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State of J. and K. and ors. Vs. Ghulam Mohammad Dar and ors.

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Court : Jammu and Kashmir

Decided On : Jul-31-1995

Reported in : AIR1996J& K31

Judge : A.M. Mir and; R.C. Gandhi, JJ.

Acts : Jammu and Kashmir Constitution - Section 104; ;Constitution of India - Article 226

Appeal No. : LPA (Writ) No. 46 of 1994

Appellant : State of J. and K. and ors.

Respondent : Ghulam Mohammad Dar and ors.

Advocate for Def. : M.I. Qadri and G.N. Naqash

Advocate for Pet/Ap. : S. Shukla, Govt. Adv.

Disposition : Appeal allowed

Judgement :

1. We have heard learned counsel for the Appellant and also perused the record placed in a sealed cover before us by the Registrar of the Court. He after holdingan enquiry has given a clear finding that counter-affidavit had been filed prior to the date of the impugned judgment. He has opined that the counter-affidavit in the matter stood filed before the Court (learned single Bench) on 7-7-

1993. It is also found that the same affidavit was placed on record with a CMP filed by learned counsel for the Appellant before that bench in terms of Sections 148 and 155 of the Code of Civil Procedure. This application was never disposed of.

2. We have ourselves examined the record placed before us. The counter seems to have been filed on 20-5-1993 and CMP No. 3051 / 93 was filed for consideration of the Court for condonation of delay. According to the Enquiry Officer (Registrar) the learned counsel appearing for the State seems to have kept this application with him up to 7-7-1993. The judgment appealed against, has been passed on 6-5-1994 (reported in AIR 1995 J & K 92). A perusal of the report and also the material placed on record shows that as on the date of the judgment, the affidavit was very much stood on the file of the Writ Petition.

3. In that view of the matter, finding ofthe learned single Bench so far as it relates tothe omission on the part of the State to file thecounter, seems to be factually incorrect. Thatground has been taken on top priority by Mr.Shukla, GA, appearing for the Appellant/State in the present appeal. (

4. M/s. M. I. Qadri and G. N. Naqash, appearing for the respondents, submit that the stand taken by the respondent/State in the Writ Petition was squarely reflected in the written arguments and therefore, even after assuming that they had filed the counter, the learned single Bench had taken a fullfledged view of the stand of the parties qua the subject-matter in hand. In their opinion, no prejudice is caused to the Appellant/State in case the counter-affidavit was not looked into.

5. We have considered the matter. We do find that the judgment of the learned single Bench is based upon incorrect preposition of facts. The Writ Court had to adjudicate upon the matter, on the strength of the pleadingsbefore that Court. We, are not in agreement with the plea that the omission on the part of the learned single Bench, to go through the counter-affidavit would not prejudice the Appellant/State. No Court can be oblivious of the pleadings that exist before it. The judgment has to be arrived at on the basis of pleadings and the support lend to such pleadings by way of proof. The finding arrived at by the learned single Bench in unequivocal terms, states that till the date of judgment i.e., 6-5-1994, no counter-affidavit had been filed. Not only that the learned single Judge has gone to

the extent of showing his displeasure for such omission. This shows that the counter has not been taken note of.

6. On the foregoing analogy, we consider it proper to dispose of this petition at this stage without admitting it. We, accept the appeal, set aside the judgment impugned and remand back the matter to the learned single Bench for passing appropriate orders after taking into account the counter-affidavit that finds place on the file and after hearing the parties. However, the writ petitioners before the learned single Bench have a right to file rejoinder if they so choose. They will be at liberty to file rejoinder to the counter within two weeks from today. We make a request to the learned single Bench to make efforts to dispose of the matter at his earliest.

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