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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.887 OF 2022

Krishna Madhav Wankhede

....PETITIONER

V/s.

Usha Atmaram Sakpal and Anr.

.....RESPONDENTS

Mr. Rajesh Datar i/by Mr. Akshay J. Kandarkar, Advocate for the Petitioner.

Mr. Rafiq Khan, Advocate for the Respondent No.1.

Mr. Ajay Patil, Advocate for the Respondent No.2.

CORAM : NITIN W. SAMBRE, J.

DATE: MARCH 22, 2022.

P.C.:

1) Considered pleadings in paragraph 6 of the writ petition which reads thus :-

“6. The said application below exhibit – 172 filed by the Petitioner was contested by Respondent No.1 by filing reply below exhibit – 174 where by respondent no. 1 contended that there was no material produced in support of the case of the Petitioner and

that since the Petitioner had affirmed the affidavit before Notary at Ulhasnagar it showed that the Petitioner was able to travel and move around easily. It was stated by Respondent No. 1 that the Petitioner had attended Notary Public for swearing the Affidavit located on the first floor of Civil Court building at Ulhasnagar. The Petitioner states that as a matter of fact the Petitioner had affirmed the Affidavit in the office of the said Notary Public Shri D.C. Shukla which is located on the ground floor and it is therefore false to suggest that the Petitioner was able to attend the Court since the Petitioner attended the Notary Public on the First Floor of the Court building. It was stated that recording of evidence by the Court Commissioner was not permissible as it was necessary to observe behavior and demeanor of the Petitioner. It was also contended that in view of rejection of application below exhibit-165 filed by Respondent No. 2, the Application below exhibit – 172 filed by Petitioner was barred by principle of res judicata. A true copy of reply filed by Respondent No. 1 below Exhibit – 174 is annexed hereto and marked as “**EXHIBIT-F**” to this Writ Petition. The Petitioner states that by order dated 30th September, 2021 the learned Civil Judge, Junior Division, Ulhasnagar rejected the application below exhibit-172 filed by the Petitioner on the ground that the Petitioner had not produced any documentary evidence or medical evidence in support of his case. A true copy of order dated 30th September, 2021 passed below

Exhibit – 172 is annexed hereto and marked as **“EXHIBIT-G”** to this Writ Petition.”

2. Fact that Respondent – Defendant has produced medical certificate dated 29th November 2018 of the Petitioner, which is not dealt with by the Court below while passing the order impugned. In my opinion, the petition needs to be allowed. Order impugned dated September 30, 2021 is quashed and set aside. Application Exh.172 stands restored to the file. The parties are at liberty to file additional affidavit, documentary evidence and pleadings, if any, in support of the claim. The trial Court shall decide the said application afresh without being influenced by the findings recorded by this Court. Petition stands partly allowed.

[NITIN W. SAMBRE, J.]