

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 31.10.2011*

+ CM (M) No. 2011/2006 & CM No.15848/2006 (for stay)

JYOTI SARUP MITTAL ENGINEER &
CONTRACTORS

.... Petitioner

Through: Mr. K. Sunil, Advocate.

Versus

ACON CONSTRUCTION (INDIA) PVT. LTD. & ANR. Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1. The order impugned before this court is the order dated 09.10.2006 vide which the application filed by defendant No. 2 (Jyoti Sarup Mittal Engineer & Contractors) seeking transposition as plaintiff No. 2 (initially arrayed as defendant No. 2) had been dismissed.

2. Record shows that the present suit is a suit for recovery of Rs. 13,50,000/- filed by the plaintiff M/s. Acon Construction (India)

Pvt. Ltd. against two defendants; the first defendant is Lok
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Nirman Cooperative Group Housing Society Limited and second defendant is the present petitioner, namely, Jyoti Sarup Mittal Engineer & Contractors. Plaintiff is engaged in the business of construction and building material; defendant No. 1 was a registered society; defendant No. 1 had awarded a contract for construction of 93 flats on plot No. 105 Patparganj, I.P. Extension, Delhi at an estimated cost of Rs. 178 lacs to defendant No. 2. Defendant No. 2 with the consent of the plaintiff and under the guidance of their Architect i.e. M/s. Garg and Associates assigned the said work to the plaintiff; contention of the plaintiff is that he had completed this project and was in the preparation of the final bill when defendant No. 1 forcefully entered into the aforementioned plot and took the possession of the said flats constructed by the plaintiff. It has further been averred that the defendant No. 1 on or about 26.04.1999 certified that defendant No. 2 had completed the construction of 93 flats at a total cost of Rs. 2.40 crores. Plaintiff thereafter submitted his final bill to the defendants. Since this payment was not made, the present suit was filed.

3. Admittedly, there was an arbitration clause between the parties which had governed the agreement between the parties; matter had been referred to the sole Arbitrator; since the arbitration agreement was not signed, the Arbitrator had returned

the proceedings back for disposal by the Civil Court. An application under Order 1 Rule 10 of the Code of Civil Procedure (hereinafter referred to as 'the Code') had thereafter been filed by the defendant No. 2 seeking transposition as plaintiff No. 2; contention being that the interests of the plaintiff and defendant No. 2 were common and in these circumstances, to avoid multiplicity of litigation and in the interest of justice, he be permitted to be transposed as plaintiff No. 2. It is also on record that the plaintiff had not filed any opposition to the said application. In spite of service, none has appeared for the defendant No. 1 before this court.

4. Record shows that the plaintiff has set up his claim against the defendant No. 1 who in turn had awarded a sub-contract to the defendant No. 2. In this application, it has been contended by defendant No. 2/petitioner that the defendant No. 1 had in fact issued a certificate certifying that the plaintiff is an authorized sub-contractor of defendant No. 2 and the construction of 93 flats of the society have been completed at a cost of Rs. 2.40 crores; contention being that the interest of the plaintiff and the defendant No. 2 is the same. These facts and submissions are borne out from the record. Impugned order is accordingly set

aside; defendant No. 2 is transposed as plaintiff No. 2. This is in
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view of the fact that the record shows that the interest of plaintiff and the defendant No. 2 is common; cause of action is substantially the same; to avoid multiplicity of litigation, the aforementioned order has been passed.

5. It is also relevant to note that the plaintiff had not opposed this application. To support his submission that where the plaintiff does not oppose an application filed by the defendant for transposition as another plaintiff, the learned counsel for the petitioner has placed reliance upon the judgment of the Punjab and Haryana High Court reported in AIR 1979 Punjab & Haryana 10 titled as Dalbir Singh & Ors. vs. Lakhi Ram & Ors. as also on the judgment of the Patna High Court reported in AIR 1979 Patna 73 titled as Basudeb Narayan Singh & Ors. vs. Shesh Narayan Singh & Ors.

6. Perusal of this file also shows that the interim order staying the proceedings in the Trial Court had been vacated on 11.08.2008. Court has been informed that there is no progress before the Trial Court; there is no explanation for the same. Trial Court shall proceed to deal with the case on its merits and will endeavour to dispose of the case as expeditiously as possible. This court has further been informed that there is no date fixed before the Trial Court. The parties are directed to appear before the Trial

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Court on 08.11.2011.

With these directions, petition is disposed of.

INDERMEET KAUR, J

OCTOBER 31, 2011
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