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in our judgment, does not apply to the case of a transfer of a portion of his holding by a fixed rate tenant. That section provides about the division of a holding. The division can be only between co-tenants and a transfer of a portion of the holding by a fixed rate tenant in favour of a stranger is not division of the holding as between co-tenants. To hold otherwise would in effect be to make the right of transfer vested in a fixed rate tenant subject to the provisions of section 37, and for this there is no warrant in the Act.

From what we have said above it follows that the rights of the case were with the plaintiff and not with the defendant. Accordingly we allow this appeal, set aside the decree of the lower appellate court and restore the decree of the trial court with costs in all courts.

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*Before Justice Sir Edward Bennet and Mr. Justice Verma*

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*January*, 19

MOHAN LAL (PLAINTIFF) *v.* GOPAL LAL (DEFENDANT)*

*Construction of document—Will—Life estate to daughter and thereafter the property to go to the daughter's son—Daughter's son surviving the testator but predeceasing the daughter —Vested and transmitable interest.*

The material provisions of a will were as follows: "(2) On my death my daughter Mst. Janki and my daughter's son Sita Ram shall be the owners of my entire property according to the Shastras. (3) Out of both the legatees my daughter Mst. Janki shall have life interest but she shall be the first owner throughout her lifetime and after her death my daughter's son Sita Ram shall be the absolute owner of the entire property . . . . (7) The legatees or their heirs and representatives shall not have the right of transfer of the property at any time under any circumstance." Mst. Janki and Sita Ram both survived the testator, but Sita Ram predeceased Mst. Janki:

*Held,* on the construction of the will, that Sita Ram was intended to take a vested and transmitable interest on the death

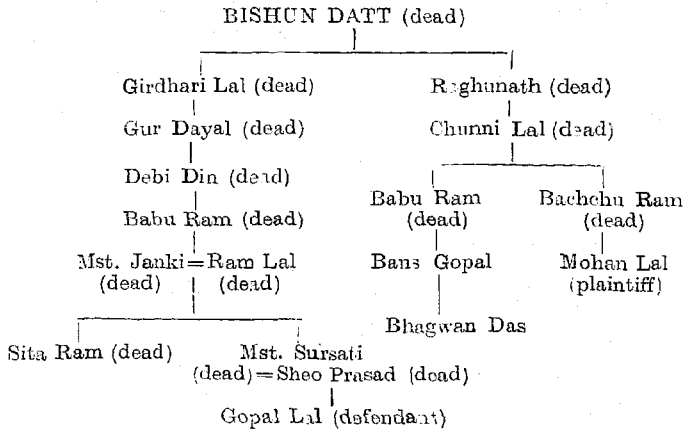
*Second Appeal No. 2116 of 1937, from a decree of S. Zillur Rahman, Additional Civil Judge of Allahabad, dated the 17th of September, 1936, reversing a decree of J. D. Sharma, Munsif of West Allahabad, dated the rd of October, 1935.

of the testator, though his possession and enjoyment were postponed until the death of Mst. Janki. The heirs of Sita Ram would accordingly take the estate on the death of Mst. Janki.

Mr. *Brij Lal Gupta,* for the appellant.

Messrs. *Gopi Nath Kunzru* and *S. N. Seth,* for the respondent.

BENNET and VERMA, JJ.:—This second appeal is filed by the plaintiff, Mohan Lal, whose suit for possession as a reversioner was decreed by the trial court but was dismissed by the lower appellate court. The appellant plaintiff set up the following pedigree: [Portions not material to the purpose of this report have been omitted.]




The plaintiff and his cousin, Bans Gopal, who was alive at the time of the plaint, were the two nearest reversioners of the deceased, Babu Ram, son of Debi Din. This man is not to be confused with another Babu Ram appearing in the same pedigree. As Bans Gopal did not join in the suit, the plaintiff claimed one-half share of the property.

Against the claim of the plaintiff the defendant Gopal Lal set up a registered will executed on 1st December, 1902, by Babu Ram. The trial court held that defendant had no interest under that will and the lower

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appellate court has held to the contrary. The will sets out as follows:

"I, therefore, in order to keep my name as also that of my forefathers alive, make the following will while in a sound state of body and mind and in full possession of my senses, without the coercion and compulsion of any one else, in respect of the property of the value of Rs.3,000 in favour of my daughter Mst. Janki and my daughter's son Sita Ram. The conditions of the will are as follows: (1) I shall be the owner of the entire property and shall enjoy all the rights and power relating thereto throughout my life. (2) On my death my daughter Mst. Janki and my daughter's son Sita Ram shall be the owners of my entire property according to the Shastras. (3) Out of both the legatees my daughter Mst. Janki shall have life interest but she shall be the first owner throughout her lifetime and after her death my daughter's son Sita Ram shall be the absolute owner of the entire property. (4) Sri Thakurji Maharaj is installed in a kothri on the upper storey and the worship of the said Thakurji is performed daily and annually for generations. I therefore make a will to this effect also that the legatees, their heirs and representatives shall perform the worship of Sri Thakurji Maharaj in the same way and according to the same system as is done in my lifetime. Should the legatees or their heirs and representatives show negligence in the worship or spending money on that account or perchance stop the worship, the panches of all the members of my brotherhood at Allahabad shall be authorised to see that this worship continues . . . . (7) The legatees or their heirs and representatives shall not have the right of transfer of the property at any time under any circumstance.

* * * * *

The case for the plaintiff appellant is that Babu Ram died in 1906 and Sita Ram died in 1909 and Mst. Janki died in 1922. Both Sita Ram and Mst Janki were

alive at the death of the testator in 1906. But Sita Ram died before the death of Mst. Janki and therefore Sita Ram never took possession of the property. The argument for the appellant is that because Sita Ram never took possession of the property therefore Sita Ram's heirs acquire no interest in the property. That is, the appellant argues that no estate vested in Sita Ram on the death of the testator and that an estate would only have vested in Sita Ram on the death of Mst. Janki. No ruling has been shown for this proposition of law. There is a ruling of their Lordships of the Privy Council to the contrary: *Bhagabati Barmanya* v. *Kalicharan Singh* (1). In that case the will of a Hindu, after giving life estates to his mother and wife proceeded as follows: "On the death of my mother and my wife, the sons of my sisters Golap Sundari Barmanya and Annapurna Barmanya, that is to say, their sons who are now in existence, as also those who may be born hereafter, shall, in equal shares, hold the said properties in possession and enjoyment by right of inheritance." It was held, on the construction of the will, that the testator's nephews were intended to take a vested and transmitable interest on the death of the testator, though their possession and enjoyment were postponed. This appears to be a similar case as in the ruling there was a life estate given to the mother and wife and the provision that on the death of the mother and wife, two persons named should receive the properties. The Privy Council held that the persons named took a vested and transmitable interest on the death of the testator. As the interest which they took was transmitable, their heirs would take after the death of the holder of the life estate.

The same principle was followed in *Bilaso* v. *Munni Lal* (2). This was a ruling by a Bench of this High Court. The case was similar. There was a will providing that the property should go to the wife of the testator and his daughter and his nephew who was alive.

(1) (1911) I.L.R. 38 Cal. 468. (2) (1911) I.L.R. 33 All. 558.

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The nephew survived the testator but died during the lifetime of the testator's wife. It was held that the nephew took a vested interest on the death of the testator and that his interest was transmitable to the sons. For the appellant certain rulings were cited in the court below. One of these was *Srinivasa* v. *Dandayudapani* (1). In that case there was a bequest to a daughter with a direction that she was to transmit the *corpus* of the estate to her male descendants on her death. There were no male descendants left at the testator's death and so there was no one in whom the property could vest on the death of the testator. This ruling has no application to the present case because in the present case Sita Ram was alive on the death of the testator.

In *Periyanayaki* v. *Ratnavelu* (2) there was a will of 1911 which would come under section 119 of the Indian Succession Act as section 57(*a*) applies to the sections which are in schedule III, and section 119 is in schedule III and there is no modification in that schedule of that section. Under the will of the testator certain properties were given to his three daughters. There was also a clause providing: "These (meaning the daughters) have no power to make sale, gift, mortgage etc., of these two houses and grounds. After these, their issue shall use and enjoy them from son to grandson and so on in succession so long as the sun and the moon may last, with power of gift, mortgage, exchange and sale and they shall every year without default perform the aforesaid ceremonies, etc." The decision of the Court was that this will was different from the will in *Bhagabati Barmanya* v. *Kalicharan Singh* (3) quoted above, and that for that reason there was no vesting on the death of the testator. This does not apply in the present case. Learned counsel for the appellant could not produce any ruling to support his contention.

We are also of opinion that the intention of the will is that the estate which was given to Mst. Janki would

(1) (1889) I.L.R. 12 Mad. 411. (2) A.I.R. 1925 Mad. 61.
(3) (1911) I.L.R. 38 Cal. 468.

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only be an estate to hold for her lifetime and that vested interest in Sita Ram existed during her life estate. Paragraph 7 of the will prevented either legatee from making a transfer and therefore the life estate without right of transfer of Mst. Janki is quite consistent with an estate of ownership of Sita Ram at the same time and Sita Ram merely had his right of possession postponed until the death of Mst. Janki. The provisions in paragraph 3 are merely intended as supplementary to paragraph 2 which clearly states that both Janki and Sita Ram are to be owners. The ownership of Sita Ram therefore began from the death of the testator. For these reasons we dismiss this second appeal with costs.

## REVISIONAL CRIMINAL

*Before Mr. Justice Collister and Mr. Justice Braund*

EMPEROR *v.* GANGA RAM AND ANOTHER*

1940 *January*, 26

*Criminal Procedure Code, section 307—Reference in jury case—Trial on several charges—Some triable by jury, others with the aid of assessors—Judge should dispose of the latter, and then make a reference in respect of the charges triable by jury—Reference of whole case incorrect.*

The words, "any of the charges on which such accused has been tried", in section 307(2) of the Criminal Procedure Code mean any of the charges on which the accused has been tried by jury; they do not include those charges which were not triable by the jury at all but were triable by the Judge with the aid of the assessors.

A sessions trial involved several charges, some of which were triable by jury and the others were triable with the aid of assessors. The jury, acting as such in respect of the former, returned a verdict of not guilty, and, acting as assessors in respect of the latter, expressed their opinion that the accused were not guilty. The Sessions Judge, disagreeing with the verdict of the jury, and without recording any judgment of acquittal or conviction on the charges which were triable with the aid of assessors, referred the whole case to the High Court under section 307 of the Criminal Procedure Code: *Held*, that the procedure of the Sessions Judge was incorrect; he should have himself recorded judgment of acquittal or of conviction

*Criminal Reference No. 728 of 1939.