1976 *Present* : **Wimalaratne, J., Sirimane, J. and Wijesundera, J.**

ANTON WIJERATNE, Plaintiff-Appellant

and

THE PUBLIC TRUSTEE OF CEYLON
Defendant-Respondent

S.C. 165/69 (F)—D.C. Colombo 235/Trust

Trust—Last will—Property devised in favour of three persons—Legatee predeceasing the testator—Does legacy lapse in such a case—Communication by testator to trustee of terms of trust—Is such requirement essential.

By his last will dated 11th May, 1950, *A* appointed the Public Trustee as his executor and trustee and left certain monies, other cash assets and shares in companies to be held by the Public Trustee for the benefit of his wife, his daughter and his sister in equal shares. It was also provided that in the event of the death of the said sister her share should be distributed among her children free of the trust.

A died on 20th February, 1964, but had been predeceased by his sister who died on 28th October, 1962. The children of the said sister instituted an action to compel the Public Trustee to distribute the share of their mother amongst them free of the trust. The Public Trustee pleaded that *A's* sister having predeceased him did not acquire any rights under the said last will and that therefore her children did not become entitled to the benefit in favour of their mother, the relevant provision of the will having lapsed. The learned District Judge dismissed the plaintiff's action on the ground that the said sister of *A* had predeceased him and the children would not be entitled to any interest under her.

Held : (1) That the principle of the lapse of a legacy in the event of the devisee p edeceasing the testator had no application on the facts of the present case. The property was devised to the trustee in trust for distribution and the share claimed by the plaintiffs did not lapse on the death of their mother.

(2) That the trust in relation to this property was declared by the last will of the testator and there was no need for communication to the Public Trustee during his life time of the terms of this trust. Under section 6 of the Trusts Ordinance a valid trust had been created.

Case referred to :

Re Gardner, (1923) 2 Ch. 230 ; 129 L.T. 206 ; 92 L.J. Ch. 569.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, Q.C., with *Y. D. S. Perera*, for the plaintiffs-appellants.

H. W. Jayewardene, Q.C., with *J. W. Subasinghe* and *Miss Manel Kalatuwawa*, for the defendant-respondent.

Cur. adv. vult

July 27, 1976. WIMALARATNE, J.

By his last will No. 2065 dated 11th May, 1950, Don Martin Amarasinghe appointed the Public Trustee as his executor and trustee, and gave all his money invested in mortgages and lying in banks and all his other cash assets as well as shares in companies to be held by the Public Trustee for the benefit of (1) his wife Rosalin Amarasinghe, (2) his daughter Mopsey Jayawardena, and (3) his sister Mary Elizabeth Wijeratne, in equal shares, subject to the trusts set out in the Last Will.

The will provided, *inter alia,* that upon the death of any of the above three beneficiaries, the Public Trustee should wind up the share of the trust estate of the person so dying and distribute the same in the manner set out therein. In the event of the death of his sister Mary Elizabeth, it was directed that her share should be distributed among her children freed from the trust.

The testator died on 20th February, 1964, and probate of the last will was issued to the Public Trustee in October of the same year. Mary Elizabeth predeceased the testator, having died on 28th October 1962. The plaintiffs, who are the only children of Mary Elizabeth, instituted the present action against the Public Trustee, praying for an order directing him to execute the trust in accordance with the provisions of the last will, and to distribute the share of their mother amongst them, freed from the trust.

The defendant pleaded that Mary Elizabeth having predeceased the testator, did not acquire any rights under the will, and that the plaintiffs, as her children, did not become entitled to the benefit in favour of their mother, and that the relevant provision of the will had lapsed.

The learned District Judge dismissed the plaintiffs' action for the reason that Mary Elizabeth could get rights only under the will, and that as she preleceased the testator, her children would not be entitled to any interest under her.

It has been contended on behalf of the plaintiffs-appellants that the learned District Judge has erred in applying the principle of the lapse of a legacy in the event of a devisee predeceasing the testator, for in the present case as the property was devised to the trustee in trust for distribution, the share claimed by the plaintiffs did not lapse on the death of their mother. It has also been contended that the District Judge has failed to give effect to the intention of the testator as expressed in the last will.

The paramount consideration being the intention of the testator at the time he made his will, it is necessary to determine that intention before applying the law to the facts of this case. The testator provided that (*a*) in the event of the death of his sister, her share should be distributed among her children, free from the trust, and (*b*) in the event of the death of h s wife her share should be divided between his daughter and his sister, if they be alive, or if they not be alive, between their children, free from the trust. The children of his sister were therefore much in his mind when he included these provisions in his will. Could it then be said that he intended that these children should share the benefit only in the event of their mother surviving him. Could it be said that they were not to be his beneficiaries if their mother died even one day before him ? I think that the two provisions referred to above clearly indicated his intention to provide for them after their mother's death, whether that event occured before his death or after his death.

It is settled law that where a legatee dies before the testator, the testamentary gift will lapse—*Jarman on Wills* (Vol. 1) p. 438 ; *Steyn on the Law of Wills in South Africa* (2nd ed.) p. 131. Thus, if a devise be made to *A* and his heirs, and *A* dies in the lifetime of the testator, the devise absolutely lapses, and *A's* heirs take no interest in the property.

The submission of learned Counsel for the plaintiffs-appellants is that the position is different where property is given in trust. Where *A* by will gives property to *B* in trust for the benefit of *C*, there is no question of the trust lapsing on *C* predeceasing the testator, if the intention to benefit *C's* heirs is clearly indicated.

Support for this proposition is to be found in the following passage in *Lewin on Trusts* (15th ed.) p. 49 :— " Where it is established that a trust for the benefit of individuals is engrafted upon property given to the donee by will or passing to him under an intestacy, the share under the trust of a beneficiary dying in the lifetime of the testator or intestate will not lapse, as the beneficiary takes, not under the will or intestacy, but under the trust, which was created from the date of its communication to the legatee ".

The learned District Judge has held that there was no evidence to show that the terms of the trust were communicated to the Public Trustee before the death of Mary Elizabeth and that as she could get rights only under the will, no rights would pass to her children because she predeceased the testator.

The need for "communication" has been dealt with in *re Gardner,* (1923) Ch. 230. In that case a testatrix, by her will executed in 1909 left all her property to her husband for his use and benefit during his lifetime, 'knowing that he will carry out my wishes'. Four days later she signed an unattested memorandum expressing the wish that the money she left to her husband should on his death be equally divided among two nieces, May and Mabel and a nephew Lancelot. She died 10 years later and the husband died five days after her. Mabel died in the lifetime of the testatrix, and the question arose as to whether Mabel's share was payable to her personal representative or whether the trust in respect of Mabel's share failed. It was held that the beneficial interest of Mabel was payable to her legal personal representative, notwithstanding that she had predeceased the testatrix. Romer, J. said, "Apart from authority, I should without hestitation say that in the present case the husband held the corpus of the property upon trust for the two nieces and nephew, notwithstanding that the niece predeceased the testatrix. The rights of the parties, appear to me to be exactly the same as though the husband, after the memorandum had been communicated to him in the year 1909 had executed a declaration of trust binding himself to hold any property that should come to him.....upon trust as specified in the memorandum. If I could construe the husband's promise as a promise to give the property on his death to such of the three named persons as should survive the testatrix or to such of them as should survive him, I should decide in favour of (the next-of-kin of the husband). I cannot, however, so construe his promise without introducing into the memorandum words that are not there" at p. 233. It would appear then, that from the fact of communication of the memorandum by the wife to the husband, a promise by the latter to carry out her wishes as contained in the memorandum, amounting to a declaration of trust by the husband, was inferred.

Communication to and acceptance by the husband was essential in that case because the memorandum designating the beneficiaries was an unattested document, an informal instrument not complying with the formalities laid down by law.

If that memorandum had not been communicated to and accepted by the husband during the lifetime of the testatrix, he would, by reason of the will have been the legal as well as equitable owner. In the instant case the trust in relation to the property was declared by the last will of the author of the trust. It became valid under section 6 of the Trusts Ordinance because the author of the trust indicated with reasonable certainty (*a*) an intention to create thereby a trust, (*b*) the purpose of the trust, (c) the beneficiaries, and (*d*) the trust property. There was, therefore no need for communication to the Public Trustee during the testator's lifetime.

Mr. Jayewardene referred to the following passage in *Scott on Trusts*—Vol. IV section 411.1 p. 2937 " An express trust may fail and a resulting trust arise in a number of situations.....It may fail in the case of a testamentary trust because the beneficiary predeceases the testator with the result that the devise or bequest of the beneficial interest lapses..... In all these cases if the trustee takes title to the property he holds it upon a resulting trust for the settlor or his estate ".

Section 412 p. 2947 " Where an express trust fails, a resulting trust in favour of the settlor arises, not because the settlor actually intended that it should arise, but because he did not intend that the trustee should have the beneficial interest and did not make any other disposition of the property in the event that the intended trust should fail ".

But Scott also makes it clear that " a resulting trust will not arise, however, if the settlor properly manifested an intention that a different disposition should be made of the property if the trust should fail ". In the instant case the settlor has made it clear that if his sister be not alive, then the trust should operate in favour of his sister's children.

For these reasons I am of the opinion that the appeal should be allowed, and that judgment should be entered in favour of the plaintiffs-appellants as prayed for with costs, both here and in the court below.

SIRIMANE, J.—I agree.

WIJESUNDERA, J.—I agree.

Appeal allowed