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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 504 OF 2024
WITH
INTERIM APPLICATION NO. 11486 OF 2024
IN
SECOND APPEAL NO. 504 OF 2024**

Mohanlal Parshuram Pinjani since deceased ... Appellants/Applicants
through legal heirs 1A. Smt Godavari Pinjari
and Ors

vs.

Shashikant Rajaram Bhogate since deceased
through legal heirs 1A. Smt Shubhangi
Shashikant Bhogate and Ors ... Respondents

Mr. Suneel Mogre for Appellants.

CORAM : GAURI GODSE, J.

DATED : 4th OCTOBER 2024

ORDER:

1. Heard learned counsel for the appellants. Second appeal is admitted on the following substantial questions of law which are formulated in the appeal memo in ground nos. A, B and C:

A. The Appellate Court has failed to appreciate and follow the law laid down by the Hon'ble Supreme Court of India in the case of Vidhyadhar V/s. Manikrao and Others, that

"Where a party to the Suit does not appeared in the witness-box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case put up by him is not correct as has been held in series of decisions passed by various High Courts and Privy Council".

The Appellate Court has totally failed and overlooked to appreciate the fact that:-

(i). Defendant No.1 A to 1E, filed pursish at Exhibit -259, that said Defendant do not want to adduce oral evidence.

(ii). Defendant No.2, filed pursish at Exhibit - 260, that said Defendant do not want to adduce oral evidence, and

(iii). Defendant No.3, for himself and on behalf of Defendant No. 4 A to 4G, as Power of Attorney Holder, filed pursish at Exhibit- 262, that said Defendants do not want to adduce oral evidence.

B. The Appellate Court in Para - 24, it has been recorded as under: -

"So, according to the Respondent No. 1 and 2's Ld. Counsel, in view the citation Vidhyadhar V/s. Manikrao, AIR

1999 SC 1441, adverse inference has to be drawn. There is a substance in the argument of respondents' Ld. Counsel up to certain extent. But whether non examination of the defendant will go to the route of the matter, needs to be seen. From the record it reveals that, admittedly plaintiff No. 2 has entered into agreement to sale ex.173 with defendant no.1 only. If the pleading of the plaintiff is taken into consideration it reveals himself is admitting the fact that, defendant no.1 and 2 are the owners of the suit property".

C. The Appellate Court has failed to appreciate and follow the law laid down by the Hon'ble Supreme Court of India in the case of Chanda Rani (Smt.) (Dead) by LRs V/s. Kamal Rani (Smt.) (Dead) by LRS- (1993) 1 SCC 519) "in the case of immovable property there is no presumption as to the time being the essence of the contract. Even if it is not of the essence of contract the Court may infer that it is to be performed in a reasonable time if the conditions are evident:

1. From the express terms of the contract.
2. From the nature of the property; and
3. From the surrounding circumstances, for example: the object of making the contract."

2. In addition to Court notice, the learned advocate for appellants to serve the respondents, by private notice and file affidavit of service.
3. Call for records and proceedings.
4. Printing is dispensed with.
5. Learned advocate for the appellants shall file private paper-book within a period of one year from today.

(GAURI GODSE, J.)