

**(1922) 08 BOM CK 0018**

**Bombay High Court**

**Case No:** Second Appeal No. 635 of 1921

Mulji Purshottam Thakkar

APPELLANT

Vs

Goverdhandas Tribhuvandas

RESPONDENT

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**Date of Decision:** Aug. 30, 1922

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 11
- Dekkhan Agriculturists Relief Act, 1879 - Section 11, 20

**Citation:** AIR 1923 Bom 36 : (1922) 24 BOMLR 1291 : 76 Ind. Cas. 148

**Hon'ble Judges:** Lallubhai Shah, J; Crump, J

**Bench:** Division Bench

**Final Decision:** Dismissed

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### **Judgement**

Lallubhai Shah, Acting C.J.

1. This appeal arises out of execution proceedings. A decree was passed in favour of the plaintiff on the Original Side of the High Court. It was an ex parte decree. The defendant was described in those proceedings as a cloth merchant. Though the summons of the suit was served upon the defendant, he did not appear to contest the suit. The decree was subsequently transferred to the Court of the Second Class Subordinate Judge at Bhivandi for execution. In the execution proceedings the judgment-debtor made an application u/s 20 of the Dekkhan Agriculturists' Relief Act for instalments contending that he was an agriculturist. The application was first rejected on the ground that that Court had no jurisdiction to entertain such an application, and that the application should have been made to the High Court which passed the decree. That view, however, was not accepted in appeal by the District Judge, and for the purposes of the present proceedings, it must be taken that it was competent to the Court at Bhivandi to entertain the application. The question that arose on the merits of the application was whether it was open to the judgment-debtor at that stage to prove that he was an agriculturist, he having failed

to challenge the allegation made in the suit that he was not an agriculturist. The Court of first instance decided in favour of the decree-holder and directed the Darkhast to proceed. The defendant appealed to the District Court and the learned District Judge has come to the same conclusion.

2. In the appeal before us, the correctness of the view taken by the lower Courts has been challenged. It is contended that as in fact there was no decision in the suit before the decree was passed as to whether the defendant was an agriculturist or not, it was open to him to show now that at that date he was an agriculturist, and that he was entitled to the benefit of the provisions of Section 20 of the Dekkhan Agriculturists' Relief Act. On the other hand, it is contended that in virtue of the provisions of Section 11 of the Dekkhan Agriculturists' Relief Act, the High Court on the Original Side would have no jurisdiction to entertain the suit, if in fact the defendant was an agriculturist, the nature of the suit being such as would fall within Section 3, Clause (w) of that Act. That section provides that every suit of the description mentioned in Clause (w) of Section 3 may be tried where the defendant resides and not elsewhere. It was essential for the plaintiff to establish that the defendant, who did not reside within the limits of the original jurisdiction of the High Court, was not an agriculturist. He asserted that the defendant was not an agriculturist, and in the suit this statement was not challenged.

3. It is clear that the point as to whether the defendant was or was not an agriculturist was necessarily involved in the suit and though there is no express decision, as the point was not in dispute between the parties, it must be taken to have been decided by necessary implication. If we treat it as having been decided, as we think, under the circumstances, we must so treat it, it follows that the defendant was not an agriculturist at the date of the decree. If he was not an agriculturist at the date of the decree, he cannot in execution proceedings, which are proceedings in the suit, raise the question that he was an agriculturist at the date of the decree. It is also clear, in view of the decision in *Balchand Chaturchand v. Chunilal Jagjivandas* ILR (1913) 37 Bom. 486; 15 Bom. L.R. 387 that if he was not an agriculturist at the date of the decree he cannot claim the benefit of Section 20 of the Dekkhan Agriculturists' Relief Act, if he becomes an agriculturist subsequently.

4. In the present case it is not suggested by the defendant that there has been any change in his status, and as pointed out in *Balchand's* case, any subsequent change in the status would not avail him. His point really is that he was an agriculturist at the date of the decree. It seems to us that when the decree was passed it must be taken to have been decided that he was not an agriculturist. Whether such a decision is reached as a result of the contest between the parties, when the allegation is challenged, or whether the allegation of the plaintiff is accepted without any contest, because the defendant does not choose to challenge it, the result is exactly the same so far as the subsequent proceedings are concerned.

5. There has been some argument before us on the question as to whether the provisions of Section 11 of the CPC would apply to these proceedings. We do not think the provisions of Section 11 of the CPC would have any application to these proceedings; but the principle underlying that section would necessarily govern execution proceedings and it is obvious that any fact which is decided in the suit expressly or by necessary implication cannot be challenged in execution proceedings. We, therefore, dismiss the appeal with costs.