

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF  
SRI LANKA**

In the matter of an Appeal to the Supreme  
Court from the Order of the Civil Appellate  
High Court of Mount Lavinia dated 15.12.2010.

**SC APPEAL 37 / 2012  
SC Leave to Appeal No  
HC/HC/CALA/ 35 /2011  
DC Mount Lavinia Case  
No. 957/T**

Mary Helen Martin Christoffelez  
(Nee Perera),  
No. 15A, Pokuna Road,  
Kawdana, Dehiwela.

And Now at

No. 54, Broadway Road,  
Kawdana, Dehiwela.

**Respondent Respondent  
Appellant**

Vs

Elrea Joseph Romould Pereira,  
"Brighton", 87, Sri Saranankara  
Road, Kalubowila, Dehiwela.

**1<sup>st</sup> Petitioner Respondent  
Respondent**

Archbishop of Colombo,  
Archbishop's House,  
Colombo 08.

**2<sup>nd</sup> Intervenient Petitioner  
Petitioner Respondent**

Mary Theresa Bright  
Kariyawasam (nee Pereira),  
No. 123, St. Anthony's Road,  
Moratumulla, Moratuwa.

**3<sup>rd</sup> Respondent Respondent  
Respondent**

BEFORE : **PRIYASATH DEP PCJ.,  
S.EVA WANASUNDERA PCJ. &  
SISIRA J DE ABREW J.**

COUNSEL : Geoffrey Alagaratnam PC for the Respondent Respondent  
Appellant  
Ikram Mohamme PC for the Intervenient PetitionerPetitioner  
Respondent  
Kaushalya Navaratne for the 1<sup>st</sup> Petitioner Respondent  
Respondent

ARGUED ON : 24.02.2016.

DECIDED ON : 31. 03. 2016.

**S. EVA WANASUNDERA PCJ.**

Leave to appeal was granted by this court on 16.02.2012 on the questions of law contained in paragraphs 10(a) and 10(b) of the amended Petition of Appeal dated 30.04.2011. The subject matter of this case is Clause 8 of Document A1, which is the last will No. 70 dated 20.09.1976 of late Mary Helen Oorloff.

Learned District Judge of Mt. Lavinia had made an order dated 31.07.2008, with regard to an application made by the Archbishop of Colombo as the Intervient Petitioner by way of a Petition dated 17.09.2007 in the Testamentary case No. 957/T regarding the aforesaid Last Will. By this order, the District Judge had made order that the Intervient Petitioner ,the Archbishop of Colombo does not get any right or title to house No. 31 in Lily Avenue, Wellawatta according to the Last Will No. 70 of late Mary Helen Orloff. The Archbishop of Colombo who is the 2<sup>nd</sup> Intervient Petitioner Respondent made a revision application to the Civil Appellate High Court to get the said order dated 31.07.2008 revised. The learned High Court Judges over turned the order of the District Judge and made order on 15.12.2010 allowing the revision application of the 2<sup>nd</sup> Intervient Petitioner Respondent, the Archbishop of Colombo and granting him an entitlement to the said house , in terms of Clauses 2 and 8 of the Last Will.

The questions of law to be decided on, by this court, contained in paragraph 10 of the Petition of the Respondent Respondent Appellant dated 30.04.2011, are as follows:

- 10(a) Did their Lordships err **in holding** that the rights under Clause 8 only vested in an heir **upon fulfillment of the conditions** stipulated therein?
- (b) Did their Lordships err **in failing** to consider well established principles of law that **upon the death of a Testator the property rights in the estate vest in the heirs?**

Clause 8 of the Last Will of Mary Helen Oorloff reads as follows:

*“ After the death of my brother George Stephen Louis Oorloff, should my house No. 31, Lily Avenue, Wellawatta remain unsold, the house should be sold together with the property, furniture, fitting etc. , inclusive of all saleable assets with all the money lying in the Bank to my credit after deducting the full cost of the Testamentary case, funeral expenses, debts and other various charges, municipality rates commissions and expenses in connection with the sale of my property etc. and legacies have been paid the total money remaining to be equally divided among my brothers and sisters surviving and being permanent residents of Sri Lanka, none of the sons and daughters of my*

brothers and sisters living or dead are entitled to any benefit of my last will. In case ***there are no beneficiaries alive to receive the benefit of this Last Will***, the outstanding moneys referred to in this paragraph 8 be paid *to the Roman Catholic Church* to be exclusively used for the propagation of faith in Sri Lanka”.

The Respondent Respondent Appellant,( Mary Helen Martin Christoffelez), the 1<sup>st</sup> Petitioner Respondent Respondent (Elrea Joseph Romould Pereira) and the 3<sup>rd</sup> Respondent Respondent Respondent ( Mary Theresa Bright Kariyawasam ) are the three children of the sister of late Mary Helen Orloff, the testatrix of the Last Will, namely Mrs. Doreen Bright Pereira. Doreen Bright Pereira died 16 years after the testatrix.

In the District Court Case No. 957/T, the 3<sup>rd</sup> Respondent Respondent Respondent and the Respondent Respondent Appellant who are the two girl children of Doreen Bright Perera in the present case before this court, filed a petition and an affidavit on 28.07.2006 and pleaded the following:

1. When the Testatrix died on 1<sup>st</sup> April,1980 , there were four siblings alive and resident in Sri Lanka. Their names were George Louis Oorloff, Lord Gdlif Dudley Oorloff , Nobel Broyar and Mrs. Doreen Bright Pereira.
2. George Stephen Louis Oorloff died on 21.11.1983. He was unmarried and without any heirs.
3. Lord Gdlif Dudley Oorloff died whose children are abroad and their whereabouts are not known.
4. Nobel Broyar died on 17.06.1988. She was an Australian citizen.
5. Mrs. Doreen Bright Pereira died on 25<sup>th</sup> May, 1996 leaving a Last Will bearing No. 1779 of 1<sup>st</sup> August, 1996 and a testamentary case bearing No. 570/97/A was filed with regard to the said Last Will which was concluded with a decision that the Appellant, 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent **are the sole beneficiaries of all the property of late Doreen Bright Pereira at the time of her death.**

The other facts pertinent to be taken into account in deciding this matter is as follows: The 1<sup>st</sup> Petitioner Respondent Respondent preferred the Testamentary

Case No. 957/T, on 20.09.1976. While the case was pending in the District Court of Mount Lavinia, due to a fire in the record room, this file got destroyed. It was reconstructed by the Appellant. The 3<sup>rd</sup> Respondent intervened in 2006. The Appellant's case was as follows: Her mother, the late Doreen Bright Pereira was the sister of late Mary Helen Oorloff whose last will was being administered in the case, and who lived and resided in Sri Lanka when Mary Helen Oorloff died on **01.04.1980**. Doreen Bright Periera died on **25.05.1996** after the death of the testatrix of this case, who died on 01.04.1980. as well as after the death of the brother of the testatrix, George Louis Oorloff **on 21.11.1983** who had a life interest to the relevant property. **The Appellant became entitled** to the proceeds of the sale of premises No. 31, Lily Avenue in terms of Clause 8 of the Last Will **through her said mother late Doreen Bright Pereira.**

So, I observe that the Appellant and the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents are claiming **through the rights of their mother Doreen** who got rights through the last will from the testatrix and *not on their own right as " sons and daughters of my brothers and sisters " as mentioned in the last will.*

Counsel for the 2<sup>nd</sup> Interveniend Respondent Respondent , submits that the Appellant , the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents are the son and daughters of the Testatrix's sister, according to the wording in the Will , who should not be entitled to the property or rights in the Will because one part of the Will reads that, "none of the sons and daughters of my brothers and sisters living or dead are entitled to any benefit of this my last will ". The 2<sup>nd</sup> Respondent also contends that the conditions to the Will , have to be complied with, prior to granting the inheritance.

It is a fact that up to date that the said house has not been sold. When this pending case is over, the executor will be able to sell the same. Before granting the proceeds of the sale to the beneficiaries in the will, the funeral expenses, the

cost of the testamentary case etc. should be paid off. **The contest is to get the rights of inheritance for the proceeds of the sale of the house in Wellawatta.**

I find that the conditions are complied with, namely the inheritance should not go to those who are resident abroad. The only sister who was living in Sri Lanka at the time the testatrix died, is Doreen. She lived for a long time after the death of the testatrix, i.e. for 16 years. If the record room of the District Court of Mt. Lavinia did not catch fire and burnt down the record, it may be that the testamentary case would have got concluded before Doreen died and then, she being the sole sibling living in this country would have got entitled to the proceeds of the sale of the house which is the subject matter of this case before she died in 1996. Could just the fact that she died before the testamentary case was over, affect her rights of inheritance under the Will? I opine that it should not.

I find that in the case of *Malliya Vs Ariyaratne 65 NLR 145*, Basnayake C.J. has said:

- (a) That the executor has power over both movable and immovable property and may sell the property left by the testator in accordance with the directions in the will.
- (b) That the immovable property specially devised **vests not in the executor but in the heir to whom it is devised** subject to the executor's right to have recourse to it in its due order for the payment of the testator's debts.
- (c) That the **executor's assent** or a conveyance by him **is not necessary to pass title to heirs appointed in the will or the heirs at law.**

Then I would like to refer to the case of *Kelaart Vs. Van Twest 1981, 1 SLR 353,(1985) BALI P 194 – CA*, Justice Victor Perera stated in writing the judgment that the paramount rule is to look for **the intention of the testator** as found in the will. The judges also held that our courts have consistently laid down the principles to be followed in construing Wills and that the **Will must be construed**

**as a whole** and apparent contradictions must be reconciled, if possible and if that cannot be done, then only will a later provision prevail. But the main thing is to get at the intention of the testator from the whole Will.

Burrows on Interpretation of Documents at page 71 , as well as Beale's Cardinal Rules of Legal Interpretation at page 607 contain many dicta in this regard. I would like to quote one to wit, " The paramount rule is that before all things we must look for **the intention of the testator** as we find it expressed and clearly implied in the general terms of the Will; and when we have found that on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words whether standing first or last."

It is a fact that the testatrix died in 1980 and brother George Stephen Louis Orloff died in 1983. The House No. 31, Lily Avenue was not sold by then. Then, the testatrix had stated that , " the house should be sold together with the property, furniture , fittings etc. inclusive of all saleable assets " . I observe that the **intention first mentioned is that the house should be sold, if at the time of the death of George, the house had not been sold.** It is noted that the Last Will was written on 20.09.1976. The testatrix had even given the right for George to sell the house during his lifetime. That is the reason, for having mentioned, 'if at the time of George , the house had not been sold'. I find in Clause 4 of the Last Will, the testatrix had invited the brother George to come and live in No. 31, Lily Avenue and also given him the life interest. So, it is quite well understood that George could have sold the house during his life time but he had not done so. Therefore, it remains as an asset of the testatrix in the Will.

The Counsel for the 2<sup>nd</sup> Intervient Petitioner Petitioner Respondent, the Arch bishop of Colombo, **argued** that the principle of law that upon the death of a testator, the property or rights of the estate vests in the heirs **does not apply** in a situation like the one in hand, as Clause 8 of the Will does not vest the house in question on any heir but contains only a direction to the executor that the house be sold and the proceeds be given to the persons who are entitled to **as at that point of time of sale of the house**, in terms of Clause 8. He draws a difference

between *the vesting of the house* in the heirs and *the proceeds of the sale of the house being directed to be given to the heirs*.

Trying to find out the intention of the testatrix, from the wording of the whole of the Will, I am of the opinion that the testatrix wanted to give preference to her siblings living in Sri Lanka and as she had in mind more than one person to be living in Sri Lanka and more over, her thinking that the monies in the bank might not be enough to pay for the testamentary case costs, taxes etc. has made her to direct the executor to sell the house and do the needful after selling the house. If she vested the house in the heirs straight away, the end result would have been the same if the heirs were more than one because then also, the vesting of the house being given to two or three, for them to share the property, it will have to be sold. In any case, the testatrix would not have projected her thoughts to the time when the property would be sold, such as the year of the sale etc. when she got the notary public to write the last will in 1976 and surely would not have ever thought of who would be alive when the house will be sold in the future. Therefore I fail to understand how an argument could be maintained for the testatrix to have had in mind *to give the monies out of the sale at the time of the sale to those who will be living at that time*.

Going through the Last Will of the testatrix bearing No. 70 attested by J.E. Corea, Notary Public of Chilaw, I find that in other clauses she had granted money to be paid to the Priorese of the Carmelite Convent at Mattakkuliya, and to the Roman Catholic Archbishop of Colombo. She had granted a block of land to the godson, Elrea Joseph Romuald Pereira. She had granted life interest of her resident house, No. 31, Lily Avenue, Wellawatta to her unmarried brother George and the right to reside therein until his death was specifically mentioned in Clause 4 of the Last Will. **In the same clause**, it is again specifically mentioned that “ A sum of Rs 20000/- to be reserved from the monies in my bank and all other assets of mine, for the payment of all rates and taxes of whatever nature to the various authorities as and when they fall due and for the maintainance of the said building , premises, furniture, fittings etc. to be in good repair and condition”. This inclusion of such a sentence shows clearly that she meant these taxes etc. to

be paid from her money, out of the monies in the bank and all other assets of hers, in case the money in the bank is not sufficient.

I am of the opinion that at the time the testatrix died, according to the conditions in the Will, her sister living in Sri Lanka at that time, Doreen Bright Pereira inherited the right to receive the proceeds of the sale of the house No. 31. When the said Doreen died her property rights which she was entitled to receive from her dead sister according to the sister's Will, get inherited by Doreen's heirs. Doreen's heirs are her two daughters and her son who are the Appellant, the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents.

The argument of the 1st Interventient Respondent Respondent which is to the effect that, " at the time of the sale of the house, if the testatrix's siblings are living in Sri Lanka only at that time, that the proceeds of the sale of the house will be granted to them" does not hold water as then the basis of inheritance would till the executor manages to sell the same, by which time , it may be , most probably, that none of her siblings would be living on earth. The 1<sup>st</sup> Interventient Respondent Respondent of course would be entitled to whatever the proceeds at whatever the time and day since the position of Archbishop is an official position and not just a human being. The intention of the testatrix does not seem to be anywhere close to that kind of situation.

Anyway, it is a well established principle of Roman Dutch Law that any property intended to be bequeathed under a Last Will , would under no circumstances, remain in suspense. Even English Law favours this presumption that under a Last Will vests early and that it should not remain in suspense.

In the circumstances, I answer the two questions of law aforementioned in the affirmative in favour of the Respondent Respondent Appellant , the 1<sup>st</sup> Petitioner Petitioner Respondent and the 3<sup>rd</sup> Respondent Respondent Respondent who are the children of Doreen Bright Pereira who lived in Sri Lanka when the testatrix died on 01.04.1980. The order of the District Judge granting letters of administration is sound in law.

I do hereby set aside the judgment of the High Court dated 15<sup>th</sup> December, 2010 and affirm the order of the District Court dated 31<sup>st</sup> July, 2008. I direct the Registrar of this Court to send back the record of the District Court forthwith, if it is here already, to the District Court of Mount Lavinia for proceeding with the rest of the case in administering the Last Will of the testatrix, Mary Helen Orloff.

The appeal of the Appellant is allowed. However I order no costs.

Judge of the Supreme Court

**Justice Priyasath Dep PC**

I agree.

Judge of the Supreme Court

**Justice Sisira J. De Abrew**

I agree.

Judge of the Supreme Court