced to enable a party to fill up any lacuna in his case. This principle can more aptly be applied to the case of a person who has remained indolent, for years together, in the matter of producing oral or documentary evidence before the Trial Court. The petitioners' position in this regard was still worse at the stage of revision. We cannot, therefore, blame any of the Courts, which have dealt with this case earlier, for non-receipt of the said documents in evidence. The entire fault lies with the petitioners and so they must suffer the consequences thereof.

5. Upshot of the above discussion is that the petitioners have badly failed in making out a case for grant of leave to appeal against the judgment of the learned Single Judge. We, therefore, refuse the leave prayed for by the petitioners, and dismiss this petition.

A.A/J-1.47/S Petition dismissed.

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