1973 *Present :* **H. N. G. Fernando, C.J., Walgampaya, J., and Wimalaratne, J.**

D. P. WIJEWICKREME and 2 others, Appellants, *and* I. C. FERNANDO and 2 others, Respondents

S. C. 54/68 (F)—D. C. Colombo, 15928/T

Last Will—Two subsequent codicils—Construction of the three instruments—Devise of immovable properties to testator's wife, with power to dispose of them among his intestate heirs—Provision that properties undisposed must pass on her death to specified persons—Death of the devisee before the testator—Resulting position—Failure or lapse of an absolute legacy by the death of the legatee before the testator—Administration of estates—Application for judicial settlement of accounts—Whether it can be made by a person who is interested only in movable property or in some minor legacy.

By Last Will of 1941 and a codicil of 1944 a testator devised most of his immovable properties to his wife, with a power for her to dispose of them among his intestate heirs. It was provided that if this power of disposition was not exercised, as also in certain other events, those properties must pass on her death to four only of all his children or the survivors of those four children.

In 1945 the testator executed a second codicil, the effect of which was that the devise only of some of the properties to the wife by the Original Will would be subject to the conditions stated in that Will, but that those conditions would be inapplicable in the case of the absolute devise to the wife of the immovable properties specified in the second codicil.

The testator's wife pre-deceased the testator in 1949. Although the testator survived until 1953, he made no further testamentary disposition.

Held, (i) that the intestate heirs of the testator were entitled to all the immovable properties which were specifically devised to his wife by the second codicil of 1945.

(ii) that *the other* immovable properties devised to the wife by the Original Will passed to the four children specified therein or their survivors.

Quaere, whether, in a testamentary action, the Court is bound to entertain objections concerning the entirety of the administration of the deceased testator's estate if such objections are preferred by a person who has an interest only in movable property or in some minor legacy.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *E. S. Amerasinghe* and *C. A. Amerasinghe,* for the respondents-appellants.

E. S. Amerasinghe, with *C. A. Amerasinghe,* for the 6th substituted-respondent.

C. Ranganathan, Q.C., with *S. C. Crossette-Thambiah, K. Jayasekera* and *B. B. D. Fernando,* for the petitioner-1st respondent.

Cur. adv. vult.

1* — A 03526 — 2,808 (73/12)

January 31, 1973. H. N. G. FERNANDO, C.J.—

In this Testamentary case, one Indumathie Catherine Fernando, who is the 1st respondent in this appeal and is hereinafter referred to as " the 1st respondent ", made application for a judicial settlement of the accounts, claiming that she was an intestate heir of the deceased Testator and a person interested in the Estate.

By the Last Will, the Testator devised all his *movable property* to his wife, but she pre-deceased him. It is therefore conceded that the Testator died intestate in respect of the movable property, and that the 1st respondent (who is the child of a daughter of the Testator who had died before the Last Will was executed) has, as an intestate heir, an interest in the movables. It was also claimed on her behalf that she has an interest in a number of immovable properties of the Testator, but the learned District Judge did not reach a finding on that claim.

On the ground that the 1st respondent has an interest in the movable property left by the Testator, the District Judge made order for a judicial settlement of the accounts of the Estate, and stated in the Order that when the accounts are filed it will be open to the 1st respondent to file objections to the whole of the accounts and not necessarily in respect of the accounts concerning the movable property.

The present appellants sought in this appeal a variation of the order of the District Court, contending that if the 1st respondent has an interest only in the movable property she is not entitled to object to the accounts furnished by the executors in respect of the administration of the numerous immovable properties included in the Estate.

We were invited in this connection to re-consider the decision of this Court in *Talayaratne v. Talayaratne*[1], 61 N. L. R. 112, but Counsel for the 1st respondent maintained that the 1st respondent has also an interest in the immovable properties of the testator, and it became necessary for us to adjudicate upon this additional claim of the 1st respondent. Since the construction of the Last Will involves questions of considerable difficulty, which have not yet been determined despite the fact that the testator died so long ago as in 1953, and since all the relevant material is available, Counsel for all parties agreed that we should adjudicate upon many of the matters which were left undecided in the District Court.

[1] *(1957) 61 N. L. R. 112.*

In view of our ultimate conclusion that the 1st respondent does have an interest in a number of immovable properties included in the estate, the objection taken against the order of the District Judge becomes more or less academic, and we need make only a few observations upon the submissions made to us with regard to the right to make objections to the accounts in the course of a judicial settlement.

In our opinion the case of *Talayaratne v. Talayaratne* was correctly decided in the particular circumstances of that case. According to the judgment of the Supreme Court, the District Judge in that case declined to hear allegations and proofs of the parties, "even though he was satisfied that the administratrix had failed properly to account for the money received by her." We agree if the Court is not so satisfied, the Court has an obligation to investigate the accounts; and that in performing such obligation it is proper for the Court to utilise the assistance of any party even if the interests of that party in the Estate may not be substantial.

At the same time, we doubt whether the judgment in *Talayaratne v. Talayaratne* is applicable in a case in which there neither is reason for the Court to suspect the correctness of the accounts nor any contest concerning the accounts raised by the persons having an interest in the bulk of the estate. In such a situation, we do not think that the Court would be bound to entertain objections concerning the entirety of the administration, if they are preferred by a person who has an interest only in movable property or in some minor legacy. Such a person in our opinion will not be entitled to contest the accounts concerning property in which he has no interest, unless some advantage can accrue to him in consequence. For example, if it is clear that his own claim will be duly satisfied irrespective of any question as to the correctness of any account relating to property in which he has no interest, there is no good reason why he should be permitted to question the accuracy of any such account. A simple instance would be the case of a person who is entitled under a Will to a piece of jewellery or to a motor car devised to him by the testator. If that is his only interest, and if the executor is perfectly willing to deliver to him the subject of the devise, he should ordinarily have no right to interfere in the administration of other property comprised in the estate.

In the instant case, the substantial interests which the 1st respondent has in both movable and immovable property entitle her to object to any of the accounts. The order under appeal

has therefore to be affirmed ; but all parties will be bound by the determinations reached in this judgment as to the proper construction of the Last Will.

The claim of the 1st Respondent involves the construction of the Last Will, and we have had very useful assistance from Counsel in our consideration of the quite difficult questions which arise.

The Testator owned considerable immovable property, and he made a Last Will in 1941. By that Will, he devised one land to a married daughter, subject to a fideicommissum in favour of her children and failing children alive at the time of her death, in favour of the Testator's son George. He made another devise of land to a second married daughter, subject to a similar fideicommissum in favour of her children, or failing them in favour of George. The third devise in the Last Will was of two lands to Sitha Fernando, the child of a deceased daughter, subject to a fideicommissum in favour of her children, and of a sum of Rs. 10,000 to be paid on her marriage. The devise of two lands to Sitha Fernando was subject to the condition that if she married without the consent of the wife of the Testator, the lands shall devolve on the Testator's son George.

It is pertinent to note at this stage that, while there were alive in 1941, two sons of the Testator, and three married daughters, and two grand-daughters by deceased daughters, the Testator nominated only the son George as the ultimate fideicommissary in the three specific devises which I have mentioned above ; also that he made no specific devise to his grand-child the 1st respondent while making such a specific devise to his other grand-daughter Sitha.

Following the three specific devises in the Will is a devise to the wife of the Testator of 13 specified immovable properties, and of a 14th item as follows :—

> " (14). All other immovable properties (except those that I have hereinbefore devised to my children and grand-child) wherever the same may be situated in possession expectancy in remainder or reversion nothing excepted ; ..... "

All these devises to the Testator's wife were made subject to the following conditions :—

> (*a*) The said Engeltina Wijeyegooneratne shall not sell, alienate, mortgage or encumber the said properties or lease the same for a period of over three years at a time (provided that a subsequent lease shall not be executed prior to six months of the expiry of any

subsisting lease) nor shall the said properties nor the interest of the said Engeltina Wijeyegooneratne in and to the same be liable to be seized for debts of the said Engeltina Wijeyegooneratne.

(b) The said Engeltina Wijeyegooneratne shall only possess the said properties and take and enjoy the rents profits and income thereof during her natural life and so long as she shall remain my widow, that is without contracting another marriage.

(c) That the said Engeltina Wijeyegooneratne shall however have the power and right which are hereby expressly reserved to her so long as she shall remain my widow to gift by Deed or devise by Last Will any of the properties hereinbefore devised to her to anyone or more of my children or remoter ..... descendants in any proportions or shares ..... subject to such restrictions against sale and other conditions to my wife the said Engeltina Wijeyegooneratne shall in her discretion seem best.

(d) In the event of the said Engeltina Wijeyegooneratne selling, mortgaging or leasing any of the said properties contrary to the provisions set out above or in the event of the said properties or the interest of the said Engeltina Wijeyegooneratne in and to the same being seized for the debts of the said Engeltina Wijeyegooneratne the property or properties so mortgaged or leased or seized or in the event of the said Engeltina Wijeyegooneratne contracting a second marriage all the said properties save and except those which may have been dealt with by duly executed deeds under the powers hereinbefore given to her or in the event of the said Engeltina Wijeyegooneratne dying without having dealt with all the properties such of the properties as shall have not been dealt with as aforesaid shall devolve on my children, Eugine Chandrawathie Fernando *nee* Wijeyegooneratne Beatrice Irene Fernando *nee* Wijeyegooneratne, Dora Padmawathie Wijewickrema *nee* Wijeyegooneratne and George Wijeyegooneratne or any of the said children who are alive at the time."

The two lands devised to the grand-daughter Sitha Fernando by the Last Will of 1941 were No. 31, Gabo's Lane, Pettah, and No. 22, Gunasekera Lane, Maradana. But, after the marriage of Sitha, the Testator executed a codicil in 1944, by which he revoked the devises to Sitha of 31, Gabo's Lane, and the Cash

gift of Rs. 10,000, stating that the land had already been transferred to Sitha and that he had given her a dowry of Rs. 10,000. He also revoked the devise to Sitha of No. 22, Gunasekera Lane, and instead devised that land to his wife, giving her the power to transfer or devise the land to Sitha or any child of hers ; failing such a transfer or devise, the land was burdened with a fidei commissum in favour of the Testator's son George.

The terms of the Last Will of 1941 and of the Codicil of 1944 demonstrate that this Testator took special care to express his own wishes as to the ultimate destination of all his immovable property. In the four specific devises to his two married daughters and to his grand-daughter Sitha, he named his son George as the ultimate beneficiary in the event of any devisee dying childless. Again, while he generally devised numerous properties to his wife with a power for her to dispose of them among his intestate heirs, he specially stated his intention that if this power of disposition is not exercised, as also in certain other events, those properties must pass to four only of his children or such of these four children who survive his wife.

The execution of the codicil of 1944 by which the testator revoked the devise to the grand-daughter Sitha of No. 31, Gabo's Lane, and of a cash dowry, which revocation was not strictly necessary, shows how anxious he was to declare his testamentary wishes with certainty.

In 1945, the testator executed a second codicil which has an important bearing on the dispute in this appeal. In this codicil, he first referred to the clause in the original will, which devised certain immovable properties to his wife subject to the conditions and restrictions above set out. He then stated that he has decided "for good reasons" to give some of those properties to his wife without those restrictions. Thereafter by the codicil he devised several specified immovable properties absolutely to his wife. The effect of this codicil was that the devise only of some of the immovable properties to the wife by the Last Will would be subject to the conditions (*a*), (*b*), (*c*) and (*d*), which have been set out above, but that those conditions would have been inapplicable in the case of the absolute devise to the wife by the codicil of the immovable properties specified in the codicil.

The testator's wife died in 1949. But although the testator survived until 1953, he made no further testamentary disposition, and the fact that the wife pre-deceased the testator gives rise to the problems of construction which we have to resolve in this appeal.

The contentions for the appellants were substantially :

(1) that the devise of certain immovable properties to the wife by the second codicil of 1945 failed because the wife pre-deceased the testator ;,

(2) that therefore those properties fell within the scope of the residual clause (14) in the Original Will ;

(3) that all the properties which remained specified in the Original Will after the second codicil, and all the immovable properties falling within the scope of the residual clause 14 (including those referred to at (2) above) were subject on the testator's death to the conditions specified in the paragraphs (*a*), (*b*), (*c*) and (*d*) set out above ; and

(4) that the effect of those conditions is that in the testator's intention, and because his wife had pre-deceased him, a paragraph (*d*) of those conditions became operative to pass to the four children named in that paragraph, or to such of them as survived the testator, the right title and interest in and to all such immovable properties.

These contentions were supported by Counsel who appeared on behalf of the 6th substituted respondent (substituted in the room of George).

On the contrary, the submission of Counsel for the 1st respondent was that either the testator died intestate in respect of all the immovable properties devised whether absolutely or conditionally to the wife, or else that the right title and interest to and in all those properties, whether devised absolutely or conditionally or specifically or generally, to the wife, passed to the intestate heirs of the testator because clause (*c*) of the Last Will which has been set out above authorised her to pass the properties to the intestate heirs.

Counsel on both sides have very properly referred us to opinions and statements in early commentaries on the Roman Dutch Law, as to the effect of clauses in Last Wills in which property is devised to one person subject to a fidei commissum in favour of other persons, and as to the operation of such clauses in the event of the death of the original devisee before the testator. Those opinions and statements have been of much assistance to me, but in my view they serve only to confirm that in a case of this nature it is the duty of the Court to ascertain from all the material available the intentions of the testator as to the destination of his estate upon his death. I also bear in mind that a Court must hesitate to determine that a person

who has made a Last Will died intestate, unless his testamentary intentions with regard to any property cannot be ascertained with a high degree of certainty.

It quite suffices in this connection to cite two passages from Steyn on the Law of Wills in South Africa, 2nd Edition :—

> "The interpretation of a Will should be done, as far as possible, consistently with the rules of law, not conjecturing it but expounding the testator's will from the words used. The intention of the testator must be the first and great object of enquiry, and to this end technical rules are to a certain extent subservient. This must be gathered from the will as a whole and governs its interpretation provided it be not unlawful or inconsistnet with the rules of law." (at page 46-47).
>
> . . . . .
>
> "As a general rule, we should seek to interpret any term in a will in a manner which best harmonises with the general scheme or thought or *voluntas* underlying the will, i.e., regard must be had to the context."

Had the testator in this case executed only the Last Will of 1941 and the first codicil of 1944, the difficulty of ascertaining his testamentary intentions would not have been very great. Those two documents as already stated, demonstrated anxiety on the part of the testator that all the immovable properties specially or generally devised to his wife must ultimately pass in accordance with wishes expressed by him. For example, in the conditions (*a*), (*b*), (*c*) and (*d*) specified in and after clause (14) of the original Will, the testator clearly expressed three intentions :—*firstly,* that the bulk of his immovable properties would devolve on his wife subject to conditions ; *secondly,* that the wife would have the power to dispose of the properties by deed or Last Will according to her own wishes among the testator's intestate heirs, and *thirdly,* that if the wife did not exercise this power of disposition, the properties must pass on her death to four of the testator's children named in clause (*d*) or the survivors of these four children.

In this way, the testator demonstrated an intention that ultimately all these properties should pass either to any intestate heirs selected by his wife under the power of appointment conferred on her, or else if his wife did not exercise that power, to the survivors of four children named in paragraph (*d*). It will be seen that accordingly, so far as the wife was concerned, the testator's intention was only to devise to her an interest for

life, or for a shorter period terminable by her, but that in regard to ultimate destination the testator did postulate two alternatives, the first that the wife may appoint the ultimate beneficiaries, and the second that if the wife failed to exercise the power of appointment, the four persons named in clause (*d*) must be the ultimate beneficiaries.

What actually occurred, by reason of the death of the wife before the testator himself, is that the intention of the testator that the wife should have an interest in these properties terminable either on her death or earlier, became inoperative, and also that the power of disposition conferred on the wife by clause (c) of the conditions in the Original Will became equally inoperative. But in my opinion, the intention clearly expressed in clause (*d*) is that if the wife for whatever reason does not exercise the power of disposition, then those properties were ultimately destined for the persons specified in clause (*d*).

Had the wife survived the testator and failed to exercise her power of appointment, the properties would clearly have passed under clause (*d*) to the persons entitled thereunder by reason of the fideicommissary substitution in that clause. In fact, however, the wife did not and could not exercise her power of appointment because she pre-deceased the testator. That being so, the proper and reasonable construction of the Original Will requires effect to be given to the testator's intention as expressed in Clause (*d*).

Counsel for the 1st respondent relied upon the statement in Steyn (at p. 131) that a legacy "may also fail or lapse after the execution of the Will by the death of the legatee before the testator." Undoubtedly the absolute legacy in the second codicil to the testator's wife did fail, because she pre-deceased the testator, and accordingly also there was a failure of the provisional right of intestate heirs to take under the clause (c) of the original Will, because of the failure of the power of appointment conferred by that clause on the wife.

The position is not, however, the same in the case of Clause (*d*). I cite again from Steyn :—

> "Substitution takes place where a testator nominates another to take the place of the appointed heir or legatee under certain circumstances. It is either direct or fideicommissary.
>
> If a person is instituted as heir or legatee without any substitution his share of the inheritance or bequest will, if he dies before the testator, lapse unless a contrary intention appears from the will.

> DIRECT (ordinary, common) substitutions (*substitutio vulgaris*) takes place when one or more persons are mentioned in the will to take the place of the appointed heir or legatee should the latter not take the inheritance or bequest for any reason, whether because he was unable to do so—as where he died before the testator, or witnessed the will—or because he was unwilling and refused to take under the will, or because there was a non-fulfilment of a condition attached to his institution. In such a case there is no transmission of the inheritance or bequest because it goes to the substituted person direct from the testator."

Applying this statement of the law to the present case, the question that arises is: "did the wife not take the bequest for any reason?". The answer in terms of the statement is that the wife did not take the bequest, for the reason that she "was unable to do so" because "she died before the testator". But the testator did provide by clause (*d*) for the destination of the property on her death without having exercised her power of disposition. In terms of the above statement of the law, there was in my opinion on the death of the testator a direct passing of the property to the children mentioned in clause (*d*).

For the opinion just stated, there is support in the following passages in Steyn (p. 265) :—

> "The rule is now well established that in case of doubt the substitution is presumed to be direct rather than fideicommissary. If, therefore, a person is appointed as heir or a bequest is made to him, and other persons are mentioned as heirs or legatees at, upon, in the event of his death, should he die, or similar words, the substitution would be direct and such other person would only succeed should the instituted heir or legatee predecease the testator."

ILLUSTRATIONS (showing direct substitution preferred).

(1) Testatrix appointed "her son as her sole heir and on his death his lawful descendants by representation". In a codicil she referred to this son in these terms, "Who after my death will become the full proprietor of the farm."

HELD, that the substitution was direct. If the son survived the testatrix he took the estate unburdened, but if he predeceased her his children were to take his place as heirs."

It will be seen that in the case referred to in the cited Illustration, the Court held that there was no fidei commissum in favour of the descendants of the son of the testatrix, but that

nevertheless if the son pre-deceased the testatrix, his children were the direct heirs of the testatrix. Clause (*d*) of the present Will in my opinion more strongly favours the persons mentioned in that clause: for it is clear that even if the testator's wife did inherit, she would have held subject to a conditional fidei commissum in favour of the four named children. That being so, the construction that those four children became direct heirs by reason of the death of their mother before the testator is all the more justified. I hold for these reasons that in consequence of the failure of the wife to inherit, the condition in clause (*d*) operated to pass to the four children named in that clause the immovable properties devised in the Original Will to the wife of the testator, which were at the time of his death subject to the conditions specified in the Last Will.

This construction however does not resolve all the difficulties which arise in this case, because in 1945 the testator executed a second codicil. As already stated, several specified immovable properties, which were originally subject to the conditions in the Last Will, were instead devised absolutely to the testator's wife. Thus the principle stated by Steyn (at page 131) applies in the case of the absolute legacy to the wife by the second codicil.

Counsel for the appellants argued that upon the failure of that legacy those properties, which by the second codicil were "taken out" of the Original Will, again reverted into the residuary clause (14) and therefore became subject to the conditions in that residuary clause, including the condition in clause (*d*). But there are more than one reason why I am unable to accept this argument.

Firstly there is the fact that the testator deliberately declared in the second codicil his intention that "for good reasons" the conditions in the Original Will shall not apply to the absolute legacy made to his wife by the codicil; thus his only wish in 1945 was that his wife should take this absolute legacy. This fact to my mind precludes a Court from reaching the construction that the testator could possibly have intended that anyone other than his wife should inherit the properties comprised in this legacy.

Again, I do not agree that the failure of a specific disposition in a codicil has the effect of bringing the subject of that disposition within the scope of a residuary clause in an earlier Will, unless the residuary clause is explicit on the point.

The two circumstances, that the wife was named legatee of the properties mentioned in clauses (1) to (14) of the Will, and that she was also named the legatee of a specific legacy in the

codicil, are purely accidental. If for instance, the codicil had named some other person as a specific legatee, and that other person had predeceased the testator, then clearly the testator would have died intestate in respect of the disposition in the codicil, and a residuary legatee named in the Original Will could not have claimed that that disposition fell into residue. In my opinion, the second codicil clearly establishes that the only testamentary wish of the testator in regard to the properties then dealt with was that they should pass to his wife, and that he had no other wish in regard to the destination of these properties.

hold—

(1) that the intestate heirs of the Testator are entitled to all the immovable properties which were specifically devised to his wife by the second codicil of 1945 ; and to the premises No. 22, Gunasekera Lane devised to the wife by the first codicil of 1944 ; and to all the movable property left by the Testator (subject of course to specific devises of money or income made in the Last Will) ;

(2) that *the other* immovable properties devised to the wife by the Last Will passed to the persons specified in clause (*d*) of the conditions set out in the Last Will.

The appeal is dismissed with costs.

WALGAMPAYA, J.—I agree.

WIMALARATNE, J.—I agree.

Appeal dismissed.