(44)

IN THE HIGH COURT OF AUSTRALIA

HOLMES

v.

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED & ORS.

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 3rd August, 1951.

H. E. Daw, Gov. Print., Melb.

C.12280/45

HOLMES

v.

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED & ORS.

ORDER

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the estate of Mary Ellen Dafgard deceased.

Regarding

HOLMES

v.

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED
& ORS.

JUDGMENT

DIXON J.
WILLIAMS J.
KITTO J.

HOLMES

V.

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED & ORS.

JUDGMENT

DIXON J.
WILLIAMS J.
KITTO J.

The question for decision on this appeal is whether the Supreme Court of New South Wales in its equitable jurisdiction (Sugerman J.) was right in declaring that upon the true construction of the will of Mary Ellen Dafgard and in the events which have happened the appellant is not entitled to a legacy of 100 shares in the Colonial Sugar Refining Co. Ltd. but is entitled to a legacy of 50 shares in such company.

The testatrix died on 14th March 1950. She was the widow of Carl August Dafgard who died on 23rd July 1927. By his will dated 9th October 1925 he appointed the Union Trustee Co. of Aust. Ltd. and the testatrix his executors and trustees and divided his residuary personal estate into two parts, one of which he bequeathed to the testatrix absolutely and the other of which he settled on trust for the testatrix for life with remainder over. Included in his residuary personal estate were 100 shares in the Colonial Sugar Refining Co. Ltd. Soon after his death the testatrix became registered in the register of members of the Colonial Sugar Refining Co. Ltd. as the sole holder of 50 shares forming part of the portion of residue bequeathed to her absolutely and registered as the holder jointly with her co-trustee, the Union Trustee Co. of Aust. Ltd., of 50 shares forming part of the settled portion of residue. In the year 1934 the Colonial Sugar Refining Co. Ltd. made a bonus issue of shares to shareholders in the company on the basis of one new share for every share then held and the testatrix thereupon became registered as the sole holder of 100 shares and as the joint holder with the Union Trustee Co. of Aust. Ltd. of 100 shares in that company.

By her last will and testament dated 16th January 1949 the testatrix appointed the Union Trustee Co. of Aust. Ltd. and the appellant, who is her nephew, her executors and trustees and devised and bequeathed to them the whole of her estate real and personal wheresoever situated or over which she had any disposing power whatever upon the conditions and trusts thereinafter set out. She gave and bequeathed free of all death duty and federal estate duty or any other duty payable by reason of her death a number of specific and pecuniary legacies. The pecuniary legacies included the legacy the extent of which is at issue on this appeal. The bequest is in the following terms - "To the said John Dashwood Holmes one-half of the shares held by me at the time of my death in the Colonial Sugar Refining Company Limited." As to the rest and residue of her estate the testatrix directed her trustees to pay the income derived therefrom to the appellant during his life and on his death to divide the capital between four charities. The testatrix also directed that the cash legacies excluding the specific bequest to the appellant should be subject to the condition that her estate was sworn for probate at the nett value of £11,000. If her estate was less than £11,000 then the cash legacies were to abate proportionally.

The nett value of the estate was in fact sworn for probate purposes at £15,760, so that the direction did not become operative. The intention of a testator must be ascertained from a consideration of the whole will read in the light of any surrounding circumstances that are relevant and admissible and the meaning of the will and all its parts determined according to that intention. If the direction in question could throw any light upon the extent to which the testatrix intended to benefit the appellant by the specific bequest it would be necessary to unravel its meaning. But it does not appear to us to do so. The solution of the problem depends entirely upon the meaning to be attributed to the language of the bequest itself and the only surrounding circumstances that appear to be material are those already mentioned, namely that the

testatrix, as we have said, was registered throughout her widowhood as the holder of shares in the Colonial Sugar Refining Co. Ltd., one half of which were in her sole name and belonged to her absolutely and the other half of which were in the joint names of herself and the Union Trustee Co. of Aust. Ltd. and were part of the settled estate of her late husband in which she had a life interest only.

The bequest to the appellant does not contain any technical words and is subject to the general rule of construction that the words of a will, like any other instrument, must prima facie be given their ordinary natural grammatical meaning. It appears to us that in the ordinary use of language a reference to shares held by a person in a company as "shares held by me" would naturally refer to shares registered in the sole name of that person and not to shares of which that person is a joint holder. It would be natural to refer to shares held in joint names as shares held by the two holders. The instrument in which the expression occurs in the present case is a will referring to shares held by the testatrix which prima facie means shares registered in her sole name. She is referring to shares of which she has power to dispose. The natural meaning of the bequest is that she is intending to bequeath one half of the shares of which she has power to dispose.

It is a bequest of shares in the Colonial Sugar Refining Co. Ltd. held by her at the date of her death so that the will contemplates that the number of shares might alter between the date of the will and her death. It may be that the testatrix did not contemplate that any of her own or the trust shares would be sold or that further shares would be purchased on behalf of herself or the trust during that period, and that the only alteration might be a further issue of shares which would be taken up by herself and the trust, so that the number of shares registered in her sole name and in the joint names would remain the same. Be that as it may, the circumstance that the testatrix was registered as the joint holder for the same number of shares as she was registered as the

sole holder could not justify an assumption that she was bringing the former shares into account in the calculation of the number of shares bequeathed to the appellant. Cases relating to the respective interests of sole and joint holders of shares in companies and of the nature of holdings required to qualify shareholders to become directors of companies under articles of association such as Grundy v. Briggs 1910 1 Ch. 444, Permanent Trustee Co. of N.S.W. Ltd. v. Palmer, 42 C.L.R. 277; and Avon Downs Pty. Ltd. v. The Federal Commissioner of Taxation, 78 C.L.R. 353, were cited to us but they do not appear to throw any light upon the meaning of the bequest.

In our opinion it is not possible to construe the bequest as referring to one half of the shares held by the testatrix in the Colonial Sugar Refining Co. Ltd. either solely or jointly at the time of her death and therefore, in the events which have happened, as a legacy of the whole of the shares of which she was the beneficial owner.

For these reasons we are of opinion that His Honour was right and that the appeal must be dismissed. His Honour concluded by saying that it was difficult to express with complete confidence a view as to the testatrix's intentions and that his mind had fluctuated during the course of the argument. Before us the argument for the appellant was supported by counsel for the trustee company which leaves us with the feeling that perhaps the intention of the testatrix has miscarried. In all the circumstances we think the case is one in which the costs of all parties as between solicitor and client should be ordered to be paid out of the residuary estate of the testatrix.