
(2015) 08 BOM CK 0200
In the Bombay High Court
Case No : Second Appeal No. 46 of 2012

Costa Pinto Associates and Others	Vs	APPELLANT
Ramdeo Maurya and Associates		RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 30 Rule 1, Order 6 Rule 17
Evidence Act, 1872 — Section 103, 34

Citation : (2015) 5 ABR 727 : (2015) 6 ALLMR 780 : (2016) 1 MhLj 692

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : R.G. Ramani, for the Appellant; S.S. Kantak, Senior Advocate and Preetam Talaulikar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

C.V. Bhadang, J—By this appeal, the appellants/original defendants are challenging the judgment and decree passed by the learned Ad hoc District Judge, Margao, in Regular Civil Appeal No. 157/2010, on 07.05.2011. The appeal filed by the appellants challenging the judgment and decree dated 17.03.2007, passed by the learned Civil Judge Senior Division at Margao in Special Civil Suit No. 25/1997/III, has been dismissed, thereby confirming the decree for Rs. 2,58,976.70 alongwith interest at the rate of 12% per annum, passed in favour of the respondent/plaintiff.

2. The brief facts necessary for the disposal of the appeal may be stated thus:

"The respondent/plaintiff was planning to construct a residential cum commercial complex by name "The Royal Palms" in the property surveyed under Survey No. 398/1, in the village Benaulim, Taluka Salcete, Goa. The respondent as a R.C.C. Labour Contractor had entered into a contract with the appellants to undertake the construction of the said complex. Accordingly, an agreement was executed between the parties on 22.11.1994 (Exhibit-20). The appellants had also engaged the services of an Architect to design the scheme and prepare

architectural drawings. The services of a consulting Engineer were also engaged. The respondent accordingly, undertook the work and completed the same as per the plans and specifications supplied and to the satisfaction of the consulting Engineer and the Architect of the appellants. The respondent submitted the running account bills of the work undertaken, which were certified by the consulting Engineer and part payment was also made towards the running account bills. According to the respondent, the total amount payable under the running account bills amounted to Rs. 9,97,789.56/- out of which, the appellants had paid an amount totaling to Rs. 7,38,812.86/-. Thus, an amount of Rs. 2,58,976.70/- was in balance. As the appellants failed to pay the amount, a suit came to be filed for payment of the amount alongwith interest at the rate of 12% per annum."

3. The appellants filed Written Statement (Exhibit-8) and resisted the suit. It was contended that the appellants' client, who were purchaser's of the premises, required a time bound delivery of the premises and under the agreement between the appellants and the purchasers, it was agreed that appellant No. 1 would be penalised for every day of delay beyond the scheduled date of delivery. It was contended that Clause 12 of the agreement (Exhibit-20), specifically provided that in the event of failure to maintain the schedule of work, the respondent was liable to a penalty at the rate of 10% of the value of the "scheduled work delayed". It was contended that the technical and supervisory staff employed by the respondent were incompetent and they failed to carry out the preparatory work in a standard manner. It was contended that in order to meet the scheduled date, even the site Engineer and other personnel from time to time, assisted the respondent to carry out the preparatory work. It was contended that the respondent neither carried out the work as per the schedule agreed upon nor to the satisfaction of the consulting Engineer. The appellants had made timely payments to the respondent as per the running account bills submitted. It was next contended that on account of the sub standard quality of construction, a chajja at the ground floor level in Block S-21 caved in after about nine months of its construction. It was contended that in a meeting, to assess the situation, it was agreed that no balance would be released, till the cost of damage was worked out and deducted. It was contended that the amount of Rs. 7,45,926.45 was paid to the respondent. Thus, an amount of Rs. 22,350.48 was deducted as TDS Rs. 99,778.95 deducted towards penalties for delay and a sum of Rs. 30,000/- been deducted as the cost of chajja replacement, painting and waterproofing, apart from the retention amount. It was also contended that the appellant No. 1 made payment on behalf of the respondent to the material suppliers, which was actually to be provided by the respondent.

4. The learned trial Court framed the following issues:--

"(i) Whether the plaintiffs prove that the defendants owe him a principal amount of Rs. 2,58,976.70 ?

(ii) Whether the defendants prove that they do not owe any money to the

plaintiffs?

(iii) Whether the plaintiffs prove that the defendants are liable to pay interest at the rate of 22% from 13.03.1995 till the filing of the suit (i.e. the defendants owe him Rs. 1,15,380.63 as interest)?

(iv) What relief? What order?"

5. At the trial, Mr. Dhananjay Maurya alias Dhananjay Maurya Kuswaha, examined himself on behalf of the respondent while, Mr. Joseph Alfred D"Costa examined himself as DW-1 and Mr. Olavo Carvalho, the consulting Engineer as DW-2.

6. The learned trial Court found that admittedly, an agreement dated 22.11.1994 (Exhibit-20) was executed between the parties. It was also found that the running account bills, certified by the consulting Engineer (Exhibits 21 to 27) worked out to a total of Rs. 9,97,789.56/-. It was further found that the respondent in para 9 of the plaint had admitted that an amount of Rs. 7,38,812.86 was already paid by the appellant No. 1 to the respondent. The learned trial Court also noted that the appellants had admitted that, as per Exhibit-47, the total amount of the bills, as per final bill was Rs. 9,97,789.56. It was further found that although, the appellants had contended that they had paid a sum of Rs. 7,45,926.45, the respondent claimed that an amount of Rs. 7,38,812.86 was paid by the appellant No. 1.

7. On the basis of the admitted position, the learned trial Court went upon examining, whether the appellants were justified in not paying to the respondent, the balance of amount of Rs. 2,58,976.70 alongwith interest as claimed. The learned trial Court has noticed that as per the appellants' claim, they had deducted a sum of Rs. 1,02,456/- towards delay in completion of the work, Rs. 30,000/- towards chajja replacement, painting and waterproofing, Rs. 49,899/- by way of security and the sum of Rs. 20,000/- to Rs. 25,000/- as TDS. The learned trial Court has proceeded to examine each of the heads under which, the amount has been deducted/retained, to find out whether the appellants were justified in doing so. The learned trial Court has also found that the appellants had failed to prove that any material was supplied to the respondent and as such, no deduction towards the material, allegedly supplied could have been made. Lastly, it was found that if, any such claim for deduction towards damage to chajja/painting/waterproofing and towards material supplied were to be raised, the same should have been by way of set off/counter claim. The learned trial Court answered the issue No. 1 in the affirmative and issue No. 2 in the negative. On the issue as regards interest, it was found that the respondent were entitled to interest at the rate of 12% per annum, from the date of the suit i.e. 29.01.1997 till realisation. Feeling aggrieved the appellants, challenged the same before the learned District Judge.

8. The first appellate Court framed the following points for determination:

"1. Whether the appellants have proved before the trial Court that they are entitled to retain/withhold a sum of Rs. 1,02,456.00 towards penalties for delay in completion of works on the part of the plaintiff?

2. Whether the appellants have proved before the trial Court that they are entitled to retain/withhold a sum of Rs. 49,899.00 as the retention amount?

3. Whether the appellants have proved before the trial Court that they are entitled to retain/withhold a sum of Rs. 30,000/- as cost of chajja replacement, painting and waterproofing?

4. Whether the appellants have proved before the trial Court that they are entitled to withhold amount towards the payments made by the defendants to material suppliers on behalf of the plaintiff?

5. Whether the rate of interest of 12% per annum awarded by the learned trial Judge from the date of the suit till the date of realisation needs modification?"

9. The first appellate Court answered point Nos. 1 to 4 in the negative, while the point No. 5 as regards interest in the affirmative. The impugned judgment passed by the learned trial Court has been modified, to the extent of interest. Thus, the first appellate Court decreed the suit with interest at the rate of 6% per annum, from the date of the suit i.e. 29.01.1997, till the date of the judgment and decree i.e. 17.03.2007 and thereafter, at the rate of 12% per annum till realisation. The interest pendente lite was reduced to 6% per annum, on the ground that the suit remained pending for ten years, when PW-1 was absent for three consecutive years and another four years elapsed, when the case was adjourned sine die. The first appellate Court found it not justified to burden the appellants with interest for no fault of theirs.

10. Ordinarily, this would have been the end of narration of facts, but for a circumstance which surfaced during the pendency of the appeal and has taken precedence over rest of the issues on merits. It so happened that the suit was filed in the name of M/s. Ramdeo Maurya and Associates, a proprietary concern, through the sole proprietor "Mr. Ramdeo Anganu Maurya". Ramdeo Anganu Maurya is the father of Dhananjay R. Kushwaha. As noticed earlier, the suit was filed on 29.01.1997, while Ramdeo Anganu Maurya died during the pendency of the suit i.e. on 14.09.2004. It needs to be mentioned that prior to that, Dhananjay R. Kushwaha had filed an affidavit in lieu of evidence (Exhibit-19) on 02.11.2002. However, the affiant therein was shown as Ramdeo Anganu Maurya. Dhananjay R. Kushwaha accordingly, entered into the witness box and was cross examined. None of the parties noticed or pointed out to the Court that the name of the affiant in the affidavit (Exhibit-19) is shown as Ramdeo Anganu Maurya, though the person who had sworn the affidavit and had entered the witness box and was also cross examined was Dhananjay R. Kushwaha, son of Ramdeo Anganu Maurya.

11. The suit was eventually decreed. Even in the appeal, none of the parties

noticed this aspect, nor it was brought to the notice of the first appellate Court. In the second appeal, when the respondent was shown as represented by Ramdeo Anganu Maurya (as was done all along in the Courts below) and when, Ramdeo Anganu Maurya was sought to be served, as per the Bailiff report, it transpired that Ramdeo Anganu Maurya had died on 14.09.2004. In that view of the matter, two separate civil applications came to be filed, one each by respondent and the appellants in the appeal. Civil Application No. 743/2012 is filed by the appellants, for bringing the names of the legal representatives of Ramdeo Anganu Maurya, which included Dhananjay R. Kushwaha, on record.

Civil Application (Stamp) No. 31/2014 is filed by the respondent under Order 6, Rule 17 and Order 1 Rule 10 of the Code of Civil Procedure (C.P.C., for short), to amend the cause title of the plaint and verification of the plaint as under:

"In the cause title of the plaint: Substitute name "Mr. Ramdeo Anganu Maurya" with the name of "Dhananjay R. Kushwaha" and "SF4, Gramilo Apartments, Taleigao, Caranzalem, Goa" with "F-9, Karim Mansion Building, Behind Pharmacy College, Panaji, Goa".

In the verification clause of the plaint: Substitute name "Mr. Ramdeo Anganu Maurya" with the name of "Dhananjay R. Kushwaha" and "SF4, Gramilo Apartments, Taleigao, Caranzalem, Goa" with "F-9, Karim Mansion Building, Behind Pharmacy College, Panaji, Goa".

12. The appellants have filed a reply opposing the same. It is contended that there are misrepresentations and suppression of material facts done by Dhananjay R. Kushwaha, which has the effect of playing fraud on the Court. It is contended that the suit was filed in the name of M/s. Ramdeo Maurya and Associates, a proprietary concern through proprietor Mr. Ramdeo Anganu Maurya. The affidavit in evidence also showed the name of the affiant as Ramdeo Anganu Maurya, when it was in fact, signed by Dhananjay R. Kushwaha. Dhananjay R. Kushwaha entered the witness box impersonating Ramdeo Anganu Maurya on 02.11.2002, 13.02.2003, 12.04.2005 and 01.08.2006. Thus, at the stage of second appeal, the respondent cannot seek amendment of the plaint, more so, in a second appeal filed by the defendants. It was contended that the suit is liable to be dismissed, as the suit stood abated, since the sole proprietor died on 14.09.2004, without bringing the legal representatives on record. I would revert to this aspect a little later.

13. The second appeal was originally filed on the following substantial questions of law:

"1. When the burden of proof under Section 103 of the Indian Evidence Act, 1872 lay on the respondents/plaintiffs to prove that a sum of Rs. 2,58,976.70 as on 13.03.1995 was due to the respondents from the appellants/defendants under the agreement dated 22.11.1994, Exhibit 20 colly whereby the respondents were engaged as R.C.C. Labour Contractor to carry out and execute the various items of work as described in the agreement as per the terms and conditions therein,

the learned Courts below were legally right in proceeding to decide the issues as if the burden lay on the appellants to prove that they did not owe the sum of Rs. 2,58,970.70 to the respondents?

2. Whether the findings of the learned Courts below are perverse being based on non-considering and/or improper consideration of the agreement dated 21.11.1994, Exhibit-20 colly, appellants' statement of account, Exhibit-47 not controverted by the respondents, appellants' letter dated 01.12.1994, Exhibit-35 not objected to by the respondent, appellants' letters dated 15.01.1996, Exhibit-43 and 10.12.1996, Exhibit 44 and the replies of the consulting Engineer dated 18.01.1996, Exhibit-52/C and 16.12.1996, Exhibit-45, running account bills, Exhibit-21/C and Exhibit 22/C to 27/C and oral evidence especially of the consulting Engineer DW-2 on record?

3. Considering the pleadings of the respondents/plaintiffs, admissions made by the respondents' sole witness PW-1, Ramdeo A. Maurya in his evidence and in the absence of production in evidence of any statement of account by the respondents which would have been relevant piece of evidence under Section 34 of the Indian Evidence Act, 1872, the learned Courts below were legally right in holding that the respondents had proved that the appellants owed them a sum of Rs. 2,58,976.70 ?

4. Whether the learned lower appellate Court after finding that the appellants could not be held liable to pay interest at the rate of 12% per annum and receding the said rate to 6% per annum for the period from the date of the suit i.e. 17.03.2007 could hold them liable to the rate of 12% per annum from the date of the trial Court's decree till its final realisation?"

14. According to the appellants, the following additional substantial questions of law arise in the appeal:

"1. Whether the suit filed by "M/s. Ramdeo Maurya & Associates" represented by its sole proprietor Mr. Ramdeo Anganu Maurya was not maintainable and assuming that the suit is taken to have been filed by Mr. Ramdeo Anganu Maurya as its sole proprietor, the same abated on 14.12.2004 as no legal representatives of the said sole proprietor were brought on record upon his death on 14.09.2004 and therefore the decree dated 17.03.2007 passed by the trial Court and modified by the decree dated 07.05.2011 by the lower appellate Court is null and void?

2. Whether the suit filed by "M/s. Ramdeo Maurya & Associates" represented by its sole proprietor Mr. Ramdeo Anganu Maurya as the plaintiff abated on the extinguishment of the said firm upon the death of its sole proprietor Mr. Ramdeo Anganu Maurya on 14.09.2004 and no legal representatives of the said sole proprietor having been brought on record?

3. Whether the decree dated 17.03.2007 passed by the trial Court and modified by the decree dated 07.05.2011 by the lower appellate Court is vitiated by fraud

on account of the evidence of the plaintiff's sole witness who impersonated as Mr. Ramdeo Anganu Maurya in witness box before and after 14.09.2004 (i.e. the date of his death) and is consequently based on false evidence and also on account of the appeal being defended by concealment before the lower appellate Court by someone as though the plaintiff firm was existing?"

15. I have heard Shri Ramani, the learned Counsel for the appellants and Shri Kantak, the learned Senior Counsel for the respondent, at length. By consent of the parties, the Civil Application No. 743/2012 and Civil Application (Stamp) No. 31/2014 are heard alongwith the second appeal, and the same are being disposed of by separate orders.

16. On hearing the learned Counsel for the parties, I find that the following substantial questions of law arise in the second appeal:--

"1. What is the effect of the suit being filed in the name of "M/s. Ramdeo Maurya and Associates", represented by its sole proprietor, Mr. Ramdeo Anganu Maurya, when the plaint was signed and verified by Dhananjay R. Kushwaha?

2. Whether the impugned judgment and decree would be vitiated, on account of any fraud/impersonation by Dhananjay R. Kushwaha?

3. Whether the first appellate Court erred in placing burden on the appellants to prove that they did not owe the amount as claimed, under Section 103 of the Indian Evidence Act, when the burden of proof to establish the amount due and payable, lay on the respondent/plaintiff?

4. Whether the findings recorded by the Courts below are perverse, being based on incorrect appreciation of agreement (Exhibit-20) and the evidence of consulting Engineer (DW-2)?

5. Whether the first appellate Court was justified in granting interest at the rate of 12% per annum, from the date of decree till realisation, in the face of reduction of the rate of interest to 6% per annum, for the period during the pendency of the suit?"

17. The parties were specifically put to notice on the aforesaid substantial questions and have been heard on the same, and the appeal is accordingly, being disposed of.

18. It is submitted by Shri Ramani, the learned Counsel for the appellants that the institution of the suit itself was illegal, when the suit was instituted in the name of M/s. Ramdeo Maurya and Associates, through the sole proprietor, Mr. Ramdeo Anganu Maurya, when the plaint was signed and verified by Dhananjay R. Kushwaha. It is submitted that the said infirmity persisted when, Dhananjay R. Kushwaha filed affidavit in evidence (Exhibit-19), where the name of the affiant was shown as Ramdeo Anganu Maurya. It is further contended that Dhananjay R. Kushwaha entered into the witness box and impersonated as Ramdeo Anganu Maurya. It is submitted that the suit could not have been

continued after the death of Ramdeo Anganu Maurya on 14.09.2004, without bringing his legal representatives on record. It is submitted that at the stage of second appeal, the respondent cannot be permitted to correct the cause title and the affirmation and that too in an appeal filed by the appellants/defendants. It is submitted that the impugned judgment and decree is vitiated on account of fraud/impersonation by Dhananjay R. Kushwaha.

19. Insofar as merits are concerned, it is contended that the first appellate Court, wrongly placed burden on the appellants to prove that they are entitled to retain/withhold the amount of penalty towards delay in completion of the work amounting to Rs. 1,02,456/-, Rs. 30,000/- towards cost of chajja replacement, painting and waterproofing, Rs. 49,899/- towards retention amount and towards the payment made by the appellants to the material suppliers on behalf of the respondent. It is submitted that the first appellate Court was patently in error in placing such burden, wrongly on the appellants, which would vitiate the impugned judgment. The learned Counsel would submit that even otherwise, the finding by the Courts below would be perverse, as they are based on incorrect appreciation of the terms of the agreement (Exhibit-20) and the evidence of the consulting Engineer (DW-2) and other documentary evidence on record. It is submitted that there was no justification to grant interest at the rate of 12% per annum, from the date of decree till its realisation. It is submitted that when, the suit is to be brought by a person, as a proprietor of a proprietorship concern, it should be in the name of the proprietor, who should appear as plaintiff, in the capacity of the proprietor of the firm. The learned Counsel has placed reliance on the provisions of Order 30, Rule 1 of the C.P.C. and judgment of this Court, in the case of Samrathrai Khetsidas Vs. Kasturbhai Jagabhai, (1930) 32 BOMLR 212 , in this regard.

20. On the contrary, it is submitted by Shri Kantak, the learned Senior Counsel for the respondent that under Order 30, Rule 1 of the C.P.C., the suit can be brought in the name of the firm, through the proprietor. The learned Senior Counsel has relied upon the decision of the Hon"ble Supreme Court, in the case of Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, AIR 1969 SC 1267 : (1969) 1 SCC 869 : (1970) 1 SCR 22 , in order to submit that in case, where there is misdescription of the parties, the same can be allowed to be corrected at any stage of the proceedings. The learned Senior Counsel would submit that the appellants were all along aware that the agreement (Exhibit-20) was entered into by Dhananjay R. Kushwaha. There were no dealings between the appellants and Ramdeo Anganu Maurya, the father of Dhananjay R. Kushwaha. The appellants were all along aware that it is Dhananjay R. Kushwaha, (who was a party to the agreement), had filed the suit and had entered into the witness box. It is submitted that none of the parties realised that in the cause title of the plaint, the proprietary concern is shown to be represented by Ramdeo Anganu Maurya. The learned Senior Counsel would submit that the plaint is signed and verified by Dhananjay R. Kushwaha. The affidavit in evidence (Exhibit-19) is also signed and affirmed by Dhananjay R.

Kushwaha and as such, it was a matter of pure mistake of fact, which was bonafide in nature. The learned Senior Counsel was at pains to point out that Dhananjay R. Kushwaha (PW-1) had no reasons to practice such impersonation. It is neither alleged nor shown that Dhananjay R. Kushwaha (PW-1) has derived any benefit, out of such impersonation or the appellants are prejudiced thereby. It is submitted that although, an unfortunate mistake of fact persisted throughout the trial and during the pendency of the first appeal, the same was noticed in the second appeal and there is no reason, not to allow the correction of such a mistake. The learned Senior Counsel has relied upon the decision of the Hon'ble Supreme Court in the case of, Bakshish Singh v. Prithi Pal Singh and Others, reported in 1995 Supp(3) SCC 577 , in order to submit that at the stage of second appeal, the plaintiff/respondent can be permitted to amend the plaint. Reliance is then placed on a Division Bench decision of this Court in the case of, All India Reporter Ltd. and Another Vs. Ramchandra Dhondo Datar, AIR 1961 Bom 292 : (1960) 62 BOMLR 251 : (1961) ILR (Bom) 257 , to submit that the defect in presenting and signing the plaint can be cured at any stage. He submitted that the appellants are trying to take undue advantage of a bonafide mistake of fact, as the appellants have no case on merits.

21. Insofar as merits are concerned, it is submitted that para 10 of the written statement would show that the appellants had never disputed the amount of Rs. 7,45,926.45 as per the running bills. It was also not in dispute that an amount of Rs. 2,58,976.70 is due and outstanding. Thus, the first appellate Court has rightly proceeded to consider, whether the appellants were justified in withholding/retaining the amount. It is submitted that in view of the admission, the onus stood shifted to the appellants to show justification to retain/withhold the amount. The learned Senior Counsel has taken me through the judgment of the trial Court and also the appellate Court, in order to submit that the Courts below have rightly considered the oral and documentary evidence on record and decreed the suit, which does not require any interference.

22. Point Nos. 1 and 2: It is not in dispute that Dhananjay R. Kushwaha (PW-1) is the son of Ramdeo Anganu Maurya. According to the respondent, the sole proprietorship concern, M/s. Ramdeo Maurya and Associates was started by Dhananjay R. Kushwaha, somewhere in the year 1991 or thereabout. Dhananjay R. Kushwaha had opened a current account with Indian Bank at Panaji Branch, in the name of M/s. Ramdeo Maurya and Associates, with its sole proprietor, Dhananjay R. Kushwaha. A copy of the letter dated 08.10.2012 from the Chief Manager, Indian Bank, Panaji is produced to show that the proprietorship concern is having an account No. 424422320 since 1991 till 07.02.2012. According to the respondent, the proprietorship concern was named after the father of Dhananjay R. Kushwaha. Further, according to the respondent, Ramdeo Anganu Maurya is not concerned with the business of Dhananjay R. Kushwaha. It was Dhananjay R. Kushwaha, who had all along dealt with the appellants and Mr. Ramdeo Anganu Maurya had no concern with the agreement (Exhibit-20) between the appellants and the respondent in this case. Thus, it is not in dispute that the agreement

between the appellants and the respondent was with Dhananjay R. Kushwaha (PW-1). It is true that there was a misdescription of the proprietor of the firm, when the suit came to be filed when the proprietor was shown as Ramdeo Anganu Maurya in place of Dhananjay R. Kushwaha. However, the fact remains that the plaint is signed and verified by Dhananjay R. Kushwaha. The affidavit is also sworn by Dhananjay R. Kushwaha and it is Dhananjay R. Kushwaha, who had entered into the witness box and was cross examined. Had it been a case, that the appellants had entered into the agreement with Ramdeo Anganu Maurya and the suit was prosecuted by Dhananjay R. Kushwaha, this would have been pointed out and brought on record, through cross examination of Dhananjay R. Kushwaha. It would be significant to note that, not even the appellants, noticed or pointed out to the Courts below, at any time that the plaintiff's proprietorship concern is shown to be represented by Ramdeo Anganu Maurya. It was also not objected to or brought to the notice of the trial Court, during the cross examination of Dhananjay R. Kushwaha that Dhananjay R. Kushwaha (PW-1) was allegedly impersonating Ramdeo Anganu Maurya. From the conduct of the proceedings before the trial Court, as also before the first appellate Court, it is clear that, not even the appellants had any time objected or pointed out that the plaint is erroneously signed and verified and there is impersonation by Dhananjay R. Kushwaha (PW-1). It was only in the second appeal, when the Bailiff Report dated 10.05.2012 showed that Ramdeo Anganu Maurya died on 14.09.2004, the appellants claimed that the plaint was not properly instituted and verified and/or the suit has abated for want of legal representatives of Ramdeo Anganu Maurya and that fraud has been practised on the Courts.

23. I have perused the record of the trial Court, as also of the first appellate Court. Before the first appellate Court, the Vakalatnama on behalf of the present respondent is signed by Dhananjay R. Kushwaha, as proprietor of M/s. Ramdeo Maurya and Associates. I have given my anxious consideration to the rival submissions made and I find that although, the respondent would have done well to act with greater diligence, it was only on account of inadvertence, and a bonafide mistake by which the respondent/plaintiff firm, was shown to be represented by proprietor Ramdeo Anganu Maurya and even, the affidavit showed the name of the affiant as Ramdeo Anganu Maurya. It may not be out of place to mention here that impersonation/fraud would essentially require an element of intention to defraud or practise impersonation, so as to cause wrongful loss to the adversely and/or wrongfully gain to the person, practising such impersonation. Such an aspect is totally lacking in this case. To my mind, it is rightly submitted on behalf of the respondent, that Dhananjay R. Kushwaha (PW-1) did not stand to gain, while describing the proprietorship concern through proprietor as Ramdeo Anganu Maurya or by showing the name of the affiant as Ramdeo Anganu Maurya. Secondly, I also find that because the appellants has entered into an agreement with Dhananjay R. Kushwaha (PW-1) and had all the dealings with respect to the agreement with Dhananjay R. Kushwaha (PW-1), the irregularity was never noticed by the appellants also. Thirdly, the appellants have

neither claimed nor demonstrated any prejudice being caused to them, by virtue of such alleged impersonation. In my considered view, this was purely a case of inadvertent mistake and misdescription of the proprietor and the same cannot be blown out of proportion to say that it amounts to fraud/impersonation, so as to vitiate the impugned judgment and decree.

24. In the case of Samrathrai Khetsidas (*supra*), the learned Single Judge of this Court held in relation to Order 30, Rule 1 of the C.P.C. that a firm consisting of a sole proprietor cannot bring a suit in the name of the firm, but, must sue in the name of the proprietor.

25. In the case of Jai Jai Ram Manohar Lal (*supra*), the plaintiff, who was the Manager of a joint family and was carrying on its business, brought a suit in the business name and when objection was taken that the firm being an unregistered firm was incompetent to sue, had applied for amendment of the suit stating that he himself had filed the action in the business name. It was held that the application could not be refused on the ground that there was no averment therein that the misdescription was on account of bonafide mistake. It has been held that there is no rule that unless, in an application for amendment of the plaint, it is expressly averred that the error, omission or misdescription is due to a bonafide mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations. The description of the plaintiff by a firm name in a case, where the Code of Civil Procedure did not permit a suit to be brought in the firm name should properly be considered, as a case of description of the individual partners of the business and as such a misdescription, which in law can be corrected. It should not be considered to amount to a description of a non-existent person. It has been further held that a party cannot be refused just relief, merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court would grant such leave to amend the pleading, unless it is satisfied that the party applying would be acting malafide or that by his blunder, he had caused injury to his opponent, which may not be compensated for, by an order of costs. It has been further held that however negligent/careless may have been the first omission and however late is the proposed amendment, the amendment may be allowed, if it can be made without injustice to the other side (see para 5 of the judgment). The Hon^{ble} Supreme Court has considered the decision of this Court in the case of Amulakchand Mewaram Vs. Babulal Kanlal Taliwala, AIR 1933 Bom 304 : (1933) 35 BOMLR 569 : 147 Ind. Cas. 786 , in which Beaumont C.J. set out the principles as under:

"..... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, *prima facie*, there ought to be an amendment because the

general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs."

26. In the case of Bakshish Singh (supra), in a second appeal filed by the defendants, the original plaintiff had sought amendment of the plaint. On facts it was held that the amendment application ought to have been allowed.

27. In the case of, All India Reporter Ltd. and Another (supra), it was held that the defect in presenting, signing and verification of the plaint are not fatal and can be cured by amendment, even after limitation. It has been held that the date of institution of suit is not changed thereby.

28. Albeit, these are the general principles which would apply in context of the individual fact. As noticed earlier, the present case is an instance, of a bonafide mistake, arising out of inadvertence and cannot partake of the nature of fraud/impersonation. In the result, I find that the impugned judgment and decree cannot be vitiated on any such ground and consequently, point Nos. 1 and 2 are answered in the negative.

29. Point Nos. 3 and 4: Coming to the merits, let us now examine, whether the first appellate Court had wrongfully cast a burden and in fact, a negative burden on the appellants to show that they did not owe an amount of Rs. 2,58,976.70 to the respondent. It is true that perusal of points 1 to 4 framed by the learned appellate Court, would indicate that the first appellate Court expects the appellants to prove the justification of retaining/withholding of the amount, under various heads. However, that has to be examined and appreciated in the context of the rival pleadings, as also the evidence led and also the issues framed by the learned trial Court. As noticed earlier, the trial Court had framed issue No. 1, by which the burden was rightly cast on the respondent to prove that the appellants owe the principle amount of Rs. 2,58,976.70. I have carefully gone through the pleadings and the reasons articulated by the trial Court. In para 10 of the written statement, the appellants have stated thus:

"With reference to paragraph 9 of the plaint, the defendants deny the contents thereof and state that they had paid a sum of Rs. 7,45,926.45 as on 13.03.1995 after deducting a sum of Rs. 1,02,456/- towards penalties for delay in completion of works, and retaining a sum of Rs. 49,899/- towards retention. Further a sum of Rs. 30,000/- was deducted as cost of chajja replacement, painting and waterproofing. Besides the defendants state that they made payments to material suppliers, such as shuttering plywood suppliers and wood suppliers on behalf of the plaintiff."

30. It can thus, be seen that the appellants while stating that they had paid a sum of Rs. 7,45,946.45 as on 13.03.1995, had claimed that they had deducted a sum of Rs. 1,02,456/-towards penalties in delay of completion of works and further retain Rs. 49,899/- as retention money (by way of security) and further, a sum of Rs. 30,000/- as cost of chajja replacement, repainting and

waterproofing. The appellants also claimed that they had made payment to the material suppliers on behalf of the respondent. To my mind, it has been rightly submitted on behalf of the respondent that once the amount of Rs. 9,97,789.56 comprised in the various running bills as certified by the consulting Engineer was not disputed and the appellants had also paid an amount of Rs. 7,38,812.86 and retained a certain amount for various reasons/heads, it was the appellants, who should demonstrate that they were justified in doing so in terms of the agreement (Exhibit-20). The learned trial Court has extensively dealt with the evidence of DW-1 and DW-2, in order to find that the appellants had admitted that the contractual work was completed and the running account bills (Exhibits 21 to 27) were certified by the consulting Engineer. The trial Court also found that there was a stipulation of penalty of 10% of the amount, which was in the wake of a similar agreement between the appellants and the purchasers, where the appellants were required to give time bound delivery of the premises. The learned trial Court has also noticed the evidence of DW-1 in which, DW-1 had admitted that no penalties were paid to the prospective purchasers, in respect of delayed delivery of the premises referred to Annexure "A" of the agreement (Exhibit-20). The learned trial Court has then referred to clause 12 of the agreement (Exhibit-20), which reads as under:

"12. Notwithstanding any thing to the contrary in this Contract, time is essence of this Contract. The R.C.C. Labour Contractor shall proceed to execute the works with proper speed, as per the Schedule of Works as decided by the Consultant Engineer, and modified by him from time to time, which copy is attached to this agreement as part thereof. If any item of work is delayed beyond the period as listed in the Schedule of Works, a fine of 10% of the value of that item of work will be levied, and the R.C.C. Labour Contractor can not claim delay by virtue of any earlier items of work which was delayed and fine levied thereof, and which item of work has caused a delay in the present work. However, if the R.C.C. Labour Contractor is able to come back into the Schedule and maintain the original times, the penalties deducted shall be refunded. The R.C.C. Labour Contractor shall not claim delays by virtue of not having received drawings on time, or not having understood details etc., except by the way of delayed supply of cement, sand metal, steel, and such building materials, provided that he has given notice of this requirements a minimum of ten days in advance of actual use."

31. It has been found, and, to my mind rightly so, that the penalty amount of 10% was on the value of the particular item of the work, which is delayed. There was a further stipulation under which, no penalty would have been leviable in case, R.C.C. Labour Contractor was able to tune in with the next stage of the schedule. Thus, the intention was clear that if, the delay in completion of the premises had no cascading effect on further stage of construction, no penalty was payable and the penalty deducted was agreed to be refunded. DW-1 has further admitted that there was no correspondence made with the respondent regarding penalty in respect of the item of work delayed and the amount of

penalty. The learned trial Court after considering the evidence at length, has concluded in para 10 that the appellants were not liable to deduct any amount towards penalty. Even so far as the retaining amount is concerned, it was admitted by DW-1 that the agreement (Exhibit-20) did not contain any stipulation for deducting the retention amount, by way of security. It was submitted by the learned Counsel for the appellants that there is a general custom/practice to retain such amount by way of security, should any defect be found or subsequently noticed in the construction. However, in the absence, of any term/stipulation in the agreement (Exhibit-20), the finding in this regard that the appellants were not justified in retaining the amount of Rs. 49,899/- cannot be said to be illegal. Even so far as the deduction towards chajja replacement, painting and waterproofing is concerned, admittedly, the chajja caved in after nine months of casting of the same and there is nothing on record to show that it collapsed on account of any defect in the casting/construction. The trial Court has also found that DW-1 has not given the details of the said collapse and further, that the agreement (Exhibit-20) did not stipulate any clause or warranty of the work done. Even so far as the claim that the appellants had paid the material suppliers, on behalf of the respondent, it has been found on the basis of evidence of DW-1, in which DW-1 has admitted that he has no documents to prove this aspect.

32. Coming to the judgment of the learned first appellate Court, although the points framed would indicate that the appellate Court expected the appellants to prove the jurisdiction for retention/withholding of various amounts, it has to be considered in the context of the rival pleadings. The appellants had not disputed the amount of Rs. 2,58,976.70/- been retained/withhold under various heads. If that be so, it can justifiably be said that the onus stood shifted on the appellants to prove their justification to withhold/retain the amount. On a careful perusal of the impugned judgments by the Courts below, I do not find that any exception can be taken to the finding about the amount of Rs. 2,58,976.70 being due and payable to the respondent. Consequently, the issue Nos. 3 and 4 are answered in the negative.

33. Point No. 5: The trial Court had granted interest at the rate of 12% per annum, from the date of filing of the suit till realisation. The first appellate Court in its discretion reduced this rate at 6% per annum, for the period during which the suit was pending. This was on a reasoning that there were circumstances, which indicated that the suit was not prosecuted with diligence. The first appellate Court was of the opinion that for such a lapse, on the part of the respondent/plaintiff, the appellant could not be burdened. Such a consideration, obviously would not apply, after the suit is decided. In that view of the matter, I find that interest granted from the date of decree till realisation, cannot be reduced, merely on the ground that the interest pendente lite was reduced to 6% per annum. Consequently, the point is answered in the negative.

34. In the face of the findings as above, the appeal is without any merit and the

same is dismissed, with no order as to costs.