B. Chotey Lal vs Fazlul Rahman Khan on 4 April, 1950

Equivalent citations: AIR1954ALL176, AIR 1954 ALLAHABAD 176

JUDGMENT

Wali Ullah, J.

1. These are two appeals against two orders of the Civil Judge of Moradataad dated 30-8-1941, and 28-3-1942, by which a decree was amended under Section 8, U. P. Debt Redemption Act (Act 13 of 1940).

2. The facts cover a long period and are rather complicated. Abdul Karim and his son Fazlul Rahman hold considerable property. On 11-1-1924 the father and the son granted a simple mortgage in favour of the respondent, Rai Bahadur Chotey Lal, for a sum of Rs. 40,000/-. It was in respect of some house property as well as some zamindari property in three villages viz. Ichaura Kamboo, Dalpatpur and Papri. Between 1927 and 1928 certain payments were made in part atisfaction of the debt. The mortgage was put in suit--suit No. 169 of 1923--and on 28-1-1929, a decree was passed on the basis of this mortgage for a sum of Rs. 59,878-14-6. In satisfaction of this decree as well (?) substantial payments were made with the result that by 21-7-1931, the judgment debtors had discharged the debt to the extent of Rs. 36,014-7-0. On 22-7-1931, a fresh mortgage was executed, practically on the same lines as the earlier mortgage by the father and the son for a sum of Rs. 29,500/- in lieu of the balance due under the decree.

Thereafter another suit viz., suit No. 113 of 1932 was instituted for sale on the basis of a mortgage of 22-7-1931 with the result that a decree for a sum of Rs. 49,531-6-6 was passed on 31-1-1933, against the father and the son. On 29-4-1933, both the judgment-debtors made a payment of a sum of Rs. 14,500/- towards the amount due under the decree. It thus came about that for the original debt of Rs. 40,000/-, the father and the son had by this date paid in all a sum of Rs. 50,514-7-0. Next it appears that the judgment-debtors applied for reduction of interest under the Agriculturists' Relief Act (U. P. Act 27 of 1934) and on 4-1-1936 the mortgage decree was amended and the sum declared to be due under the amended decree was Rs. 34,881-14-6.

3. Thereafter on 1-10-1936 an application was made by the judgment-debtors under Section 4, Encumbered Estates Act (U. P. Act 25 of 1934). It is not necessary to go into details, but as the result of these proceedings on 15-2-1939, the Special Judge, 1st Grade, Moradabad, passed a decree in favour of Chotey Lal against Abdul Karim alone for a sum of Rs. 35,8457- as the amount due under the mortgage decree in Suit No. 113 of 1932. The decree of the special Judge went on to apportion the liability between Abdul Karim and Fazlul Rahman and it was provided that the liability of Abdul Karim was to the extent of seven-eighths and the liability of Pazlul Rahman was to the extent of one-eighth. On 2-2-1940 Abdul Karim executed a waqf 'alal-aulad' appointing his son, Fazlul Rahman, as the sole 'Mutwalli'. The 'waqf was subject to the payment of the debts of the 'waqif.

4. Subsequent to this the decree-holder applied for execution of the decree to the extent of one-eighth against Fazlul Rahman. This was before the Collector. On 5-4-1941 (1348 Fasli Rabi) Fazlul Rahman presented an application in his personal right under Section 8, Debt Redemption Act (U. P. Act 13 of 1940) for amendment of the decree in respect of his one-eighth share. It is interesting to note that for the first time on this date some attempt was made at specification of liability of the father and the son. We have emphasized this inasmuch as this application may have some bearing on the question of apportionment of liability between the two judgment-debtors.

5. On 30-8-1941, Fazlul Rahman's application v/as allowed by the Civil Judge and a sum of Rs. 684/147- only was found payable by Fazlul Rahman. Against this order the mortgagee-decree-holder has come up in appeal to this Court. It is Execution First Appeal No. 457 of 1941.

6. Next we find that on an application made by Abdul Karim under Section 20, Encumbered Estates Act, the proceedings under that Act were quashed on 15-11-1941.

7. On 27-11-1941 (: 1349 Fasli Kharif) Abdul Karim and Fazlul Rahman both jointly presented an application for amendment of the decree under Section 8, Debt Redemption Act. Curiously enough, although it was a joint application, it was in respect of seven-eighths share of the liability under the decree. Apparently Fazlul Rahman joined in this application as he was the Mutawalli under the waqf 'alal-aulad' created by Abdul Karim on 2-2-1940. This application also proceeded upon the basis of the decree granted by the Special Judge in proceedings under the Encumbered Estates Act although, in point of fact, those proceedings had been quashed on 15-11-1941. The decree-holder objected to this application (paper No. 16 C of the record). The decree-holder challenged the right of the judgment-debtors to claim any apportionment of their liability.

8. On 14-3-1942 (: 1349 Fasli Rabi) another application was made by Abdul Karim and Fazlul Rahman for amendment of the decree under Section 8, Debt Redemption Act. This was in respect of the entire decree. On 20-3-1942, the Court directed that the application be put on the file. On 28-3-1942, the learned Civil Judge allowed the application dated 27-11-1941, with the result that the decree to the extent of seven-eighths share only was amended. This order of the learned Judge has been challenged by the decree-holder in Execution First Appeal No. 224 of 1942.

9. We have thus two appeals before us made by the decree-holder, Chotey La-1, against Pazlul Rahman and Abdul Karim, and they are directed against the two orders mentioned above, by one of which, Pazlul Rahman's petition for the amendment of the decree was granted and by the second of which the joint application of Abdul Karim and Fazlul Rahman for amendment of the decree was allowed.

10. Tliese two appeals came up for hearing in the first instance before a Bench of this Court on 5-4-1944. Two main questions arose for consideration before that Bench: (i) whether Abdul Karim and Fazlul Rahman are agriculturists within the meaning of the Debt Redemption Act and are entitled to take the benefit of that Act and (ii) whether on taking account and determining the amount due to the decree-holder under Section 9 of the Debt Redemption Act the principal sum of

the loan is to be determined with reference to the mortgage of 21-7-1931, or it is to be determined with reference to the mortgage of 11-1-1924, By their order dated 5-4-1944, the learned Judges appear to have decided the second question about the method of accounting thus: that the accounts would be re-opened from the date of the first mortgage i. e. 11-1-1924. With regard to the first question, however, the learned Judges felt some difficulty in deciding the matter inasmuch as the relevant facts had not been correctly ascertained by the Court below. Consequently they remitted two issues to the Court below. They are these:

> "(1) Whether Abdul Karim and Fazlul Rahman were agriculturists within the meaning of the U. P. Debt Redemption Act on 11-1-1924, and on 21-7-1931, the date of the mortgages, and on the date when they made an application for the amendment of the decree and whether they are jointly or separately entitled to apply for the amendment of the decree under Section 8, U. P. Debt Redemption Act.
>
> "(2) In case only one of these two persons being (sic) (is) entitled to the benefit of the Debt Redemption Act how is the loan to be apportioned between them in view of Section 11 of the Act and for what amount the decree is to be amended in favour of such a person."

11. It may be mentioned here that the learned Judges gave the judgment-debtors leave to present a fresh petition to the Court below, before investigation was made of the issues, amending their former applications; the fresh application was to be treated as a supplementary application and not a substantive application. Such an application appears to have been made on 13-1-1945.

12. The learned Civil Judge returned his findings by his order dated 10-4-1945. He treated all the three dates i. e., 11-1-1924, 21-7-1931 and the date of the application i. e. 27-11-1941 as the crucial dates. He found that on 11-1-1924, Pazlul Rahman was an agriculturist but Abdul Karim was not inasmuch as he paid a local rate of Rs. 119/12/6. On 21-7-1931, also he found the position to be exactly the same. As regards the position on the date of the application he found, however, that after the execution of the 'waqf the capacity of Fazlul Rahman was that of a 'Mutwalli' and it was not open to him to take advantage of the provisions of the Debt Redemption Act.

He further found that Fazlul Rahman as a 'Mutwalli' paid a local rate of more than Rs. 100/- and was, therefore, not entitled to claim any benefit under the Debt Redemption Act. In conclusion he also found that it was difficult, if not impossible, to arrive at any apportionment as regards the liability of the father and the son. In the result, he recorded his opinion that neither the father nor the son could make an application for amendment under the Act.

13. To these findings objections were filed by learned counsel for the parties.

14. Next, these appeals came up for hearing before another Bench of two learned Judges. This Bench by an order dated 12-11-1946, remitted a fresh issue to the Court below for a finding. It was:

> "Was the 'Mutwalli', Pazlul Rahman, an "agriculturist" on the date of the application i. e. 27-11-1941, and 14-3-1942?"

15. The learned Civil Judge by his order dated 8-2-1937, has recorded the finding that the 'Mutwalli', Pazlul Rahman, paid Rs. 105/4/- as local rate and was therefore not an agriculturist on the two dates mentioned in the issue remitted.

16. Against this finding as well objections have been filed by learned counsel for the parties under Order 41 Rule 26, Civil P. C.

17. We have heard learned counsel for the parties at length. The questions involved in these appeals are not free from difficulty. Two cardinal questions emerge from the discussions in these cases. They are (i) whether Abdul Karim and Fazlul Rahman or either of them was an "agriculturist" at the relevant date and (ii) whether Abdul Karim and Fazlul Rahman or either of them could be considered to be "liable to pay the amount due under the decree" in question at the relevant date.

18. Before I proceed to deal with these questions it is convenient to state at once that the two orders under appeal in these two cases are orders passed by the Court below on the footing that the decree passed in proceedings under the Encumbered Estates Act was in force and so was the apportionment of liability between the two judgment-debtors to the extent of seven-eighths and one-eighth.

As mentioned above, in an earlier part of this, judgment, on 15-11-1941 the proceedings under the Encumbered Estates Act were quashed. The result was that with those proceedings the decree passed in the course of those proceedings also came to an end. Thereafter the only decree which could be amended by means of the applications made under Section 8 of the Debt Redemption Act is the decree which was passed in Suit No. 113 of 1932 as subsequently amended by proceedings under the Agriculturists' Relief Act on 4-1-1936. This decree creates a joint and several liability against Abdul Karim and Fazlul Rahman and it is riot possible to amend the decree separately in favour of Abdul Karim and Fazlul Rahman limiting the liability of one to seven-eighths & that of the other to one-eighth. In this view of the matter, it is obvious that the orders of the Court below dated 30-8-1941, and 28-3-1942, cannot stand.

19. In case the judgment-debtors-respondents to these appeals are found to be "agriculturists" and entitled under Section 8 to apply for amendment of the decree, the case will have to go back to the Court below for decision on the merits.

20. I now proceed to deal with the two cardinal questions involved in these appeals. The relevant provisions of law are these:

> Section 8 (1) of the Debt Redemption Act stand thus:
>
> "Notwithstanding the provisions of any decree or of any law for the time being in force, an agriculturist ..... liable to pay the amount due under a decree to which this

> Act applies passed before the commencement of this Act, may apply to the Civil Court ..... for the amendment of the decree by reduction according to the provisions of this Act of the amount due under it. ."

21. Under these provisions the applicant must first of all be an "agriculturist". Next, he must be under a liability to pay the amount due under the decree.

22. The term "agriculturist" is defined in Section 2, Sub-section (3) of the Act thus: "Agriculturist" means a proprietor of a mahal or of a share in or portion of a mahal or a tenant: Provided that no such proprietor or tenant shall be deemed to be an agriculturist if-

> (a) the aggregate of the rent, if any, and of ten times the local rate if any, payable by him exceeds one thousand rupees, or .....

Explanation II.-- If on account of a fall in the price of agricultural produce a temporary remission has been made in the 'land revenue payable by a proprietor', or in the rent payable by a tenant the local rate payable by such proprietor, shall, for the purposes of this sub-section, be deemed to have been reduced in the same proportion as the land revenue and the rent payable by such tenant shall be deemed to be the rent as reduced by such temporary remission in rent." The rest of the definition is not material for our present purpose.

23. The expression "local rate" is defined in Section 2(10) thus :

> "Local rate" means the rate which under the U. P. Local Rates Act, 1914, is payable by, or recoverable from an agriculturist possessing heritable and transferable rights."

24. This definition was substituted for the original definition, contained in the original Act, by the Amending Act (U. P. Act 6 of 1942).

25. The first question is whether Abdul Karim and Fazlul Rahman or either of them, was an "agriculturist" at the relevant date. The relevant date at which the applicants have to show that they were agriculturists is the date of the application made by them under Section 8 of the Debt Redemption Act. The first application made by them jointly was on 27-11-1941. On 14-3-1942, both of them made another application praying, in effect, that the entire decree might be amended under the provisions of the Debt Redemption Act. Both these dates fall within the same Fasli year i. e. 1349 Fasli. The relevant date in this connection, therefore, is the year 1349 Fasli. It is the first mortgage on the basis of which the decree in dispute has been passed. Therefore by reason of the provisions of Section 21 of the Debt Redemption Act, no personal decree can be passed, nor has it been passed against any of the two judgment-debtors.

It follows, therefore, that the amount due under the decree in the present case can be realised only from the property mortgaged. The Full Bench decision of this Court in -- 'Ketki Kunwar v. Ram Swarup', AIR 1942 All 390 (A), has laid down these propositions "Where the advance is recoverable from the property of an agriculturist the proviso to Section 2 (9) of the Debt Redemption Act has no

application and the case is governed by the main clause of Section 2 (9).

Where the advance is recoverable only from the property of an agriculturist, it is not necessary that the advance should have been also made to an agriculturist."

26. Following the decision in the case of - 'Ketki Kunwar, (A)', in the case of --'Shil Gange v. Manohar Lal', AIR 1945 All 346 (B), a Bench of this Court has held:

> "To attract the application of Section 8 all that is necessary is that the advance should be recoverable only from the property of an agriculturist; it is not necessary that the advance should have been also made to an agriculturist."

27. To the same effect is the decision of another Bench of this Court in -- 'Benaras Bank Ltd. v. Dwarka Nath', AIR 1946 All 497 (C), which held:

> "Where the advance is recoverable only from the property of an agriculturist or workman, it is not necessary that the advance should have been also made to a workman or an agriculturist."

28. The relevant date, therefore when an applicant in a case like the present has to show that he is an agriculturist is the date of the application. It is, therefore, not material to consider whether the applicant or applicants was or were agriculturists at the time of the loan either in the year 1924 or the year 1931.

29. In the present case admittedly we are not concerned with the payment of "rent", Abdul Karim as well as Fazlul Rahman claim to be "agriculturists" by reason of the fact that they are proprietors of a 'Mahal' or a share in or portion of a Mahal; but by reason of the 'proviso' attached to the definition, neither of them would be deemed to be an "agriculturist" if ten times the local rate, if any, payable by him, exceeds one thousand rupees. The crucial question, therefore, is: What was the "local rate" payable by each of them at the relevant date? If it wss less than a hundred rupees each one would, according to the definition, be an "agriculturist".

30. According to the findings recorded by the Court below, which we have accepted, it would appear that at the time of the first mortgage i. e., 11-1-1924, Abdul Karim paid a local rate of Rs. 119/8/6 whereas Fazlul Rahman paid only Rs. 13/-. Exactly the same was the position on 21-7-1931, when the second mortgage was executed. On 2-2-1940, Abdul Karim executed the 'waqf alal-aulad', Thereafter Abdul Karim paid only Rs. 2/- as local rate in respect of the property held by him in village Mohammadganj. Fazlul Rahman, in his personal right, paid, as before, Rs. 13/- as local rate; but Pazlul Rahman as the 'Mutwalli' under the waqf alal auiad' paid in respect of all the waqf properties, a total amount of 'local rate' amounting to Rs. 119/7/-. This amount of local rate, however, does not take it out of the "remissions" which were made by the Provincial Government in rent as well as Land Revenue on account of the fall in the price of the agricultural produce. Thus the position was that on 27-11-1941, as well as on 14-3-1942 --both, these dates fall within the same year, 1349! Fasli -- Abdul Karim was an "agriculturist" inasmuch as he paid only Rs. 2/- as local rate.

Similarly, Fazlul Rahman, in his personal capacity was also an "agriculturist" inasmuch as he paid Rs. 13/-as local rate.

31. As Mutwalli Fazlul Rahman would normally be liable to pay Rs. 119/7/- as local rate.

32. The important question, therefore, is whether Fazlul Rahman as 'Mutwalli' is entitled to the benefit of "remissions" in rent and land- revenue made by the Provincial Government; if so, to what extent? The remissions made by Government in the land revenue in the Tahsils and the Mahals of the various villages in the Moradabad district were allowed on account of the fall in the price of the agricultural produce. This was notified by Government under notification No. 620B/1B dated 7-11-1931, (Ext. 31 on the record). . According to the findings recorded by the Court below, it is clear that the rate of remission continued from the 1st of July, 1931, to 30th of June, 1942. The remission was to the extent of one-sixth of the land revenue and there was a corresponding remission in the rent as well.

33. There are altogether six items of property comprised in the deed of waqf as would appear from 'Ext. PP', "the chart" prepared on the basis of village papers, which is admitted by the parties to be correct. Land revenue is actually paid in respect of some of these items of property, but some others are 'muafi' lands in respect of which no land revenue is paid. The Court below has in calculating the amount of local rate payable by the 'Mutwalli' tsken into consideration the remission in respect of the items of property where land revenue is actually payable, but it has declined to take into account such remission in respect of the items of property where land revenue is not actually payable i.e., the items of property which are 'muafi' lands.

The question is whether that is a correct view of the matter. In this connection, the provisions of explanation 2 attached to the definition of an "agriculturist" in Sub-section (3) of Section 2, Debt Redemption Act and, in particular, the expression "temporary remission has been made in the land revenue payable by a proprietor" have to be carefully considered.

34. Explanation II provides:

> "If on account of a fall in the price of agricultural produce a temporary remission has been made in the land revenue payable by a proprietor, or in the rent payable by a tenant the local rate payable by such proprietor, shall, for the purposes of this sub-section, be deemed to have been reduced in the same proportion as the land revenue and the rent payable by such tenant shall be deemed to be the rent as reduced by such temporary remission in rent."

35. It has been contended on behalf of the respondent-judgment-debtor that there were remissions in revenue where it was payable and in rent where no revenue was payable, so in accordance with the provisions of Explanation II proportionate remissions should be allowed in the local rate payable by him. It has been contended on behalf of the decree-holder that, on a proper construction of Explanation II, "local rate" would be deemed to have been reduced only when remission has been actually made in the land revenue payable by a proprietor. If no land revenue is paid by a proprietor

and consequently no remission could be made in such revenue no question of a reduction in the amount of "local rate" arises. On the other hand, it is argued on behalf of the judgment-debtor that actual remission of 'land revenue' is not the sole criterion for determining the reduction that may be deemed to have been made in the 'local rate'. In this connection, it is pointed out by learned counsel for the judgment-debtor-respondent that in the definition of an "agriculturist" no prominence has been given to "land revenue", rather prominence has been given to "local rate", inasmuch as it was contemplated by the legislature that there were lands which paid no" land revenue. But that every kind of land paid "local rate".

Reference is made in this connection to the definition of "local rate" in Section 2(10) of the Debt Redemption Act. Next, reference is made to the provisions of Section 2, U. P. Local Rates Act (Act I of 1914) which show that in order to determine the "local rate" in the case of land of which revenue has been wholly or in part released the revenue that would have been assessed, but for the complete or partial release, is taken into account. In the present case "local rate" is payable in respect of all the six items of property comprised in the deed of "waqf. It is thus argued that the basis for the assessment of "local rate" is land revenue, 'actual or assumed'. And "local rate" is to bear a certain proportion to the land revenue 'assessed or assumed'.

36. Next, reference is made to the definition of "revenue" in Section 3(19) of the U. P. Tenancy Act:

> " 'Revenue' means land revenue and includes revenue assessed only for the purpose of calculating the local rate payable under the United Provinces Local Rates Act (Act 1 of 1914)".

37. In this connection, reference is made to Section 2(1) of the Debt Redemption Act which, 'inter alia', incorporates the definition of "land revenue" as given in the U. P. Tenancy Act, 1939. Reference is also made to Section 3(c) of the Debt Redemption Act which provides:

> "For the purposes of this case ..... (c) 'local rate' in respect of which a notification of exemption has been issued under the provisions of Section 15, U. P. Local Rates Act, 1914, 'shall be deemed to be payable' ."

38. The effect of this provision is that a "local rate" would still be deemed to be "payable" for purposes of this Act even though the proprietor of the land may have been granted an exemption by the Provincial Government under Section 15, U. P. Local Rates Act, 1914. The idea underlying this provision undoubtedly is that even though a proprietor may have been exempted from the payment of local rate under Section 15 of the Local Bates Act, he will nevertheless be deemed to be paying the local rate from the payment of which he has been exempted so that he may be able to take advantage of the Debt Redemption Act and be entitled to the benefits thereof.

39. On the strength of these statutory provisions it has been contended on behalf of the judgment-debtor that "local rate", even where no land revenue is payable assumes a certain amount of land revenue for purpose of calculation and the said assumed land revenue should be taken into consideration wherever such calculation is necessary for determining the amount of "local rate".

40. Next, reference is made to Section 123, U. P. Tenancy Act which, in effect, provides that in cases of agricultural calamities the Provincial Government may remit or suspend the rent payable by tenants in accordance with the provisions contained in Schedule 6. It also provides that in such an event the land revenue shall also be remitted or suspended in the same proportion.

It is argued that it is clear from the aforementioned provisions that what the legislature contemplates is that whenever there is a remission in rent, there will necessarily be a reduction, in the same proportion of land revenue payable. In the present case admittedly there has been a remission of 'rent' as well as 'land revenue'. It is, therefore, argued that even in respect of the items of property for which no land revenue is payable actually there has been a reduction in the rent payable. That being so, the proprietor should have the benefit of a corresponding reduction in the 'local rate' payable by him.

We have given careful consideration to all these arguments. The crux of the whole matter is whether the expression "land revenue payable by a proprietor" in Explanation II means only land revenue 'actually payable' or it includes land revenue which may be 'assumed to be payable' by a proprietor, stress has been laid by learned counsel for the judgment-debtor-respondent that the Debt Redemption Act being a remedial statute should be construed liberally. Reference has been made to the decision of the Judicial Committee of the Privy Council in the case of -- 'Raghu Raj Singh v. Hari Kishan Das', AIR, 1944 PC 35 (D), where it was laid down at page 38:

> "The words of a remedial statute must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved.

41. These observations were made by their Lordships of the Judicial Committee in connection with the Agriculturists' Relief Act, but they have equal cogency with reference to the provisions of the U. P. Debt Redemption Act, which is also an Act for granting relief from indebtedness to agriculturists and workmen in the United Provinces. This view has been taken by a Bench of this Court in the case of -- 'AIR 1946 All 497 (C)' where it was held:

> "The U. P. Debt Redemption Act being a remedial statute its words must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall noc be denied to the class intended to be relieved."

42. Bearing in mind these principles, we have to construe the provisions of Explanation II and, in particular, the expression "temporary remission has been made in the land revenue payable by a proprietor" as it occurs in that Explanation. The principles underlying the provisions of the Local Rates Act (U. P. Act 1 of 1914) clearly indicate that there is a very real connection between the land revenue assessed on an estate (where land revenue is actually payable or paid) and the land revenue assumed to be assessed on an estate (where land revenue is not payable or paid). In both these cases, the amount of "local rate" payable is assessed with direct reference to the amount of such land revenue. In either case if land revenue is reduced in respect of an estate there would be an automatic reduction of the amount of local rate payable. Conversely, if 'land revenue' is enhanced, there would

be an automatic increase in the amount of 'local rate' as well. The determination of the amount of 'assumed land revenue' (in the case of land not subject to land revenue) is directly based upon land revenue actually payable for similar land. When the 'liability' is measured by an assumed standard the 'corresponding relief, in case of a temporary remission, should not be measured by a different standard; benefit of remission available in one case should be available in the other case as well.

On principle, therefore, there appears no reason why benefit of the temporary remission in the amount of land revenue should not go to the landlord or proprietor who is equally liable for payment of the local rate. The provisions of the Debt Redemption Act have to be interpreted liberally so as to promote the object which the lagislature had in view in enacting the Act. Therefore, the proper interpretation of Explanation II attached to the definition of an "agriculturist" in Section 2(3) is that the benefit of a temporary remission of land revenue goes both to the landlord (or proprietor) who actually pays land revenue as well as to the landlord or proprietor who is assumed to pay land revenue. In either case the landlord (or proprietor) has to pay "local rate" at the same rate.

The object of this Explanation is that the effect of a temporary remission in land revenue should be a reduction in the amount of the "local rate" payable. In my view, therefore, the 'waqf estate', as represented by the 'Mutwalli' Fazlul Rahman is also entitled to claim a reduction in the local rate payable in respect of four non-revenue paying items of property comprised in the 'waqf. In this view of the matter, admittedly the amount of local rate payable by all the six items of the zamindari property comprised in the 'waqf would be less than a hundred rupees. The result, therefore, is that the 'waqf estate' as represented by the Mutwalli Pazlul Rahman, is an "agriculturist" within the meaning of the definition of the term as contained in Section 2(3), Debt Redemption Act.

43. Another argument addressed to us on behalf of the judgment-debtor-respondent, Fazlul Rahman, the 'Mutwalli', is that the 'waqf represented by him, in his capacity as a 'Mutwalli' does not pay any "local rate" such as is contemplated by the definition of the term "agriculturist". The contention is that "local rate" referred to in the definition means the "local rate" as it is defined in Section 2(10) of the Debt Redemption Act. That definition is set out above in an earlier part of this judgment. The argument is that the 'waqf represented' by the 'Mutwali' does not come within the category of an "agriculturist" possessing heritable and transferable rights.

This argument has force. Considering the nature of the 'waqf property, it seems to me clear that the 'waqf estate which has been found by the court below to pay a "local rate" of Rs. 105/4/-cannot be looked upon as an agriculturist which possesses heritable and transferable rights. It is well settled that 'waqf property is neither heritable nor transferable. The "local rate" payable by the 'waqf estate, whatever may be the amount of such local rate, would not therefore, affect the character of the 'waqf estate as an "agriculturist".

44. In the result, therefore, I would hold that both Abdul Karim & Fazlul Rahman were "agriculturists" at the date of the application underj Section 8, Debt Redemption Act. Similarly the 'waqf estate as represented by Pazlur Rahman was an "agriculturist" at the date of the application.

45. The next question which has to be considered is whether, at the relevant date, Abdul Karim and Fazlur Rahman, or, either of them, could be considered to be "liable to pay the amount due under the decree" within the meaning of that expression in Section 8, Debt Redemption Act. The decree in question is a mortgage decree passed on 31-1-1933. This decree was modified in proceedings under the Agriculturists Relief Act on 4-1-1936. On 2-2-1940 Abdul Karim created a 'waqf 'alal aulad' in respect of six items of the zemindari property which were comprised in the mortgage. Thenceforward he ceased to have any interest in such property.

46. As mentioned above there is no personal liability attaching to Abdul Karim or Fazlur Rahman in respect of the mortgage decree in question. All the property from which the amount due under the mortgage decree can be realised, passed out of the hands of Abdul Karim by reason of the waqf created by him in February 1940. It follows that Abdul Karim cannot be considered to be "liable to pay the amount due under the mortgage decree" within the meaning of Section 8, Debt Redemption Act. For the same reason Fazlur Rahman in his personal capacity cannot be said to be liable to pay the amount due under the decree. But the 'waqf' represented by Fazlur Rahman as its 'mutawalli', is liable to pay the amount due under the decree. As a matter of fact, the deed of 'waqf makes an explicit provision for the payment of the mortgage debt out of the dedicated property. Therefore, the result is that Abdul Karim, was not liable to pay the amount due under the decree and was, therefore, not competent to apply under Section 8, Debt Redemption Act for reduction of the amount of the decree. But the 'waqf estate undoubtedly is liable to pay the amount due under the decree. Fazlur Rahman as 'mutawalli' is, therefore, fully competent to make an application under Section 8, Debt Redemption Act. Obviously it is an application in the name and on behalf of the 'waqf.

47. For the reasons given above, I would allow both the appeals, set aside the orders of the Court below dated 30-8-1941, and 28-3-1942, and direct that the case shall be sent back to that Court with directions to dispose of the applications made on 27-11-1941 and 14-3-1942 (as modified subsequently by the application dated 13-1-1945) by Fazlur Rahman on their merits, bearing in mind the observations made in this judgment. The accounts will be re-opened and the Court will determine the amount after going into the accounts from the date of the first mortgage i.e. 11-1-1924. Costs here and hitherto will abide the result.

Sapru, J.

48. I agree.

By The Court

49. We allow this appeal, set aside the orders of the Court below dated 30-8-1941 and 28-3-1942, and direct that the case shall be sent back to that Court with directions to dispose of the applications made by Fazlur Rahman on 27-11-1941 and 14-3-1942 (as modified subsequently by the application dated 13-1-1945) for amendment of the mortgage decree, on their merits, bearing in mind the observations made in this judgment. The accounts will be re-opened and the Court below will determine the amount after going into the accounts from the date of the first mortgage, i.e.,

11-1-1924.

50. Costs here and hitherto shall abide the result.