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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5149 OF 2022**

Tirupati Enterprises Petitioner.

V/s

Sangli, Miraj, Kupwad
City Corporation, Sangli Respondent.

Mr. Kuldeep U. Nikam for the Petitioner.

CORAM: NITIN W. SAMBRE, J.

DATE: APRIL 29, 2022

P.C.:-

1] Heard.

2] The order impugned is dated 2nd April, 2019 passed by Civil Judge, Senior Division, Sangli before whom decree passed in Special Civil Suit No.135 of 1997 was moved for execution

3] The dispute was for recovery of amount. Respondent also took out counter-claim for recovery of amount and both these proceedings were decided by common judgment and order.

4] As regards decree in the suit of the Petitioner/Plaintiff is concerned, appeal preferred by the Respondent-Corporation came to be allowed, however SLP preferred by the present Petitioner feeling aggrieved by the order passed in aforesaid appeal was dismissed on 26th September, 2003. The execution preferred by the Respondent being Regular Darkhast No.179 of 2009 was dismissed on 29th September, 2014 and the said Respondent preferred another Darkhast being Special Darkhast No. 46 of 2014 for execution of the decree which is objected vide Exhibit-16 by the Petitioner on two grounds viz. **(a)** execution is barred by limitation as decree under execution is of 30th December, 1997 and execution was taken out in November, 2014 and **(b)** once first Darkhast No.179 was dismissed on 29th September, 2014, second Darkhast will not be maintainable as the test of due diligence has to be complied with in view of provision of Order 21 Rule 106 of the Civil Procedure Code.

5] I have appreciated submissions.

6] The decree under execution passed by the Court below in

Special Civil Suit No.135 of 1997 is for recovery of amount at the behest of the present Petitioner. Against the decree passed in favour of the Petitioner, Respondent-Corporation preferred an appeal which was allowed and the Petitioner's SLP was dismissed on 26th September, 2003. Fact remains that within limitation of 12 years, Darkhast being Regular Darkhast No.179 of 2009 was preferred and same was dismissed on 29th September, 2009 for want of prosecution.

7] The second Darkhast being Regular Darkhast No.46 of 2014 was preferred on 24th November, 2014. Limitation has to be considered from the date of rejection of appeal of the present Petitioner by the Apex Court on 26th September, 2003 and as such second Darkhast has to be held to be within limitation of 12 years.

8] As far as issue of due diligence as provided under Order 21 Rule 106 is concerned, it is worth to mention that there is no statutory embargo on the right of decree holder to take out second execution proceedings even if first are dismissed in default, provided such proceedings are within limitation. That being so, embargo, as has

been claimed under Order 21 Rule 106 will not operate to the detriment of the Respondent/decreed holder.

9] In that view of the matter, no case for interference is made out. Petition fails and same stands dismissed.

(NITIN W. SAMBRE, J.)