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

S.C. Appeal No. 71/2017
SC/HC/CALA No.231/2010
WP/HCCA/COL 246/2007 (F)
D.C. Colombo Case No. 5391/99/SPL

Merryl Ephram Henry De Almeida,
No. 62/2, Old Kottawa Road,
Mirihana, Nugegoda and 32 others

Plaintiffs

Vs.

Jayakodi Arachchige Dona Patriciahamy,
No. 40, Naththandiya Road,
Marawila.

Mohamed Anver Mohamed Ashrof,
No. 96, Central Road,
Colombo 12.

Defendants

AND

Mohamed Anver Mohamed Ashrof,
No. 96, Central Road,
Colombo 12.

2nd Defendant – Appellant

Vs

Merryl Ephram Henry De Almeida,
No. 62/2, Old Kottawa Road,
Mirihana, Nugegoda and 32 others

Plaintiffs - Respondents

Jayakodi Arachchige Dona Patriciahamy,
No. 40, Naththandiya Road,
Marawila.

1st Defendant – Respondent

AND NOW BETWEEN

Mohamed Anver Mohamed Ashrof,
No. 96, Central Road,
Colombo 12.

2nd Defendant – Appellant – Petitioner/Appellant
Vs

Merryl Ephram Henry De Almeida,
No. 62/2, Old Kottawa Road,
Mirihana, Nugegoda and 32 others

Plaintiffs – Respondents - Respondents

Jayakodi Arachchige Dona Patriciahamy,
No. 40, Naththandiya Road,
Marawila.

1st Defendant – Respondent - Respondent

Before : B. P. Aluwihare PC, J,
Murdu N. B. Fernando, PC J,
E. A. G. R. Amarasekara, J,

Counsel : Faiz Musthapha PC, with Mr. Keerthi Thilakaretne for the 2nd Defendant –Appellant- Petitioner.
Nihal Jayamanne PC with Ms. Uditha Kollure for the Plaintiff- Respondent- Respondent.

Argued on: 25.11.2019

Decided on: 24.06.2022

E. A. G. R. Amarasekara, J.

The Plaintiff- Respondent – Respondents (hereinafter referred to as the Plaintiffs or Plaintiff Respondents) by filing the plaint dated 19.07.1999, instituted case No. 5391/99SPL in the District Court of Colombo on 27.07.1999 against the 1st Defendant – Respondent – Respondent (hereinafter referred to as the 1st Defendant or 1st Defendant

Respondent) and the 2nd Defendant – Appellant – Petitioner (hereinafter referred to as the 2nd Defendant or the 2nd Defendant Appellant) praying inter alia for;

- A declaration that the Plaintiffs are entitled to the proceeds of the sale of the property described in the schedule to the Plaint, in terms of the Last Will bearing No. 3064 dated 09.02.1963 executed by late Benedict de Andrado which was admitted to probate in DC Colombo Case No. 21198/T.
- A declaration that the 1st Defendant and the 2nd Defendant are not entitled to the said property.
- Ejectment of the 2nd Defendant from the said property.
- A direction on the Registrar to sell the said property and to deposit the proceeds of sale.
- Distribution of the said proceeds of sale among the Plaintiffs and the other beneficiaries of the said Last Will.
- Orders or directions to give effect to the terms of the said Last Will.

As per the said Plaint;

- The subject matter of the action consists of lot 1 depicted in plan no. 349 dated 19.09.1992, made by A. Sameer, Licensed Surveyor together with the right of way attached to it over lot 6 of the same plan. The plantation and the buildings in the said Lot 1 bear the assessment no. 136, Mahawatte Road, Madampitiya.
- Aforesaid property was owned by one Benedict de Andrado who died on 25.06.1963 leaving a Last Will bearing No. 3064 as stated above. And in terms of the said Last Will, his wife Violet de Andrado was appointed the executrix. And that the said Last Will was duly proved in the District Court Colombo case No. 21198/T and the probate was issued to said Violet de Andrado.
- Said Violet de Andrado had passed away without conveying or distributing the assets of the estate according to the terms of the said Will and the said Last Will stipulated that the rest and residue of the estate of the deceased be converted to cash and be divided into 15 equal parts.
- The subject matter of the action constituted part of the rest and residue of the estate of said Benedict de Andrado, and his wife Violet de Andrado was given only a life interest on that in terms of the said Last Will.
- The rest and residue of the estate of the said late Benedict de Andrado was bequeathed to be converted into cash and divided into fifteen parts and distributed as follows;

  "1 part to the Parish Priest of St. Joseph's Church, Grandpass, to be used for the holy masses

1 part to the St. Anthony's Church, Mahawatte for improvements to the Church

3 parts to the Brother–Director of St. Benedict's College, Kotahena for scholarships

4 parts to the children of Laurie de Almeida

4 parts to the children of Bridget Gunaratne

1 part to the children of Leo de Almeida

1 part to the children of Lennie Gunawarndena.:"

The Plaint further states;

- That the 1st to 33rd Plaintiff- Respondents were the children and the heirs of the above designated natural persons, namely Laurie, Bridget, Leo and Lennie whose children were named to get 10/15 parts of the cash gained after the selling of the rest and residue of the estate as indicated above.
- That the 1st Defendant had caused the production of a Last Will purportedly executed by said Violet De Andrado in District Court Marawila Case No 280/T and had obtained probate to administer the estate of said Violet de Andrado which included the property in suit. And thereafter the 1st Defendant by Executor's Conveyance bearing No. 368 dated 17.01.1994, had purportedly transferred the said property to herself and subsequently by Deed of Transfer bearing No. 4793 dated 05.12.1994, the said property had been conveyed to the 2nd Defendant Appellant.
- That, since the said Violet de Andrado had only a life interest in the property in question, she could not have disposed of the same by a Last Will and hence no title could pass to the 2nd Defendant Appellant and the Plaintiff Respondents are entitled to the proceeds of sale from the said property.

As per paragraphs 5 and 6 of the plaint and the corresponding issue no 9 raised by the plaintiffs, it appears that in describing how the cause of action arose, the plaintiffs have attempted to allege that it happened due to the fault of said Violet De Andrado who being the executrix of the said Will died without distributing the relevant assets according to the said last will of Benedict de Andrado. However, this allegation contradicts the position in their plaint which says that said Violet de Andrado had the life interest over the same property, because if she had the life interest, she had the right to use and enjoy the property till her death and the law cannot expect her to do what should have been done after her death, prior to her death.

The idea of instituting testamentary proceedings is generally to administer the estate of the deceased person under the supervision of the court through the executor named in the Will, or through an administrator appointed by the court and, through that administration, to settle the liabilities of the estate and to collect the dues to the estate and, thereafter, distribute the estate among the legatees or the heirs as the case may be. Mere reading of the said Last Will indicates that the expectation of the testator at the time of making the Last Will was that estate be declared closed only after certain legatees get the money allocated to them through the Will after converting the rest and residue of the estate in to money. The first executrix named in the will was undoubtedly given a life time interest to enjoy the said rest and residue. (Whether the terminology used in the Will indicates a creation of a fideicommissum or a life interest will be discussed later.). Thus, it appears, the prayers in the plaint filed in the District Court seems to be reliefs that could have been gained even in the testamentary case filed in relation to the last will of Benedict de Andrado by the relevant legatees or their representative through intervention at the appropriate stage. In this regard I would like to refer to **Meemanage Harold Fernando Vs Jayani Wimalarathna nee Fonseka S.C Appeal 56/2010 S.C minute dated 29.03.2012** where this court had expressed the view that the role of the judge in a testamentary action is not a mere spectator nor to be a rubber stamp. Thus, the judge has a supervisory role and even if the final account is filed, the court ex mere motu or on the instance of a party or an intervenient party can consider whether such account should be accepted or should make necessary orders for the proper accounting of the estate and distribution of assets before the estate being declared closed. Therefore, it appears that the legatees of the said will or their heirs who apparently were to gain benefit from the subject matter after converting it to cash, had not taken due interest to get proper orders in the said testamentary action filed in relation to the last will of said Benedict De Andrado, and now the plaintiffs, as the said legatees or their heirs, have filed a separate action to claim the said benefits for them.

Generally, publications are made at the commencement of a testamentary actions. Plaintiff Respondents or their predecessors might have been aware of the testamentary case. As per the case record of the said testamentary action related to Benedict De Andrado's estate marked P2 at the trial, it appears that the Plaintiff Respondents were not parties to the said action. Thus, they might not have had notice of any interim applications or orders made in that case. However, the ability to file a separate action will be discussed later in this Judgment.

The 2nd Defendant by Answer dated 11.07.2000 has admitted that said Benedict de Andrado at the time of his death seized and possessed the land described in the schedule to the plaint and he made and executed the Last Will bearing no. 3064 and said Violet de Andrado was the executrix appointed by the said Will. He has further admitted that said Benedict de Andrado died on 25th June 1963 without revoking the said Will and the said Will was duly proved in Colombo District Court Testamentary Proceedings No. 21198/T

and Probate was issued to said Violet de Andrado. He also has admitted that the 1st defendant filed the Testamentary Proceedings No. 280/T in the Marawila District Court and the said 1st defendant obtained the Probate for the estate of said Violet de Andrado.

The 2nd Defendant has further stated in his answer that;

- The land in the schedule of the plaint was correctly included as a land belonged to the estate of said Violet de Andrado.
- Since the proceedings in the Testamentary Case No. 280/T had been terminated on 10.01.1994, the Plaintiffs have no right to challenge the issuance of probate in the said case and even if there was any right, now it is prescribed.
- The 1st Defendant as the executrix of the estate of Violet de Andrado executed an executor's conveyance no.368 dated 17.01.1994 and got the title of the land in issue in her name and the 2nd Defendant bought the said land for Rs.4200000.00 as a bona fide purchaser.
- Violet de Andrado even had prescriptive title to the said property in terms of the provisions of the Prescription Ordinance due to her absolute possession from the death of Benedict De Andrado and even the 2nd Defendant has prescriptive title as he and his predecessors in title have been in adverse and independent possession against all and everyone for more than 10 years.[1]
- In any event, even if one assumes that said Violet de Andrado had only a life interest, with the passage of Abolition of Fideicommissa Act No. 20 of 1972, the said Violet de Andrado became the absolute owner of the property and the Plaintiffs cannot maintain this action.
- The Plaintiffs have no rights whatsoever to the land and premises in issue and no cause of action has accrued to them and further, in any event, without obtaining probates or letters of administration for the estates of their predecessors in title in terms of the section 545 of the Civil Procedure Code, the Plaintiffs cannot maintain this action.
- In view of the malicious and mala fide action of the Respondents, the 2nd Defendant is entitled to damages in a sum of Rs. 5 million.

The Plaintiff Respondents then filed a replication denying the claim of the 2nd Defendant.

[1] My view is that this is not a viable argument unless there is a proof of an overt act from which commences the adverse possession since Violet de Andrado either as the executrix or as the Fiduciarius of a fideicommisssum (as per the stance of the 2nd Defendant) or as the life interest holder (as per the stance of the Plaintiffs) cannot commence prescriptive possession without changing the nature of possession she had on the land in that capacity. This argument may hold water if it is proved due to the abolition of Fideicommissa Act, Volet De Andardo became the owner of the land 10 years prior to the institution of the action. Also see **Bahar V Burah 55 N L R 1**

The case then proceeded to trial *inter parte* between the Plaintiffs and the 2nd Defendant on 29 issues raised by the parties and one of the main issues was whether the Last Will of said Benedict de Andrado conferred only a life interest on his wife Violet de Andrado in respect of the property in suit or whether it was given subject to a fideicommissum.

The learned District Judge and, in appeal the learned Civil Appellate High Court Judges held in favour of the Plaintiff Respondents. Being aggrieved by the Judgment of the learned High Court Judges, the 2nd Defendant had filed a leave to appeal application to this court and when it was supported, as per the S.C. minutes dated 07.10.2015 and 24.03.2017, this court has granted leave on following questions of law.

"1. Did the Civil Appellate Court err in holding that the Last Will (P1) did not create a fideicommissum in favour of Violet in respect of the property in subject matter of this action?

2. The Civil Appellate Court err in granting that (Sic) the reliefs prayed for in paragraphs "a" and "b" of the Petition to the District Court dated 19.07.1999?

3. Did the High Court Judges err in not granting the reliefs prayed for in paragraphs "ඒ", "ඒ", "ඉ", "ඊ"in the plaint as granted by the District Judge?

4. The Respondent not having sought to canvass the judgment of the court of Appeal (Sic) by way of an Application for Leave, is he entitled in law to raise the issue No. 3?"

The questions of law no. 1, 2 and 4 mentioned above were suggested by the learned President's Counsel for the Defendant Appellant and the question of Law No.3 above was suggested by the learned President's Counsel for the Plaintiff Respondent.

Before analyzing whether the courts below erred in coming to their conclusions, it is appropriate to quote the relevant portion of the last will of the Benedict De Andrado.

(Quote)

" I give devise and bequeath to my wife VIOLET a life interest on the rest and residue of my estate in remainder reversion or expectancy nothing expected.

After the death of my wife it is my desire that such residue be converted to cash and direct that cash be divided into 15 equal parts……..

(a) Out of such fifteen parts I give one part to the Parish Priest of St. Joseph's Church Grandpass to be utilized for Masses for the following:

1. *Miguel de Andrado and wife (Paternal Grand Parents)*
2. *Philip de Andrado and Sarah de Andrado (Parents)*

3. *Thomas and Camel de Andrado (Uncles)*
4. *Patronotia de Andrado (Grand Aunt)*
5. *Joseph Victor Emmanuel and Clement de Andrado (Brothers)*
6. *Michael Mendis and wife (Grand Parents Maternal)*
7. *James de Mendis, Philip de Mendis*
8. *Josephine, Emmie Lousia (Aunts Paternal)*
9. *Repose of soul of my wife Violet*
10. *Repose of soul of self*

(b) One part to St. Anthony's Church Mahawatte to be utilized for improvements to the said Church.

(c) Three parts to the Brother Director of St. Benedict College Kotahena for the establishment of a Scholarship fund at the said institution under the title of "The Andrado Scholarship" for the education of a Roman Catholic pupil, such pupil to be selected by the Director above referred to at the annual Prize Examination.

The rest of the management of the fund, I leave entirely to the discretion of the said Director……..

(d) The balance ten parts out of the 15 is to be distributed as follows: -

- *4 parts to the children of Laurie de Almeida*
- *4 parts to the children of Bridget Gunaratne*
- *1 part to the children of Leo de Almeida*
- *1 part to the children of Lennie Gunawardena*

……

……

I appoint my wife VIOLET DE ANDRADO executrix of my LAST WILL AND TESTIMENT. On the demise of my wife I appoint His Grace the Archbishop of Colombo or his nominee as Executor of my LAST WILL." (unquote)

In the District Court

The learned District Judge by Judgment dated 08.06.2007 decided the action in favour of the Plaintiffs on the following findings, namely;

- That the Defendants did not dispute the Last Will made by Benedict De Andrado and the Testamentary action filed in relation to the said Last Will.

- That the evidence led by the plaintiffs in relation to the devolution of title also was not disputed.
- That the property in issue was covered by the Last will of Benedict De Andrado and it was owned by said Benedict de Andrado were not among the disputed facts.
- That said property was to be sold and the cash to be distributed among certain people subject to the life interest of Violet de Andrado were also not among the disputed facts.
- That it was not in dispute that Violet de Andrado had the life interest to the property in issue which is part of the rest and residue of the estate of Benedict de Andrado in terms of the Last Will of Benedict de Andrado marked as P1.
- That the said Last Will marked P1 sets out in detail that the rest and residue of the estate of Benedict de Andrado should be converted to money after the death of Violet de Andrado and the said money had to be divided in to 15 equal portions and also as to how it should be distributed.
- That what was in dispute was whether the 1st defendant got lawful title to the property in issue since Violet de Andrado had only a life interest under the Last Will of Benedict de Andrado, marked as P1.
- That the right decision of the case would depend on the question whether the Last Will of Benedict de Andrado created a life interest in favour of Violet de Andrado or whether it created a fideicommissum with regard to the rest and residue of the estate and whether Violet de Andrado acquired full title due to the Abolition of Fideicommissa Act.
- That in the present case, the testator had clearly identified the beneficiaries who were entitled to the proceeds of sale. In that backdrop, on the basis of the Judgment of **Kularatne Vs Gunatilleke 1994 (2) SLR 258**, the said Last Will only conferred a life interest on Violet de Andrado without dominium and hence no fideicommissum was constituted and therefore, no title could pass to said Violet de Andrado due to the abolition of Fideicommissa Act.
- Thus, the named persons in the Last Will marked P1 to receive said 15 portions of sale proceeds in the manner stated in the said Will, are entitle to get that money through the sale of the property and the 1st Defendant did not have good title to convey it initially to herself through an executor conveyance and subsequently to the 2nd Defendant.

It appears that the learned District Judge at certain places in the judgment had misinterpreted the case between the parties and the Last Will when in his judgment he stated that it was not in dispute that the said property was to be sold and the money was to be distributed among certain people subject to the life interest of Violet de Andrado. The dispute was that even though the word life interest was used in the Last Will, in the factual

context whether it created a Fideicommissum or whether the Abolition of Fideicommissa Act had any effect on the devise of property in dispute by the said Will. Further, what was expected by the Will was to convert the property into money after the death of said Violet de Andrado. Thus, the direction was not to sell the property subject to life interest but to convert it to money only after the consummation of 'life interest' given to Violet de Andrado. Thus, when the Will says that the property to be converted to cash, it is important to see whether it is imperative to sell the property to fulfill the direction given in the Will or whether a proper valuation and making payments accordingly would suffice. In this regard I would like to quote **Walter Pereira** from his book titled **"Laws of Ceylon- 2nd Edition".**

(Quote)

> *" In England, legacies are payable primarily out of personal estate; and where, by implication, real estate is also charged with the payment of the legacies, the presumption is that the real estate is intended to be charged in aid only of, and not so as to exonerate, the personalty."* (unquote)-(at page 465 of the said book).

The above indicates the possibility of paying money without selling the property concerned and getting it redeemed for the benefit of lawful heirs. This questions whether it was imperative to grant the reliefs as prayed for in the plaint which demand to sell the property and distribute money even if one decides that there was a case for the Plaintiff Respondents since their entitlement was for certain amount of money corresponding to the value of the property. The entitlement of the plaintiff Respondents as per the Will is rather to a sum of money than to the landed property. Further, this possibility of paying money and getting the property released, makes it necessary to prove how and on what grounds or what circumstances the testamentary case relating to the estate of Benedict de Andrado was terminated, to get the reliefs prayed for in the plaint, and that aspect will be discussed later in this judgment.

It appears that the naming of the beneficiaries in the Will had been considered by the learned District Judge as a ground to say that there was no fideicommissum created by the Will. To come to a conclusion whether there is a fideicommissum or not, the court has to see whether dominium of the property was given to a beneficiary with a condition that it shall be passed on to someone or some other persons at a later stage; thus, whether there is a *fiduciarius* (the dominium owner) and a *fideicommissarius* (the sequential owner). Walter Pereira in his book mentioned above at page 429 refer to the definition of *Fideicommisum* as follows;

> *"A Fideicommissum is defined in the Censura Forensis as a provision of one's last will by which a mandate is given to him to whom something is to come to give the whole or a part of it up to another, or to give something else. Van der Linden says – "Sometimes a person is appointed heir under the condition that the property after his death shall pass to another. This is termed a fideicommissum."*

At the same page, referring to **Voet 36.1.9**, he also points out that a fideicommissum can be imposed not only by will, but by an act *inter vivos*.

It appears that for the creation of a fideicommissum, all that the law requires is a prohibition against alienation (express or implied) and a provision that after a specified time or on fulfilment of some condition the property should go over from the first taker to second beneficiary, who must be clearly designated – vide **Mary V Kurera 74 N L R 5.** However, what has been quoted above indicates even a mandate to give part of the property or something else also may constitute a fideicommissum.

Though the Fideicommissa are abolished now, why a creation such as Fideicommissum was needed is explained in the following paragraph found in the same book at page 430.

> *"A fidei commissum may be so expressed as to take effect from a day, as at the expiration of ten years after the death of the fiduciary heir. Such a limitation would be void without the interposition of a fidei commissum, because the law would not permit the inheritance to remain in abeyance, or, in other words, for the ancestor to remain intestate during this interval. But by a fidei commissum, an heir is in the meantime instituted, who holds inheritance until the fidei commissary becomes entitled to receive it."*

The above quoted paragraph indicates that when a legacy is to be taken effect not immediately after the death of the testator or a fiduciary heir but after a certain period of time, to suspend the title going to the legal heirs on the death of the testator or the fiduciary heir as per the Law relating to intestate succession, an interposition of fideicommissum was needed to hold the title through a fiduciary till the fideicommissary becomes entitled to receive the property.

The decisions in **Welgama V Wijesundera (2006) 1Sri L R 110** also expresses the view that the Law does not and cannot recognize an interval between the death and the passing of property, since rights and obligations, from which perspective only, property

and legal relationships are identified in law, have to be, at any given point of time vested or reposed in a person or a legal entity.

However, in a usufruct such as simple life interest over a property, the usufructuary /life interest holder does not have full title or dominium and the Donor/ Testator or his heir or some other person has rights in reversion or remainder which rights are rather dormant till the usufruct/life interest is over. In **Sunil Gotabaya Lamabadusuriya V Yasoma Champa Nilmini Abeygunawardena SC Appeal No 169/2011** decided on 06th April 2018, Prassanna Jayawardena PC, J while referring to authors such as Masdorp, Wille, Van Leeuwen, Grotius and Lee discussed the nature of a usufruct/life interest and points out that a life interest holder, even though has the power to exercise *jus utendi* and *jus fruendi* (Rights to use and enjoy the Property) in full measure, subject to his right to deal with his life interest, he does not have power to exercise *jus disponendi* (Right to alienate the property) or *jus abutendi* (Right to demolish or diminish the property) which remains with the title holder who has the dominium over the property but who could not exercise it fully without the assent of the life interest holder . On the other hand, it was stated in **Silva V Jayawardene 28 NLR 115 at 122** *"the ordinary rule is that in the case of a Fideicommissum the fiduciary retains the dominium until his death and there is no vested interest in the remainder nor during that interval. Where the fidei commissary dies before the fiduciary the latter takes the property."*

Thus, fiduciary of a fideicommissum has the full dominium subject to the prohibition or bar (unless such power is given) to alienate the property which is to be vested on the fideicommissary when the condition is satisfied or the contingency is reached. If the contingency or the condition for the fideicommissum to take effect is the death of the fiduciary, in effect the fiduciary has only a "life interest" but with dominium, subject to the prohibition or bar to alienate and, no one holds rights in remainder or reversion as in a usufruct or life interest over property. Thus, when the term life interest is used in a testamentary disposition that belongs to the time when fideicommissum was valid, it has to be carefully scrutinized to see whether it refers to a simple life interest given to a person where the rights in remainder and/or reversion lies with another or whether it is a 'life interest' of a fiduciary of a fideicommissum who has the right to enjoy the property till his death with full dominium subject to the prohibition or bar to alienate. The learned District Judge in her judgment has found what has been given by the testator to his wife Violet de Andrado was only a life interest over the rest and residue of his property. However, it appears that the learned District Judge has not attempted to see whether there is any meaning in the phrase *"in remainder reversion or expectancy nothing expected"* found in the paragraph in the Will which reads as *"I give devise and bequeath to my wife VIOLET a life interest on the rest and residue of my estate in remainder reversion or expectancy nothing expected."*

On the other hand, though the learned District Judge had come to the conclusion that life interest was with Violet De Andrado, it is not clear, as per the learned District Judge's judgment, who held the title or dominium parallelly to said life interest. As explained above, the test that should have been applied to decide whether Violet De Andrado was given a mere life interest or fiduciary status subject to a fideicommissum to hold and enjoy the property during her life time was to see with whom the dominium or title was bestowed with.

Further, to negate the applicability of the Abolition of Fideicommissa Act the court must satisfy itself that not only the nonexistence of a fideicommissum but also the nonexistence of a provision in the Will relating to the property in issue that has the effect of any entail, settlement or restraint on alienation of property or limit or curtailment on the person whom the title of the property was vested with[2]. Further, certain factual differences as described below can be identified between the case at hand and the aforementioned **Kularatne Vs Gunatilleke** referred to by the learned District Judge in her Judgment;

- As per the terminology used in the Will in this case, the legatees named therein for the distribution of the money after converting the property into cash cannot be termed as people who are entitled to claim the property in issue in its physical form after the death of Violet de Andrado, the first beneficiary. They are entitled to a certain share of the cash gained by conversion of the property into cash. The property in issue has not been given or bequeathed to them to deal with it as they wish. Among the recipients of money, other than the natural persons named as children of certain named individuals who are entitled to the 10/15 share of the money value after conversion, Parish Priest of St. Joseph's Church, St. Anthony's Church, and Brother Director of St. Benedict's College also had been named as recipients. The money is given to those office holders or the institution only for the charitable or religious deeds mentioned in the Will. Thus, the natural persons who hold those office may change and, as 5/15 of money to be gained after conversion of the property was allocated to spend and do charitable and religious work, it cannot be said that to that extent, any personal entitlement has been created to that amount of money which represent the 5/15 share of the money value of the property. It appears that the intention of the testator was to give money to the natural persons who would be holding the offices as parish priest of St. Joseph's Church or the director of St. Benedict's College or the care taker of the St. Anthony's Church respectively at the time the conversion of property to money would take place. Thus, one cannot think that the testator intended that they be vested with the right in remainder

[2] See sections 2 to 4 of the Abolition of Fideicommissa Act No 20 of 1972 as amended by Law No13 of 1972

or the dominium of the property relating to the 'life interest of Violet' at the time of his death. Further the other legatees who have been described in the Will as entitled to money after the conversion of rest and residue of the estate to money after the death of Violet de Andrado have been identified as children of certain named individuals but names of those children are not given. It is not clear whether all of them were even born at the time of the death of the testator. However, nowhere in the Will it is stated that the testator devised or bequeathed or gave the rest and residue of the estate to those children. They have not been given a right to the immovable property but to certain shares in cash after converting the property to cash; may be by sale or through a valuation. Their entitlement is not on the landed property but to money. If the testator wanted to give dominium over the property leaving a life interest to his wife, he could have easily devised the property to them while leaving the life interest to his wife. However, it appears that the plaintiffs in the aforesaid case **Kularatne Vs Gunatillake** were entitled to claim the property itself after the demise of the first beneficiary as the property in that case had been bequeathed to the legatees in that case to deal with according to their wishes which is not the case at hand.

- In the said case relied on by the learned District Judge, it appears that the intention of the testator was to vest the property in the beneficiaries after the death of the named persons in the Will who were to enjoy the property until their death. However, in the case at hand, property was not intended to be given to the named people or institutions to deal with it as they wish, but only cash was to be distributed among them; for some of them for the purposes mentioned therein and for some of them as their personal entitlement. Further, it appears a phrase similar to "in remainder reversion or expectancy nothing expected" was not included in the Will relevant to the said case. Thus, the factual matrix of the case cited by the learned District judge to decide what was given to Violet de Andrado was a life interest differs from the case at hand.

Even in **Fonseka V Babunona 11 N L R 333** cited by the Plaintiff Respondents rest and residue of the estate was to be given to the blood heirs after the death of the life interest holders where in the case at hand it is not the landed property but the money generated from converting the property has to be distributed, indicating that the dominium of the property was not intended to be vested with them to deal with the property the way they want. Further, it appears, nothing similar to the phrase quoted above from the Will in question in the present case was discussed in the said **Fonseka V Babunona** case.

Gunawardene V Visvanathan 24 N L R 225 was a case where the testator gave and devised the property to his wife to hold and possess it during her life time but with a

prohibition to alienate and the property was to be devolved on the testator's sons after her death. It was decided that the prohibition on alienation as well as the words used namely '*I give and devise*' indicates that it did not create a life interest but a fideicommissum by giving full dominium to the wife. In that case even when the property itself was to be devolved on the sons after the death of the testator's wife, it was held that the property was given to the wife with full dominium. In the case at hand the phraseology used is '*I give devise and bequeath*' and, even though there is no direct prohibition for alienation, the intention of the testator that it shall not be alienated during his wife's life time is expressed by stating his desire to convert the property after the wife's death into money and distribute it among the legatees.

The above indicates that there were certain areas that had to be looked into with regard to the correctness of the decision of the learned District judge. Especially the learned District Judge;

- appears to have given prominence to the word 'life interest' but has not considered whether any additional meaning is contained in the phrase 'in remainder reversion or expectancy nothing is expected',
- appears to have not considered that the testator has not devised the landed property that was included among the rest and residue of his estate to the named legatees other than giving them and named institution or office holders of certain named institutions entitlements to certain amount of money,
- appears to have not considered, as to who held the title to property parallel to the 'life interest', if it was only a life interest given to the wife.

<u>In the High Court</u>

As mentioned before, the Appeal made by the 2nd Defendant Appellant against the said Judgment of the District Court, was dismissed by the Civil Appellate High Court of the Western Province holden in Colombo by its judgment dated 11.06.2010, and the learned High Court Judges in their judgment stated that;

- Since the testator had specifically devised several properties to his wife, his intention with regard to the rest and residue of the estate was that it should devolve on the persons nominated in the Last Will and only a life interest had been given to the wife. The title of the said rest and residue of his estate has been given to the said nominated people subject to the life interest of the wife. For easy distribution it has been directed to sell and distribute the money as per the order they have been nominated.
- The testator intended that his estate had to be administered even after the death of the executor appointed by him, namely his wife and there was also

a provision to appoint a succeeding executor nominated, namely His Grace the Archbishop of Colombo.

- No fideicommissum was constituted since the intention of the testator was to bequeath only a life interest to Violet, his wife and it appears that no intention was there to convey title of the property to the Wife, Violet.
- The passage of Abolition of Fideicommissa Act did not have a bearing on the said property and Violet de Andrado or her successors did not get any title to the property.
- No order for ejectment of the Defendant Appellant could be granted in the absence of a declaration of title in favour of the Plaintiff Respondents, and their prayer to the effect that the property to be sold in this action and the proceeds of sale of the property in suit be distributed among them also cannot be granted as it is a relief that should be given through the administration of the estate in the testamentary action.
- Only the declaratory reliefs can be granted in the present case and the other reliefs have to be moved in the relevant Testamentary action.

The learned High Court Judges also have referred to aforesaid decision **Kularatne and Another V Gunathileke (1994) 2 Sri L R 258** but to express that the intention of the testator has to be gathered from the terms of the Will and surrounding circumstances. I also can endorse the view that the intention of the testator has to be gathered from the terms of the Will and surrounding circumstances but what matters is whether the learned High Court Judge has come to the correct finding in that regard.

Mere reading of the above quoted relevant parts of the Last Will of Benedict De Andrado No.3064 marked as P1 indicates that said Benedict de Andrado wanted to appoint His grace the Archbishop of Colombo or his nominee as executor after the demise of his wife, the first named executrix of the Will, indicating that the intention of the testator was to administer his estate even after the demise of his wife, the first named executrix. Thus, the learned High Court Judges were correct in stating that the testator intended that his estate had to be administered even after the death of the executor appointed by him, namely his wife Violet de Andrado. However, any named executor of a Will is at liberty to decline the office.

Anyhow, the learned High Court Judges have come to the conclusion that no order for ejectment can be granted in the absence of a declaration of title in favour of the Plaintiff Respondents and further, the learned High Court Judges have refused to grant the reliefs prayed to the effect that the property be sold in this action and the proceeds of sale of the property in suit be distributed among the Plaintiffs and also to make necessary orders to effect the direction given in the Will as the High Court Judges saw that the reliefs sought

are reliefs that should be given through the administration of the estate in the testamentary action.

However, the conclusion of the learned High Court Judges that no order for ejectment of the Defendant Appellant can be granted in the absence of a declaration of title in favour of the Plaintiff Respondents appears to be a misstatement of law even when the cause of action is based on title, as decided in the case of **Dharmasiri V Wickramatunga (2002) 2 Sri L R 218**, a relief of ejectment can be granted if the title is pleaded and proved even though there is no prayer for a declaration of title. On the other hand, as per section 217 of the Civil Procedure Code a decree to yield up possession is a stand-alone relief and it need not be a relief prayed along with a declaration of title. However, title is needed to be proved by the party claiming such relief of ejectment be given, if the cause of action is based on title. However, in this case no title to the impugned property had been pleaded and or raised as an issue by the Plaintiff Respondents other than the statements to the effect that the Defendants have no title to the property and they are entitled to the sale of property and to their share of cash as per the directions in the Will. Hence, case filed before the District Court was not based on a cause of action based on title to the property.

Thus, though there is a misstatement, it was correct to say that such relief of ejectment cannot be given in a case where the cause of action is based on title and where title is not proved, but in my view, it should not mean to say that the legatees cannot file an action even after the estate was closed after administration, if the estate was administered in an improper manner, in other words, if the cause of action is based on improper administration. It is true that it was stated in **Nonohamy V Punchihamy 31 NLR 220** that where a final account has been filed in administration proceedings and the estate is declared closed, the court has no power to reopen proceedings in order to entertain a claim to share of the estate on the ground that the claimant is an heir. However, in **Aron Fernando V Buddhadasa (1986) 2 Sri L R 285** it was decided that an Administrator is functus officio only when he has duly completed the administration of estate. Closing of the proceedings or rendering of a final account or even a judicial settlement of the estate will not make the administrator functus officio if he has not completed the administration. In **Ekanayake V Appu (1899) 3 N L R 350**, it was expressed that the tendering of a final account does not make an administrator functus without a judicial settlement or a formal discharge or removal from the office. In **Supramaniam Chetty V Palanniappa Chetty 3 Bal 57**, an opinion was expressed that even where there has been a judicial settlement an administrator may still be sued and it may be proved that he had not duly administered the estate. Middleton J in **Soysa V Abeydera 12 N L R 349,351** stated that under English Law an executor is entitled to his release from the beneficiaries under the will upon filing of proper accounts and vouchers showing a due discharge of his obligation under the will, and, so far as what can gather from a perusal of chapters XXXVIII and LIV of the Civil Procedure Code, an executor may get his discharge in Ceylon on the same grounds and for

the same reasons. However, the said statement contemplates the proper accounting and due discharge of the duties. (See **Moysa Fernando V Alice Fernando 4 N L R 201, Silva V Silva 10 N L R 234, Malliya V Ariyaratne 65 N L R 145** with regard to the extent of applicability of English Law in respect of Executors and Administrators).

Above shows the possibility of suing the executor or administrator if there was no proper discharge of duties as administrator or executor even after the tendering of the final account. However, in the matter at hand, Violet, the executrix of the estate of Benedict de Andrado, who dealt with the relevant property through her own last will after the conclusion of the aforesaid testamentary proceedings of Benedict de Andrado's estate, is dead and gone. Thus, it is necessary to see whether any aggrieved legatee of the administration of the estate of Benedict de Andrado can file an action against the person who holds the relevant property after the administration.

No doubt an executor's relationship is fiduciary in nature like in a trust.

> "*In English law, if a trustee wrongfully disposes of property entrusted to him, the cestui que trust is entitled to follow it into the hands of any person, except a purchaser for value without notice. In Dutch Law the fidei commissary*[3] *is entitled to follow immovable property into the hands of any one, but right to follow movables is limited.*[4] *As regards immovables, although in theory they can be followed into any hands, the courts of South Africa have repeatedly expressed their disinclination to interfere with bona fide purchaser without notice who had obtained registered transfer."*- vide page **458 of Laws of Ceylon 2nd edition by Walter Pereira**.

Thus, in that context, the correctness of the view expressed by the learned High Court Judges that the order for ejection cannot be obtained without a declaration of title and also the refusal to grant certain reliefs on the ground that they should have been prayed in the testamentary action can be questioned in this type of action filed by a legatee to recover property and get their entitlement as per the Will due to alleged maladministration of the estate. In this regard, I wish to quote the following paragraphs at pages 474 and 475 of the book 'Laws of Ceylon' referred to above.

> *"The Legatee has three distinct actions for his legacy—(1) A personal action under the will against the heir or such other person as is charged with the payment of the legacy, or against*

[3] Fideicommissa were the only trusts fully recognized by the Roman Dutch Law. Vide Walter Pereira, Laws of Ceylon 2nd Edition, page 456.
[4] Voet 36.1.64

the executor, for the delivery of the thing, with such increase or decrease as it may have suffered, provided the latter has not been caused by the fault of the heir. The legatee may not take possession of the thing bequeathed on his own authority. He must demand it from the heir, unless the right to take possession is allowed him by the Will. (2) An action in rem to recover the thing itself, against any possessor whosoever, if the thing bequeathed belonged to the testator. (3) Any Hypothecary action on the ground of the tacit or implied mortgage which the law gives to legatees in this respect in all the property which comes to the heir from the testator. The Legatee has a right of tacit hypothec on the estate of the deceased after the debts have been paid, but the right of mortgage may be disallowed by the Will."

"A legatee may maintain an action for the legacy against the executor of the Will under which the legacy is claimed without alleging or proving the latter's assent to the bequest, nor need he allege or prove sufficiency of assets in the hands of the executor to meet the bequest. Whether the assets are sufficient or not is a fact particularly within the knowledge of the executor, and he may plead insufficiency of assets in answer to the legatee's claim.[5]"

What is elaborated above indicates the availability of a separate action for the legatee against the executor/administrator or against the person who holds the property. Thus, I doubt the correctness of the statements made by the learned High Court Judges in refusing certain reliefs by stating that they have to be prayed in the testamentary action as this case appear to be based on a cause of action arising out of an allegation of improper or wrongful administration of the estate. Even though, a testamentary action commenced after due publications, a legatee or heir who does not have any objection to the issue of probate or letters of administration may not intervene and thus, may not have due notice with regard to the other interim application made to court in relation to the administration of the estate. It must be noted as per the documents tendered in relation to the testamentary case relevant to the estate of Benedict de Andrado, no one has been named as Respondents. Even the learned High Court judges by granting the declaratory reliefs have admitted this right to file an action by the legatees. However, it is my view that the plaintiff to be successful in obtaining reliefs as prayed for in the plaint, which are referred to at the commencement of this judgment, there must be proof for;

[5] Fernando V Soysa 2 N L R 40

- That the administration of the estate was improper,
- That the Defendant was not a bona fide purchaser, and
- Entitlement of the legatees to the property alienated.

Whether there was proof of improper administration of the Estate;

It is not incorrect to say that it is the task of the executor/ executrix to execute the intention of the testator expressed in the will subject to the supervision of the relevant court and further, the executor/executrix may also have to settle the liabilities of the estate of the deceased testator. Once the liabilities are settled there may be situations that may cause difficulties in executing the intention of the testator in the same manner as expressed in the Will due to the insufficiency of assets or funds. Even in the case at hand, as per the document marked P5 which is relied upon by the Plaintiff Respondents as the final account in the testamentary case of Benedict de Andrado, certain liabilities of the estate of the said Benedict de Andrado had been mentioned where the monetary value of such liabilities appeared to have been exceeding the cash received by the said estate even though the total value of the assets exceeded the value of liabilities. This indicate that certain liabilities mentioned there had to be a burden on the immovable property of the said estate which included the property in issue in this case. However, insufficiency of funds had not been pleaded in defense in this case. On the other hand, the executor who tendered the said final account and who had the knowledge as to the sufficiency or insufficiency of funds was not among the defendants before the District Court case to take up such stance. It appears that the position of the Plaintiff Respondents is that the said testamentary case was terminated on this final account. However, no convincing evidence had been led by the plaintiff respondents to show why the legatees who were entitled to cash as per the Will did not intervene in the said case and prayed for suitable intervention by the court. However, as mentioned before they were not parties to the testamentary action and might not have had the notice of the purported final account or of the termination. In this regard I would like to refer to the decision of **Meemanage Harold Fernando Vs Jayani Wimalarathna nee Fonseka S.C Appeal 56/2010 S.C minute dated 29.03.2012** mentioned above.

In fact, it is questionable whether Violet de Andrado, the first executrix had the ability to tender a final account as such, since the administration of the estate was intended to be continued after her demise. In this regard, the Plaintiff Respondents has brought this court's attention to an averment in the said final account tendered by Violet de Andrado which was marked as P5B which is quoted below.

(quote)

> "*There are certain legacies to be made after my death from the residual property bequeathed to me and I shall in due course*

make the necessary provisions to give effect to those legacies."
(unquote)

However, as per the above averment in the purported final account quoted above, said Violet de Andrado. while referring to the property as one bequeathed to her, has undertaken to do certain things which she cannot do or ensure of taking place since, in terms of the Will, land has to be converted into money and the money has to be distributed only after her death. Therefore, as per the views expressed in the said case **Meemanage Harold Fernando Vs Jayani Wimalarathna nee Fonseka**, there were sufficient grounds for the legatees who were to get money from the conversion of the residual property to money to challenge the said document as the final account in the said testamentary case if the operation of law due to the Abolition of Fideicommissa Act had no effect on this Will. However, as they were not parties, as mentioned before, they might not have notice of the tendering of final account and the termination of the testamentary case.

On the other hand, as per the Jurat at the end of the said final account, it was dated 4th November 1974. The journal entries of the said testamentary case had been marked as P3 at the trial. As per the Journal Entry dated 18.11.74, it appears the final account had been tendered to court by that date, and as per the journal entries dated 18.12.74 and up to the Journal entry dated 28.08.1975, it is clear that the Court did not accept the final account as it was, and had directed to tender an amended final Account in accordance with the report contained in journal entry no 42-(vide journal entries Nos. 41 to 49). At Journal Entry 50, the lawyer for the petitioner of that case (namely lawyer for the said Violet De Andrado, the Executrix) had revoked his proxy, and as per the journal Entry No.51 dated 27.10 75, it appears that the said Petitioner of that case had filed a motion and moved to do away with the need for an amended final account and to release her from her duty as the executrix and further to terminate the proceedings due to the reasons contained in the motion. Accordingly, the district court had ordered to do away with the need to file an amended final account and had terminated the proceedings. What is important is that the Plaintiff Respondents have not tendered the relevant motion at the trial before the original court. It appears that the real reasons to terminate the proceedings were contained in the said motion which was not produced in evidence. Thus, no evidence was there as to the reason for the termination of the testamentary case prior to the death of Violet de Andrado. Among the possible reasons, lawful or not, that might have contained inter alia in the motion to terminate proceedings without keeping the estate open to be administered after the death of the first executrix, there might even have been a settlement to do away with the final accounts or a submission that Abolition of Fidecommissa Act applies and the petitioner of that case had become the owner of the property or a submission that a necessary arrangements as per her averment in the said final account were made or payments were made to satisfy the payments to the legatees who were to get money after

the death of the executrix by conversion of the residual property to cash or even a settlement or renunciation of the legacies etc.

As explained before, Violet de Andrado cannot be blamed for what had to be done after her death but if she impeded the distribution of the money as per the direction of the Will, that may amount to improper administration. Due to the non-production of the said motion in evidence, the trial court was not aware of the true reasons for the termination of the proceedings without an amended final account and also without keeping the estate open for further administration after the death of the executrix, Violet de Andrado. In that backdrop, one cannot come to the decision that there was sufficient proof of improper administration of the estate. Thus, the Plaintiff Respondent have failed to prove that the administration of the Benedict Andrado's Estate was improper as they failed to prove the reasons or on what grounds the relevant testamentary case was terminated prior to the death of Violet de Andrado.

For the sake of argument if one considers that the improper administration was proved and Abolition of Fideicommissa Act has no relevance, in my view, the outcome would have been that Violet de Andrado and /or her executor had to hold the property in trust for the legatees in terms of Sections 90 and/or 96 of the Trust Ordinance. Trust would be to convert the property to money and distribute it among the legatees. No allegation has been made in the plaint that the 2nd Defendant Appellant bought the property for a lesser value. In such a situation there would have been a cause of action to recover the money from the 1st Defendant who was the executrix of the estate of Violet de Andrado but I doubt whether there was any cause of action against the 2nd Defendant Appellant who appears to be a bona fide buyer.

Whether there was proof to show that the Defendant was not a bona fide purchaser;

The Defendant did not buy the property involved from Violet de Andrado. Violet de Andrado included it in her last will and the executrix of the said last will of Violet de Andrado, namely the 1st Defendant executed an executor's conveyance transferring the property to her name and then sold it to the 2nd Defendant. It appears the 1st Defendant did not take part in the proceedings after serving summons. To prove mala fides of the 2nd Defendant there should be evidence to show that the 2nd Defendant, prior to buying the said property, knew that Violet de Andrado did not have title and there was an improper administration of the estate of Benedict de Andrado. To prove there was improper administration, the Plaintiff has not filed the aforesaid motion which apparently contained the reasons for termination of the testamentary proceedings. Whether, due to the operation of law introduced by the Abolition of Fideicommissa Act, the property was vested with Violet de Andrado will be discussed later in this judgment. However, no evidence has been led to show that the second Defendant was aware of the contents of the Will of Benedict de Andrado or of the said motion or that Violet de Andrado did not have title to the property

prior to the moment he bought the property in issue. On the other hand, even to establish that there is a defect in title, it was necessary to prove how and why the testamentary case was concluded by producing the said motion in evidence and also necessary to establish that Abolition of Fideicommissa Act has nothing to do with in deciding the title holder of the property involved in this action.

Whether there was proof with regard to the entitlement of the legatees;

To prove the entitlement of the legatees even to the share of money, the legatees must first prove that the estate of Benedict de Andrado was not properly administered. For this, as explained earlier the Plaintiffs have not tendered the motion that contained the request and reasons for the termination of the proceedings of the testamentary case prior to the death of Violet de Andrado.

However, it appears that the learned High Court Judges were of the view that the title to the rest and residue of the estate was vested with the legatees who were entitled to get certain share from the money after converting the said property to money and only a life interest was given to the wife Violet de Andrado. The reasons to express the said view by the High Court appears to be that;

- Violet de Andrado, the wife of the testator and the first named executrix in the Will had been given certain properties separately and thereafter life interest of the rest and residue had been given to her subject to the sale of the said rest and residue after her demise to distribute the money as directed in the Will.
- The intention of the testator emanating from the Will due to aforesaid direction was to devise the title of the rest and residue of his estate to the said legatees while subjecting the said rest and residue to the life interest of his wife, Violet de Andrado and only for the convenience of distribution it has been directed to sell the property.

However, it appears that the learned High Court Judges failed to appreciate that,

- Other than the expression of the testator's desire to distribute the money by the conversion of the property after the death of his wife the first executrix named in the Will, as said before, the terminology used in the Will does not directly indicate that the testator had any intention to devolve the title of the landed property, which became the rest and residue, to the named legatees who were made entitled to cash to be gained by the conversion of the property;
- Some of the legatees named therein appears to be not legal or natural persons who can hold property but only offices or institutions such as parish priest, director of an institution or a church as mentioned above;

- If it was the intention of the testator to give the title of the rest and residue of the property to the legatees who have been named to receive cash, it could have been simply stated that his intention was to devise the rest and residue to those legatees while reserving the life interest to his wife but he has only directed to give cash to them after converting the property to cash;
- It was only a direction given to the executor to convert the property into money as there is a named executor to be appointed after the death of Violet De Andrado, the first executrix named in the Will but not a conveyance of dominium of the landed property to the legatees;
- Even though, the testator had specifically devised several properties to his wife, it is not sufficient to decide whether the intention of the testator was only to give a life interest to his wife or to create fideicommissum as the Abolition of Fideicommissa Act was not in force at the time the testator executed the last will, and the same result could have been achieved by creating a restriction on alienation of title while giving dominium of the property to the wife with full power to enjoy it through her life.

There is no doubt that the testator intended to give cash to the named legatees in the manner described in the Will. However, the view expressed stating that for easy distribution it was directed to sell and distribute money seems to be found upon mere conjectures and surmises not supported by any evidence to that effect. Moreover, in coming to that conclusion, even the learned High Court Judges appear to have overlooked the phrase "*in remainder reversion or expectation nothing expected*" and only have given prominence to the word 'life interest' preceding those words in the Will.

Further, if the finding of the learned High Court Judges to the effect that the residual property and its title were to be devolved on the said legatees and the direction was to sell it for cash is correct, then their finding that the Abolition of Fideicommissa Act has no application seems to be defective. Since the said property cannot be alienated in any other manner those named legatees wish. Only thing that could have been done to the property was to sell it and distribute money among the named legatees in the manner described in the Will. In such a scenario, the Plaintiffs should have become the owners for two reasons, firstly, due to the enforcement of the Abolition of Fideicommissa Act and secondly with the death of Violet de Andrado their right in remainder attracts the full enjoyment of the Property. In such a situation the property ceased to be a part of the estate of the Benedict de Andrado due to operation of law. Thus, if the learned High Court Judges' finding that the title was with the legatees was correct due to operation of law their entitlement to sell the property would not arise from the direction contained in the Will but due to the ownership. The cause of action and the prayers in the plaint would not correspond to such legal rights. However, it appears though there were several Plaintiffs named in the plaint, some of them had not given proxies to proceed with the case (vide-page 16 of the district

court judgment and proceedings dated 25.08.2003) and they were not made party defendants even. If so, if the finding of the learned High Court Judges were correct as to the devolution of title on them, only some of them cannot as Owner-Plaintiffs pray for a declaration for their entitlement to sell the property. Thus, for the reasons given above, there appears to be insufficiency of proper reasons to support certain conclusions reached by the learned High Court Judges when they declared the plaintiffs were entitled to the landed property or that the 1st and 2nd Defendants were not entitled to the land in dispute, especially in deciding whether Violet de Andrado had only a life interest/usufruct and not a 'life interest' subject to a fideicommissum. Thus, I cannot uphold the High Court judges' decision to grant reliefs to the plaintiff respondents.

In deciding whether it was a life interest or a devise of property to Violet de Andrado subject to a fideicommissum, the proper test to apply was to see whether the life interest holder had the title or dominium to the property or whether it was with someone else; in other words, whether rights in remainder or reversion vested with someone else. If A bequeath a life interest on his land to B while keeping the dominium with him, B has right to use and enjoy the fruits of the property but A or his heirs as the case may be has rights in reversion that reverts the full use and enjoyment of the land at the death of the life interest holder. On the other hand, they have rights in remainder since the life interest holder does not hold *jus disponendi* (Right to alienate the property) or *jus abutend*i (Right to demolish or diminish the property) or the full dominum. On the other hand, if A devises the land to C while bequeathing a life interest on B, C has a right in remainder that attracts the full use and enjoyment of the land at the death of the life interest holder.

In the above backdrop, which sets out the difficulties in accepting the interpretation given by the learned High Court Judges, I would endeavor to see other possible interpretations that could be given to the relevant term in the Will, namely "*I give devise and bequeath to my wife VIOLET a life interest on the rest and residue of my estate in remainder reversion or expectancy nothing expected*" and the acceptability of such interpretations. It must be noted, after the above term in the Will, the testator had expressed his desire to convert the rest and residue to cash and distribute among the named legatees but nowhere, he has expressed, as said before, his intention to devise the landed property on the said legatees.

Other interpretations;

1. one other interpretation that can be considered is that the testator intended only to give life interest to his wife, Violet de Andrado, namely right to use and enjoy the property during her life time and other residual rights of ownership and or the dominium were not given to any one expressly as conveyance of such rights to any person cannot be understood from the words used in the Will and the 2nd executor named in the Will had to execute the

conversion of property after the demise of first named Executor. This interpretation cannot be accepted for two reasons namely;

a) It also does not give any meaning to the words *"in reversion remainder or expectation nothing expected".*

b) If the residual rights of the ownership what is not included in the life interest, in other words, the dominium of the rest and residue of the estate was not intended to be given to the wife or any other person identified in the Will, with the death of Benedict De Andrado, said residual rights or dominium had to devolve on his lawful heirs which included his wife as per the laws relating to succession of intestate property, as any part of his estate cannot be remained intestate till an unknown future date that comes after the death of his wife Violet de Andrado as indicated above by quoting from page 430 of the Laws of Ceylon.

In **Welgama V Wijesundera (2006) 1 Sri L R 110**, this proposition of law was stated as follows;

> *"The Law does not and cannot recognize an interval between the death and the passing of property, since rights and obligations, from which perspective only, property and legal relationships are identified in law, have to be, at any given point of time vested or reposed in a person or legal entity[6]."*

Thus, when one contemplates a situation where the residual rights related to a life interest or the dominium was not given to the wife Violet de Andrado or any one named in the Will, with the death of Violet de Andrado rights to use and enjoy the property would also devolve on the rest of the lawful heirs and on the person/s who get entitlement through the testator's wife Violet de Andrado and they would gain the full title to the said rest and residue of the property. So, on such a scenario, by the operation of law it would not remain as part of the Estate of the Benedict de Andrado for the second named executor to sell it as part of the Benedict de Andrado's estate at the death of Violet de Andrado. As the intention of the testator was to convert the rest and residue of his estate after the death of his wife, it is clear that he did not intend to get the residual rights that remains after creating a life interest or dominium remain as part of his intestate property. Thus, the said interpretation would not suit the intention of the testator. On the other hand, if one argues that even on such scenario legal heirs are bound to sell the property through the second executor and distribute the money as per the Will, then there is an effect of an entail or restraint on alienation of property.

[6] Also see Silva V Silva 10 N L R 234 where Grenier A.J stated that on the death of a person his state, in the absence of a Will, passes at once by operation of law to his heirs, and the dominium vests in them and once it is so vests, they cannot be divested of it except by the several well-known modes recognized by law.

2) Another interpretation that can be considered is that the testator intended to give full dominium to his wife Violet de Andrado but subject to a condition that she can enjoy it through her life time but should not alienate and preserve the property for the executor to convert it to money which money is to be distributed as per the directions in the Will. In my view this interpretation is more plausible for the following reasons;

- At the time the Will was made, Abolition of fideicommissa Act was not in existence, and as such the testator had the ability to impose a restriction on alienation.
- This interpretation gives a meaning to the words "*in reversion, remainder or expectation nothing expected*". It appears, by these words, the testator intended to express that he wanted to give his wife a life interest but without any hope or expectation with regard to his or his heirs or any other person's rights in remainder or reversion. Thus, it denotes his intention of giving full title or dominium without keeping any residual rights after creating the life interest. However, there is an implied restriction of alienation as he had expressed his desire for the rest and residue to be converted to money after the death of his wife and distribute it among the named legatees.
- What has been given to the wife was the life interest of the rest and residue of the estate. If this was taken as a simple life interest on the rest and residue of the estate after distributing the other parts of the estate as per the terms of the Will, the residual rights of ownership after giving the life interest remains with the estate of Benedict de Andrado, and it again become the rest and residue of the estate for which the life time enjoyment again has to be with the wife. In other words, rights in remainder or reversion of the subject matter are not something alien to the estate of Benedict de Andrado but part and parcel of the rest and residue of the said estate. Thus, it indicates the intention was to give full dominium to wife subject to the implied restriction of alienation.
- As per **Gunawardene V Visvanathan 24 N L R 225** mentioned above when the words "I give and devise" are used and /or prohibition of alienation is contained in the Will the dominium is given to the beneficiary.

In view of the above I opine that the 'life interest' given to Violet de Andrado was subject to a fideicommissum and she had the full dominium. Title to the property was to be devolved on the lawful heirs or persons who get it through Violet de Andrado but subject to the charge on the property to convert it to money and pay as directed. Even if one can argue that there is no fideicommissum since fideicommissaries are not clear, Violet de Andrado had been given dominium subject to a restriction on alienation for which the Abolition of fideicommissa Act Applies.

Since the passing of Abolition of Fideicommissa Act took place after the making of this last will and as it prohibits fideicommissum, restriction on alienation and entailments, that law applies to this Last will, and as per the provisions of the said law the Violet de Andrado, wife of the testator who possessed the property involved at the time that law came into existence became the absolute owner of the property. Hence the Plaintiff Respondents' claim could not have been successful before the District Court and the learned High Court Judges erred in granting even the declaratory reliefs.

As such, in my view, the Plaintiff Respondents could not have obtained any relief prayed in the plaint including the declaratory reliefs which were given by the learned High Court Judges. Thus, in my view, the questions of law no.1 and 2 have to be answered in the affirmative. It must be noted that the action has been filed to get the property sold and distribute the money and not to recover money from the 1st defendant. Further, subject to the answer to be given to the question of law no.4, on merits, the question of law no.3 has to be answered to say that even though there appears to be certain misstatements of law made by the learned High Court Judges, not granting of the reliefs referred to in the question of law No. 3 was correct.

However, the question of law No.4 challenges the entitlement of the Plaintiff Respondents to raise such a question of law as represented by question of law no.3 in this appeal. In fact, if the Plaintiff Respondents were dissatisfied by the learned High Court Judges' decision which did not grant reliefs as prayed in the prayers **'c'** to **'f'**, they could have filed a leave to appeal application over that. Filing of a leave to appeal application by the Defendant Appellant or possible outcome of that appeal cannot create a new situation that brings any new grief or dissatisfaction in relation to not granting of those relief. It must be noted learned High Court Judges granted only declaratory reliefs, but no executable relief was granted. As such dissatisfaction due to the refusal of prayers **'c'** to **'f'** should have been there from the moment the judgment was pronounced. As per section 754 of the Civil Procedure Code an aggrieved party has to appeal within the appealable period. Hence, in my view the Plaintiff Respondents are not entitled to raise the question of law as contemplated in question of law no.3. Thus, answer to question law no.4 has to be in the affirmative.

For the forgoing reasons, this appeal of the 2nd Defendant Appellant is allowed with costs here and also in the courts below and accordingly, reliefs prayed in prayer (b), (c), (d) and (e) of the Petition of Appeal dated 22nd July 2010 are granted.

Judge of the Supreme Court

Murdu N.B. Fernando, PC. J.

I have had the advantage of reading in draft, the judgement of my brother Amarasekara, J., allowing this appeal. However, I respectfully beg to dissent with the said judgement for the reasons stated herein and hence pens this judgement.

Amarasekara J., in his draft judgement had extensively dealt with the facts pertaining to the matter in issue. Nevertheless, in order to understand my reasons for this dissenting view, I wish to refer to the facts in chronological order;

01. One Benedict de Andrado on 09-02-1963 executed a Last Will attested by ARM Razeen N.P. ("Last will") whereby he gave and bequeathed to his wife Violet de Andrado, the following,

    - an undivided half share of a coconut land at Mahawewa in Marawila;

    - blocks 2,4,5 in plan No 349 dated 14.08.1962 made by M I Sameen Licensed Surveyor, [pertaining to a land at Grandpass, Colombo/ Mahawatta Road, Madampitiya] with a notation 'without any reversion whatsoever'; and

    - all the moveable property of his estate.

02. In addition to the above, by the said Last Will Benedict de Andrado, gave and devised defined lands and properties to a relative, referred to by name, subject however to the life interest of his wife Violet. He also bequeathed cash to certain other named persons.

03. Lastly, by the said Last Will Benedict de Andrado devised and bequeathed to Violet his wife, the ***life interest on the 'rest and residue' of his estate, in remainder, reversion or expectation nothing expected.*** *He went on to state that after the death of his wife Violet, it was his desire that such residue be* ***converted to cash*** *and directed such* ***cash be divided into 15 equal parts*** *and be distributed in the following manner;*

    - *one part to be utilized for masses at a Grandpass church for the repose of the soul of himself, his wife and certain named ancestors;*

    - *another part for the improvement of a church at Mahawatta;*

    - *three parts for establishment of a scholarship fund at St. Benedicts College, Kotahena;*

- the balance ten parts to be distributed as stipulated among the children of four relatives referred to in the Last Will.

04. Benedict de Andrado appointed his wife Violet to be the executrix of the Last Will and Testament and on the demise of Violet his wife, named His Grace the Archbishop of Colombo or his nominee to be the executor of his Last Will.

05. Benedict de Andrado died on 25.06.1963. Violet his wife filed testamentary action in the District Court of Colombo. The Last Will was duly proved and probate was thereafter issued to Benedict de Andrado's wife Violet de Andrado.

06. Violet de Andrado died on 29.08.1991 at an Elders Home in Kegalle, 28 years after the demise of Benedict de Andrado.

07. Thereafter the 1st defendant-respondent-respondent ("the 1st defendant") one Patriciahamy, said to be the lady who looked after Violet de Andrado, being the beneficiary and the executrix of a non- noterially executed Last Will of Violet de Andrado dated 22-03-1985, applied to the District Court of Marawila and obtained probate to administer the estate of Violet de Andrado. The said Last Will of Violet, executed in Marawila before five persons (whose names are not reflected in the Last Will) only referred to a single property, land and premises in extent 33.56 P bearing No. 136, Mahawatta Road, Madampitiya.

08. On 17.01.1994, the 1st defendant Patriciahamy by executor's conveyance transferred the said property referred to as lot number one together with the right of way attached to it over lot 6 depicted in plan bearing No 349 dated 14.08.1962 made by MI Sameer, Licensed Surveyor to herself as the beneficiary of Violet's Last Will.

09. On 05.12.1994, the 1st defendant conveyed the said property at No.136, Mahawatta Road, Madampitiya to the 2nd defendant-appellant-appellant (2nd defendant/appellant).

10. Thereafter in the year 1999, the plaintiffs-respondents-respondents ("the plaintiffs/ respondents") being the identified beneficiaries of 10/15 parts [the church being the beneficiary of the balance 5/15 parts] upon the rest and residue clause of Benedict de Andrado's Last Will dated 25-06-1963, sued the 1st and 2nd defendants in the District Court of Colombo and prayed for the relief stated therein.

11. Only the 2nd defendant filed answer in the instant case and took up the position that the land referred to in the schedule to the plaint, *viz.*, No 136, Mahawatta Road, Madampitiya was a land belonging to the estate of Violet de Andrado and upon

proof of the Last Will of Violet, the 1st defendant obtained title to the said land which had now passed onto the 2nd defendant, a *bona-fidae* purchaser. The 2nd defendant also pleaded that Violet had prescriptive title to the land and even if its assumed that 'Violet only had a life interest' in the property in issue, with the passage of Abolition of Fidei Commissa Act No 20 of 1972, 'Violet becomes the absolute owner' and therefore, the bequeath by Violet to 1st defendant is lawful and valid. Further, the 2nd defendant pleaded, therefore the transfer of the subject property by the 1st defendant to the 2nd defendant is also in accordance with the law and claimed damages in a sum of Rs. 5 million.

12. The instant appeal before this Court springs from the said District Court case.

13. The District Court trial proceeded *ex-parte* against the 1st defendant and *inter-partes* against the 2nd defendant. The District Court gave judgement in favour and the plaintiffs and granted all the reliefs *i.e.*, prayer (a) to (g) prayed for by the plaintiffs in the plaint and dismissed the cross-claim of the 2nd defendant.

14. Aggrieved by the said judgement the 2nd defendant, appealed to the Civil Appellate High Court ("the High Court"). The High Court rejected the appeal and upheld the District Court judgement. However, the High Court disallowed the reliefs (c),(d),(e) and (f) and granted only the declaratory relief referred to in prayer (a) and (b) to the plaintiffs. v*iz., a declaration that the plaintiffs are entitled to the proceeds of sale of the property described in the schedule to the plaint and a declaration that the 1st and 2nd defendants are not entitled to the said property*.

15. Whilst the plaintiffs did not canvass the said judgement of the High Court, the 2nd defendant came before this Court and obtained Leave to Appeal upon the contention that the **High Court erred in holding that the Last Will did not create a *fidei commissum* in favour of Violet de Andrado,** in respect of the property in issue, which is the subject matter of this appeal, *viz.*, No 136, Mahawatta Road, Madampitiya, depicted as lot 1 together with the right of way over lot 6 in plan No 349 dated 14.08.1962 more fully referred to in the schedule to the plaint.

From the foregoing narration of facts, it is my respected view, that the crux of the issue to be determined by this Court is, whilst Benedict de Andrado, unequivocally without any reservation whatsoever bequeathed lots 2,4,5 in plan bearing No 349 dated 14.08.1962 [together with other defined properties] to his wife Violet, whether **the transfer of the life interest in the rest and residue of his estate, constitute a *fidei commissum*** with regard to only 'lot one' in plan No 349, in favour of Violet when in fact 'lot one' in the said plan is not expressly or impliedly referred to in the Last Will of Benedict de Andrado.

Corollary, can an unidentified, undefined and undescribed property of a testator fall within the realm of *fidei commissum*? Moreover, can only one single undefined property, which among other properties constitute the 'rest and residue of an estate' establish a *fidei commissum* in favour of a life interest owner?

In general parlance, can the clauses and properties in a Last Will be severed and interpreted individually? Could some clauses or certain properties in a clause in a Last Will, expressly or impliedly establish a *fidei commissum*, independent to other properties and clauses, which will not establish a *fidei commissum*?

To be very specific, when it is the desire of the testator **to convert to cash the rest and residue of his estate** subject to the life interest of the spouse of the testator, can only a precise property where title has not been expressly bequeathed to the spouse of the testator and which comes within the realm of rest and residue of the estate, be deemed subject to a *fidei commissum*?

These queries are raised principally upon the reason that according to the Last Will, the desire and intention of Benedict de Andrado was for his wife Violet, to be his executrix and have a life interest on the rest and residue of the estate and administer the estate and upon the death of Violet his wife, for the Archbishop of Colombo to fulfill the obligations therein, *viz.*, convert the rest and residue of the estate of Benedict de Andrado into cash and distribute the cash received, in the manner described in the Last Will of Benedict de Andrado.

It is trite law, that in interpreting a testament or a will, the intention of the testator should be given effect to and implemented. The intention could be ascertained from the terms of the testament or the will and from the surrounding circumstances. [see. **Mohamed v. Mohamed 30 NLR 225; Seneviratne v. Candappapulle et. al 16 NLR 150**]

It is manifestly clear from the reading of the Last Will **P1** [vide pages 254 to 256 of the brief] that the testator Benedict de Andrado's intention was to devise and bequeath a number of defined and described properties *to his wife Violet without any reservation whatsoever viz.* coconut land at Marawila and three lots bearing No 2,4 and 5 in plan No 349 at Grandpass/Madampitiya.

Similarly, it was the desire of the testator to bequeath certain properties depicted in the Last Will in detail, to a nephew without any reservation. However, one property described as No 148, Mahawatta Road, Madampitiya [not the subject matter No. 136, Mahawatta Road, Madampitiya] was bequeathed to the said nephew, *subject to the life interest of his wife Violet.*

There was also provision in the Last Will to make detailed cash donations, upon the testator's death to named persons, pay estate duty and other liabilities from defined sources

and also pay a sum of money as a legacy from the rest and residue of the estate as the first call to a named party.

Having specifically devised and bequeathed the above properties, the testator's Last Will ended with a rest and residue clause. Thus, Benedict de Andrado devised and bequeathed the ***life interest of the rest and residue of his estate*** *without remainder, reversion or exception nothing expected, to his wife Violet,* indicating his desire, that the rest and residue of his estate be converted to cash and be divided into 15 equal parts and distributed in the manner described in the Last Will.

Thus, it is apparent from the reading of the Last Will, that Benedict de Andrado bequeathed the properties in different ways. Firstly, a number of defined properties were expressly bequeathed to Violet his wife, unequivocally and unreservedly. Secondly, one defined and described property was bequeathed to a nephew subject to the life interest of his wife Violet. The rest and residue of his estate was bequeathed to the named beneficiaries with the express desire that **'the rest and residue of the estate be converted to cash and distributed in the manner provided in the testament'** subject however to the life interest of his wife. Thus, only the life interest of the rest and residue of the estate was bequeathed to Violet his wife under this clause.

From the foregoing facts, it is observed that the intention of the testator Benedict de Andrado was for certain legacies to take place upon his death and certain other legacies to happen consequent to the demise of his wife Violet, the life interest holder. To achieve his intention and desire, Benedict de Andrado appointed his wife as the executrix of the Last Will and upon her demise the ArchBishop of Colombo as his executor to fulfill his desire.

Undisputedly, the property in issue bearing assessment No. 136, Mahawatta Road, Madampitiya (depicted as 'lot one' in plan No 349 dated 14-08-1962 and described in detail in the schedule to the plaint) is not a legacy bequeathed to Violet his wife expressly. It is not even bequeathed to a 3rd party, named or unnamed, subject to the life interest of Violet his *wife viz-a-viz* assessment No. 148, Mahawatta Road, Madampitiya bequeathed to the testator's nephew, subject to the life interest of the testator's wife Violet.

The property in issue is neither described, defined nor expressly referred to, and or independently or separately identified in the Last Will **P1**. Hence, it will only fall within the parameters of the 'rest and residue' of the testator's estate.

There is no dispute between the parties that the residue of Benedict de Andrado's estate, was subject to the life interest of his wife Violet. The intention and the desire of the testator was to convert to cash, the rest and residue of the estate and distribute same in the manner provided. It had to be done only upon the demise of his wife, since she had a life interest over same. Incidentally, part of the money was to be used for the repose of her soul. The ArchBishop of Colombo was specifically named by Benedict de Andrado in his

Last Will to act as the executor, upon the demise of his wife, to fulfill his intention and desire unequivocally and as clearly laid down in the Last Will **P1**.

The plaintiffs being the beneficiaries of the sale proceeds of the rest and residue of Benedict de Andrado's estate, moved the District Court to obtain among other reliefs, declaratory relief with regard to their legacy, in so far as the property in issue is concerned. The District Court granted all the relief prayed for by the plaintiff. The High Court whilst upholding the said judgement restricted the relief granted. The High Court only granted the two declaratory relief sought and disallowed the consequential reliefs.

The contention of the appellant before this Court was that the finding of the trial court, upheld by the High Court, was erroneous for the reason *firstly,* that the property in issue created a *fidei commissum* in favour of Benedict de Andrado's wife Violet and *secondly,* with the passing of the Abolition of Fidei Commissa Act No. 20 of 1972, the aforesaid *fidei commissum* in favour of Violet was extinguished and the property in issue vested absolutely and free of any encumbrances on Violet. Hence, the appellant argued that Violet de Andrado was entitled to transfer, devise and bequeath the property in issue at her free will, to whom so ever she wished and thus the disposition of the said property by Violet upon her non-notarially executed Last Will to her nurse and maid *i.e.,* the 1st defendant, is in accordance with the law.

The learned President's Counsel for the appellant extended his argument to encapsulate the position that the deed of disposition by which the 1st defendant transferred the property in issue to the 2nd defendant is legal and valid and is in accordance with the law. The recital of the said deed of transfer by which the 1st defendant conveyed her interests to the 2nd defendant reads, "*Benedict de Andrado devised and bequeathed to his wife, Violet….lot 1 of plan …..".* Upon a plain reading of the Last Will **P1,** it is manifestly clear that Benedict de Andrado only devised the life interest of the rest and residue of the estate and not 'lot one' of plan No 349 or the title or domimum of 'lot one' in particular, as stated in the recital of the deed of disposition referred to above. Thus, in my view, the aforesaid contention is erroneous and misconceived and is a misstatement of the law.

I wish to pause at this juncture to refer to the argument put forward by the respondent before this Court. The learned President's Counsel vigorously contented that the Last Will of Benedict de Andrado (**P1**) did not create a *fidei commissum* with regard to the subject matter in favour of Violet his wife, as the dominium or the title to the property did not vest in Violet as a *fiduciary,* since she was only given a life interest. The attention of this Court was also drawn to the book titled **Law relating to Fidei Commissia by AJL Cruz Raj Chandra** and specifically to page 10 wherein the distinction between a trust, *fidei commissum* and life interest is discussed.

'Legacy' as we are very much aware is a bequest or a gift of a personal property by a Last Will or a Testament. A *fidei commissum* on the other hand, is a bequeath or a gift to

a person known as *fiduciary* subject to the condition that on the happening of a certain event (death or otherwise) the property will vest in a certain named person or persons known as *fidei commissury* or *fidei commissuries.*

In the matter in issue, Benedict de Andrado independent to the described and defined legacies bequeathed to his wife also devised and bequeathed to her, the life interest on the rest and residue of the estate. It is important to note by this legacy i.e., the rest and residue, the dominium or title to a property was not bequeathed or gifted to her. Thus, the dominium or title of 'lot one' of plan No 349 was not expressly or impliedly bestowed on her.

The rest and residue of the estate, among other moveable and immovable property also include the property in issue i.e., lot one in plan No 349. The intention and the desire of Benedict de Andrado, as the Last Will **P1** clearly spelts out, was for such rest and residue to be converted to cash and divided into 15 equal parts and distributed in the manner provided. This task had to be carried out by the 2nd executor named in the Last Will, as it had to be attended to consequent to the demise of his wife and executrix Violet, since she held the life interest to the rest and residue of the entire estate.

Hence, in my view there is no ambiguity whatsoever in the wording of the Last Will. Benedict de Andrado unequivocally and unreservedly granted his wife Violet only the life interest of the rest and residue of the estate. With regard to the subject property, Violet was not the *fiduciary*, nor were there any named *fidei commissury* or *fidei commissuries.* The dominium or the title of the subject property, 'lot one' in plan No 349 was not expressly transferred to Violet nor was it transferred to any other person by way of an instrument of transfer. It only comprised of a part or a segment of the rest and residue of the estate. Hence, in my view, transfer of only the life interest of the property not defined nor identified in the Last Will (**P1**), does not create a *fidei commissum* in favour of Violet, as strenuously argued before this Court by the appellant.

In the case of **Gunawardena v. Vishvanathan 24 NLR 225 and Pabilina v. Karunarathne 50 NLR 169**, this Court has considered the manner in which a *fidei commissum* is created. In the **24 NLR** case, whilst the Court held a *fidei commissum* was established, in the **50 NLR** case, the Court held that a *fidei commissum* was not established and went onto observe that the real intention of the donor should not be a matter of conjecture but has to be ascertained from the language used.

Similarly, in a comparatively recent case, **Bengamuwe Dhammadinna Thero v. Perera and another SC Appeal 15/2012 decided on 14-03-2017**, this Court observed, quoting many books [Prof. H.W. Thambiah Q.C. on Principles of Ceylon Law and Prof. T. Nadaraja on Fidei Commissum of Ceylon and especially **Laws of Ceylon by Walter Pereira**] that with regard to *fidei commissum*, a variety of views and expressions have been expressed but that no satisfactory test appears to be available to be applied to the question

whether any particular word or words in a particular document have the effect of creating a *fidei commissum.*

The words of Lascells CJ in **Fernando V. Perera 17 NLR 161**, that the most troublesome of all encumbrances is the *fidei commissum*, aptly demonstrate the complexity of *fidei commissum.*

I do not wish to get into an academic exercise with regard to formation or the creation of a *fidei commissum,* the material differences between a *fidei commissum* and *usufructus*, the implications of the term 'life interest' and 'life interest holder'. Suffice is to state, the primary function of a trial court is to give effect to the desire and the intention of the testator to be ascertained from the terms of the will, as observed in **Pabilina's case** referred to above and numerous other judgements of this Court.

In the instant appeal, the intention and the desire of Benedict de Andrado is apparent upon the reading of the Last Will **P1**. It was to gift, defined and described properties to his wife [and others] without any reservation whatsoever and whatever is remaining i.e., the rest and residue of the estate, to be converted to cash and equally distributed among the beneficiaries as stipulated therein, upon the demise of Benedict de Andrado's spouse Violet. The finding of the trial court, upheld by the High Court strikes to achieve the said objective and the intention of the testator and I see no reason to disturb or interfere with such finding.

It is further observed, that in coming to its findings both the District Court and the High Court made reference to a judgement of this Court, **Kularatne and another v. Gunatilleke** reported in **[1994] 2 SLR at page 258**. I wish to refer to the afore said case in detail, as the legal principles discussed therein are similar to the instant appeal.

In the said **Kularatne's case,** one Don Abraham by his Last Will bequeathed his property to his nephews and nieces. Among the beneficiaries were the two plaintiff's to whom a property was bequeathed *'to be vested after the deaths of the said Don Abraham and his wife'.* Within a month of Don Abraham's death in 1965, his wife by Last Will bequeathed the said property [which Don Abraham devised to the two nephews] to the defendant and her husband who attended to Don Abraham during his last stages. Don Abraham's wife died consequent to the passing of the Abolition of Fidei Commissa Act No 20 of 1972 and the question that was posed before this Court was whether the said Last Will created a *fidei commissum* in favour of Don Abraham's wife and whether the property passed onto the absolute ownership of Don Abraham's wife on the enactment of the Abolition of Fidei Commissa Act.

In the said case, Kulatunga J., (with GPS de Silva CJ and Ramanathan J, in agreement) considered the fact that Don Abraham refrained from making a devise in favour

of his wife and also the use of the language employed a creation of a *usufruct* in favour of the surviving spouse and at page 262 observed thus;

> "If the testator intended to give his wife the dominium in the property as the first beneficiary, he might have used more specific language. This he failed to do; and the facts indicate, that he was not interested in nominating *fidei commissaries* with inchoate rights but heirs to take over his estate except that the fulfillment of the legacy was deferred in order to provide for the needs of his wife during her life time. On this basis, the reasonable construction is that the Will gave only a life interest to the testators wife….and therefore [she was] not competent to bequeath the ownership of the property by Last Will…"

In the instant appeal, the wording of Benedict de Andrado's Last Will **P1** is much more clear and specific than the words and language used in the Last Will of Don Abraham, in the afore discussed **Kularatne's case**.

In the appeal before us, the testator Benedict de Andrado, only devised and bequeathed to his wife, the life interest on the rest and residue of his estate. No dominium in the subject property was granted to the wife expressly or impliedly, either as a first beneficiary or otherwise. Corollary, the dominium of the property could not be granted to the wife, as the Last Will **P1**, did not describe or define or depict the specific property. Thus, the subject property, together with other undefined movable and immovable property, could only be slotted and accommodated within the 'rest and residue of the estate.'

The intention of the testator was to bequeath to the wife Violet, only the 'life interest on the rest and residue of the estate'. The words of the testator are clear and precise. If he wished to bequeath 'lot one' also to his wife Violet, he could have specifically, without any ambiguity bequeathed it to her. He did not do so. As discussed earlier in this judgement, the testator expressly and unreservedly bequeathed and devised several other properties to her and 'lot one', the subject property is not one of those properties.

The testator's intention was for the rest and residue to be converted to cash and devolved on the persons nominated in the Last Will, consequent to the demise of the wife. Nominating the wife as the executrix and upon her death appointing the Archbishop of Colombo or his nominee to fulfill the said obligation, in my view, further exemplify and illustrate the intention of the testator which was only to create a life interest upon the rest and residue of the estate in the wife. In my view, the intention of the testator should be given effect to and his desire has to be fulfilled.

Thus, I have no hesitation in upholding the finding of the High Court. The surrounding facts and circumstances of this case, does not warrant or create a *fidei commissum* in favour of the wife as the dominum or title of 'lot one' never passed on to her. Hence, in my view, the Last Will of Benedict de Andrado (**P1**) does not envisage a *fidei commissum* situation. Thus, the passing of the Abolition of Fidei Commissa Law too, has no effect or bearing whatsoever, upon the property in issue, namely No 136, Mahawatta Road, Madampitiya/ Grandpass in Colombo.

Further, I see no rhyme or reason to disturb the finding of the High Court, that Violet de Andrado and or her alleged successors, i.e., the 1st and 2nd defendants, are not in receipt of any title or dominium to the property in issue.

Hence, for reasons more fully adumbrated in this judgement, I answer the **1st and 2nd questions of law** raised before this Court namely,

(i) Did the Civil Appellate Court err in holding that the Last Will (**P1**) did not create a *fidei commissum* in favour of Violet in respect of the property which is the subject matter of this action?

(ii) Did the Civil Appellate Court err in granting reliefs prayed for in paragraphs (a) and (b) of the plaint to the District Court?

in the negative and uphold the judgement of the High Court. Further, the two declarations referred to in prayer (a) and (b) of the plaint, affirmed and declared by the High Court in favour of the plaintiffs/respondents are also upheld.

The **3rd question of law** raised by the respondents as a consequential issue and the **4th question of law** raised by the appellant thereafter, are as follows;

(iii) Did the learned High Court Judges err in not granting the reliefs prayed for in paragraphs c,d,e and f of the plaint as granted by the learned District Court Judge?

(iv) The Respondents not having sought to canvass the judgement of the Court of Appeal by way of an application for leave, are they entitled in law to raise question No. 3 as aforesaid?

I do not wish to delve into greater detail or analyse the said two questions in depth, except to state that it is paramount for a trial court to look into and consider the terms of the Last Will and its surrounding facts when interpreting same, in order to ascertain the intention of the testator.

As discussed earlier, the desire of Benedict de Andrado undisputedly was to convert the rest and residue of his estate into cash and equally divide it into 15 parts and distribute the cash in the manner provided, consequent to the demise of Benedict de Andrado's

spouse Violet. By the terms of the Last Will, the testator appointed a succeeding executor to fulfill the said obligation and also to attend to other incidental matters.

Hence, my considered view is that there is no impediment whatsoever, for the relevant parties to take appropriate steps to fulfil the said obligation. In view of the said finding, I refrain from answering the two consequential questions of law raised before this Court.

In the aforesaid circumstances, the judgement of the Civil Appellate High Court is upheld. The appeal of the 2nd defendant-appellant-appellant is dismissed subject to costs fixed at Rs. 250,000.00 payable by the appellant to the plaintiffs-respondents-respondents.

Appeal is dismissed.

Judge of the Supreme Court

Aluwihare PC, J.

I have had the privilege of reading the judgements of his Lordship Amarasekara J and her Ladyship Fernando PC,J. With great respect I have not been able to agree with the conclusion reached by my brother Amarasekara J that this appeal should be allowed. When I consider the evidence placed in this matter, I am inclined however to agree with the views expressed by her Ladyship Fernando PC, J, that this appeal should be dismissed.

Judge of the Supreme Court