

**SENARATNE**  
**v.**  
**SENARATNE AND OTHERS**

SUPREME COURT  
AMERASINGHE, J.,  
WADUGODAPITIYA, J. AND  
EDUSSURIYA, J.  
SC APPEAL NO. 1/98  
CA APPEAL NO. 349/91 (F)  
DC COLOMBO NO. 24678/T  
JUNE 28, 2001

*Testamentary action – Administration of estate – Intestate heirs – Gift of a part of the estate to one of the heirs pending administration – Right of such heir to a share of the remainder of the estate – Admissibility / evaluation of oral evidence for varying such right.*

Upon the death of one Senaratne intestate, his widow the original petitioner (now deceased) obtained letters of administration. During the pendency of testamentary proceedings the widow and all the children of late Senaratne – being respondents to the petition – by deed No. 2642 gifted the rights which devolved on them on the death of the deceased intestate in respect of premises No. 82, Galle Road, Bambalapitiya, to the 1st respondent-appellant, a daughter of late Senaratne.

Thereafter, the administratrix filed Final Accounts and the scheme of distribution of the estate leaving out the appellant on the ground that the appellant had promised to convey her rights to the remainder of the estate to the other heirs. Some of those heirs gave evidence before the District Judge supporting that position, but the appellant denied the existence of such a promise. She stated that the said premises were gifted to her as dowry for her marriage and claimed her rights to the remainder of the estate.

**Held:**

- (1) The rights of the deceased intestate vested in his heirs immediately upon his death and their rights in respect of the premises in dispute were validly gifted by a notarial deed.

- (2) The terms of the deed of gift could not be varied by oral evidence; and in the absence of a notarially executed deed by which the appellant surrendered her rights to the remainder of the estate, the appellant was entitled to 1/10 "share" in the remainder of the estate.
- (3) There was no acceptable oral evidence of any promise by the appellant to give up her rights to the remainder of the estate, and in all the circumstances, the submission of counsel for the respondents that the appellant held her share in the remainder of the estate in trust for the other heirs was untenable.

**APPEAL** from the judgment of the Court of Appeal.

*P. A. D. Samarasekera*, PC with *Keerthi Sri Gunawardena* for the appellant.

*R. K. W. Goonasekera* with *Aravinda Athurupana* for the 2nd substituted petitioner-respondent.

*Dr. Jayatissa Costa* for the 4th and 5th respondents.

*Cur. adv. vult.*

August 29, 2001

**EDUSSURIYA, J.**

During the pendency of testamentary proceedings instituted by the original petitioner (now deceased) namely, the widow of one A. M. Senaratne, in respect of the said Senaratne's intestate estate the said widow and 2nd, 3rd, 4th and 5th respondents who are the daughter and sons of the deceased A. M. Senaratne gifted and conveyed the rights which devolved on them on the death of the deceased intestate in respect of premises number 82, Galle Road, Bambalapitiya, to the 1st respondent-appellant who is also a daughter of the deceased.

The petitioner-administratrix then filed an affidavit with accompanying amended Final Accounts on 15th March, 1985, along with a scheme of distribution of the estate leaving out the 1st respondent-

appellant and took up the position that premises No. 82, Galle Road was gifted to the 1st respondent-appellant by the other heirs on the 1st respondent promising to convey her rights in the remainder of the estate to the other heirs and was, therefore, not entitled to share in the remainder of the estate of the deceased.

The 1st respondent-appellant then filed objections dated 15th November, 1988, seeking (1) a rejection of the amended Final Accounts (2) exclusion of premises No. 82, Galle Road, Bambalapitiya, as an asset of the estate on the ground that the other heirs gifted to her their rights in the said premises as her dowry on 24th July, 1972 and whilst denying that she the 1st respondent-appellant had given any undertaking to convey her rights in the remainder of the estate to the other heirs sought an order of Court entitling her to a 1/10th share of the remainder of the estate both movable and immovable. 20

At the inquiry into the same the petitioner-administratrix giving evidence took up the position that the other heirs gifted their rights in premises No. 82, Galle Road, Bambalapitiya, to the 1st respondent-appellant because the 1st respondent-appellant who had qualified in Homeopathic medicine wanted to set up practice therein. 30

At the inquiry the following matters were put in issue :

- (1) According to the scheme of distribution, apart from premises No. 82, Galle Road, Bambalapitiya, is the 1st respondent entitled to a 1/10th share of the remainder of the estate?
- (2) Were the rights of the other heirs gifted to the 1st respondent on the condition that the 1st respondent would waive her 1/10th share in the remainder of the estate and convey the same to the petitioner and the 2nd to 5th respondents?
- (3) If issue No. 2 is answered in the affirmative is the 1st respondent estopped from asking for a 1/10th share of the remainder of the estate? 40

- (4) Can an oral agreement relating to immovable property be enforced in view of the provisions of the Prevention of Frauds Ordinance?

The said issues were answered by the learned District Judge as follows :

- (1) Yes.                      (2) No.                      (3) No.                      (4) No.

An appeal was filed from the said order and the Court of Appeal set aside the order of the District Court on the ground that "the learned District Judge has erred in rejecting the evidence of the petitioner and two other heirs that the 1st respondent did renounce her right to her share of the intestate property having already accepted as a gift by deed No. 2642 the residential premises referred to therein and which formed part of the intestate estate". 50

The Court of Appeal went on to hold that the 1st respondent (appellant before this Court) is not entitled to any further share in the intestate property of the deceased and that the scheme of distribution be accepted.

It is settled law that where a person dies intestate leaving behind heirs, that the property belonging to the estate vests in the heirs according to the law of inheritance immediately, on death. Thus, for this reason alone the judgment of the Court of Appeal must necessarily be set aside since a 1/10th share of the entire estate of A. M. Senaratne had already vested in the 1st respondent-appellant and any such rights in the immovable property can be divested by the 1st respondent-appellant only by a notarially attested document. 60

This was conceded by the learned Counsel for the 2nd, 4th and 5th respondents at the hearing of this appeal.

Counsel for the 2nd respondent with whom the Counsel for the 4th and 5th respondents associated himself urged that although the 70

learned District Judge had not taken into consideration the evidence adduced by the then petitioner who is now deceased (and in whose place the original 2nd respondent has been substituted) and the other respondents who gave evidence in relation to the circumstances or conditions under which the deed of gift in respect of premises No. 82, Galle Road, Bambalapitiya, came to be executed, on the ground that such evidence cannot be led to vary the terms of a notarially attested document, such evidence was led only to establish the conditions under which the said deed came to be executed and not to add to or vary the terms of the said deed. 80

Learned Counsel has undoubtedly made this submission in view of the statement at the end of the first paragraph at page 353 of the brief wherein the learned District Judge has stated that it is now not open to any party to give evidence on any matters outside what is reflected in the deed.

Although the learned District Judge has stated so, he has, in fact, considered the evidence given by the witnesses in respect of the circumstances and conditions relating to the execution of the said deed of gift.

In fact, the learned District Judge has stated in his order that the deed does not refer to the 1st respondent giving an undertaking to convey her rights in the remainder of the estate to the other heirs and that if there had been such an undertaking it would undoubtedly have been reflected in the deed of gift. 90

It was contended by the learned Counsel for the 2nd respondent that –

- (1) the 1st respondent-appellant is estopped by acquiescence and or by encouragement from now claiming rights in the remainder of the estate of the deceased, and

- (2) that the 1st respondent-appellant is holding the rights in the 100 remainder of the estate in trust for the other heirs.

Although I have stated hereinbefore that the learned District Judge has considered the evidence relating to the circumstances and conditions under which the said deed of gift came to be executed I will now proceed to examine that evidence at length in view of the submission that the 1st respondent-appellant did not give evidence and also the contention that the 1st respondent-appellant is holding her 1/10 of the remainder of the estate in trust for the other heirs.

The original petitioner in giving evidence spoke of the 1st respondent-appellant saying at the time that the deed of gift was 110 executed that she would not claim from the remainder of the estate. She also stated that one of the heirs refused to sign the deed of gift saying that the 1st respondent could not be trusted and that she had to plead with him to sign the said deed.

In these circumstances it is difficult to accept the position that the other heirs did not get the 1st respondent-appellant to gift her 1/10 share in the remainder of the estate to them by the same deed or by getting the 1st respondent-appellant to execute another deed. Further, if as the petitioner stated the 1st respondent-appellant wanted to set up practice at No. 82, Galle Road, Bambalapitiya, the 120 other heirs could easily have permitted the 1st respondent-appellant to do so without gifting the said premises to her. This confirms the position taken by the 1st respondent-appellant in her objections that the said premises was gifted to her as a dowry in consideration of her marriage which had been solemnized shortly after the execution of the deed of gift.

It was also elicited in evidence that the petitioner having gifted another property belonging to the estate to one of her sons subject to her life interest was litigating with him over the right to possession. However, that son has been included in the scheme of distribution 130 of the estate.

Then again when questioned in relation to the business that was carried on at Armour Street the petitioner gave evasive evidence often contradicting herself. (pages 298, 299, 300, 301, 302). This evidence showed without doubt that her evidence was unacceptable. Her evidence regarding the Final Accounts which she at first denied filing but later admitted by saying that "if I have signed it then I know. If it has been filed it should be in Court" should also be borne in mind in evaluating her evidence. The evidence of Ingrid Manel, another daughter of the petitioner who had also been gifted an immovable 140 property on the same day that the 1st respondent-appellant was gifted the property at No. 82, Galle Road, Bambalpitiya, was more in the nature of a person who had resigned herself to being contented with what she had been given rather than litigating to get her rights.

Her evidence which appears at page 317 of the brief reads as follows :

"we discussed and *gave* my elder sister the Bambalapitiya house. *I was given* a house at Balapokuna. *They were given* on the condition that we do not ask for the other properties."

"After I was *given* the house I did not ask for rights in the other 150 properties. I am contented with what I got."

So that if at all, a condition had ben laid down, and it was unilateral and the evidence does not establish that the 1st respondent-appellant agreed to abide by such a condition. This is further confirmed by Ingrid Manel (at page 326) that "when these two houses were given it was on the promise that we would not claim from the other properties. We should be *contented with what was given to us*". . . . "*It does not matter. What I got is enough*".

Even the evidence of the other witness does not strengthen the case of the petitioner namely that the 1st respondent-appellant agreed 160 to surrender her rights to the remainder of the estate. The entirety

of the evidence led to establish a waiver or a promise by the 1st respondent-appellant accepting the gift on the condition that she would not claim from the remaining properties is therefore totally unreliable for the reasons given by me earlier and must, therefore, be rejected. In the circumstances the question of the 1st respondent-appellant giving evidence to refute such unreliable evidence does not arise. It must also be borne in mind that there is no contemporaneous notarially attested document gifting such 1/10 share in the remainder of the estate to the other heirs and that the oral evidence relating 170 to the same has come thirteen years later.

Further, the house which had been gifted to the 1st respondent-appellant was valued in the original inventory at Rs. 20,000 (whatever the value may be now), whereas, the entire estate was valued at Rs. 6,94,258/42 cts. Hence, even if there was such a condition as claimed by the petitioner-respondent it will not be equitable to hold that the 1st respondent holds 1/10 share in the remainder of the estate in trust for the other heirs. Even Ingrid Manel had been gifted a property valued at Rs. 35,000.

We, therefore, allow this appeal and set aside the judgment of 180 the Court of Appeal and restore the order of the District Court.

The 2nd respondent-substituted petitioner will pay a sum of Rs. 10,500 as costs.

**AMERASINGHE, J.** – I agree.

**WADUGODAPITIYA, J.** – I agree.

*Appeal allowed.*