

**PEDRIS**  
v.  
**FERNANDO AND ANOTHER**

SUPREME COURT.

SHARVANANDA, J., WIMALARATNE, J., AND ABDUL CADER, J.

S.C No. 18/82. – C.A. No. 551/73 (F) – D.C. COLOMBO No. 13153 (L).

OCTOBER 12, 1983 AND FEBRUARY 24, 1984.

*Fideicommissum conditionale – Prohibition of alienation by act inter vivos such as sale, donation, mortgage or lease – Does such prohibition extend to alienation by Last Will?*

The plaintiff sought to vindicate title to the lands described in Schedules 1 to 10 of the plaint and to have the defendants evicted therefrom. She traced title to one Cornelis Fernando who by his Last Will P1 dated 21.6.1948 and Codicil P2 admitted to probate in D.C. Kalutara 3435/T had devised the lands in Schedules 1 to 6 and 8 to 10 to his son Lambert Cornis Fernando subject to the conditions that he shall not sell, donate, mortgage or lease for a period exceeding five years at a time or in any other way alienate the same till the 31st day of December, 1970. Cornelis Fernando by deed of gift No. 3341 of 24th October, 1947 (P3) gifted the land described in schedule 7 also to his son Lambert Cornis Fernando subject to the condition that the donee shall not on any date prior to 31st December, 1968 sell, mortgage, donate, or lease for a period exceeding five years at any time or otherwise alienate the said premises. In the event of the conditions in the Will and donation being disobeyed the premises were to pass over to the children of Cornis Fernando.

Cornis Fernando died on 27.4.1968 himself leaving Last Will No. 380 dated 21st April, 1968 (P4) by which he devised the said lands to the plaintiff. This Last Will was the subject-matter of testamentary proceedings where the two defendants claimed that the said lands were subject to a fidei commissum created by Last Will P1 and deed of gift P3 and that Cornis Fernando had no disposal interest in these lands. The plaintiff then instituted the present action in the District Court.

The District Judge held that Cornis Fernando was entitled and competent to bequeath the said lands by Last Will P4. In appeal the Court held that alienation by Last Will was covered by the prohibitions imposed in Last Will P1 and donation P3 and that the Last Will P4 was a contravention of them.

**Held—**

By the documents P1 and P3 Lambert Cornis Fernando was prohibited from alienating the properties for a limited period to anybody whether within or without the family. The prohibition created a "fideicommissum conditionale," that is a fideicommissum conditioned to come into existence on the breach of the prohibition. A prohibition against alienation must be strictly interpreted and ought not to extend to modes of alienation other than those expressly mentioned. The phrase "in any other way alienate" in P1 or "otherwise alienate" in P3 does not cover alienation by Last Will because it is only when alienation of a thing *outside the family is forbidden in general terms* that a testamentary disposition is also included in such a prohibition. Alienation outside the family is not prohibited by P1 and P3 and therefore must be limited to alienation by act inter vivos.

A will is ambulatory during the lifetime of the testator and does not operate as a disposing or putting away of any estate until after the death of the person making it. It requires the death of the testator for its consummation. The Last Will P4 does not constitute a breach of the prohibition on alienation and therefore the plaintiff is entitled to be declared owner of the properties in suit.

## Cases referred to :

- (1) *Kanayson v. Rasiah*, (1967) 69 N.L.R. 553 (P.C.).
- (2) *Doe Stevenson v. Glover*, (1845) 14 L.J.C.P. (N.S) 169 ; 1 C.B. 448 ; 135 E.R. 615.
- (3) *Executor of Last Will of Rambukwella Siddhartha v. Sumana Thero*, (1943) 44 N.L.R. 365.
- (4) *Ex parte Van Eeden*, (1905) T.S. 151, 153 (Transvaal Law Reports – Supreme Court)

APPEAL from a judgment of the Court of Appeal.

*H. L. de Silva, P.C.* with *Iftikhar Hassim* for plaintiff-appellant.

*K. N. Choksy, P.C.* with *L. C. Seneviratne, H. Soza* and *Miss. I. R. Rajapakse* for the defendant-respondents.

*Cur. adv. vult.*

May 17, 1984

### SHARVANANDA, J.

The plaintiff filed this action for a declaration of title to and ejectment of the defendants from the lands described in the schedules 1-10 in the plaint. The plaintiff pleaded that one Cornelis Fernando was entitled to the said lands and that he by his Last Will P 1 dated 21.6.1948 and Codicil P 2, which were admitted to probate in D.C. Kalutara 3435/T, had devised the said lands described in the schedules 1-6 & 8-10 to his son Lambert Cornis Fernando, subject to the terms and conditions set out in the said Last Will P 1. The said Cornelis Fernando by deed No. 3341 of 24th October, 1947 (P.3) donated the lands described in schedule 7 of the plaint to the said Lambert Cornis Fernando, subject to the terms and conditions set out in the said deed. The said Lambert Cornis Fernando who thus became entitled to the said lands described in schedules 1-10 of the plaint, subject to the terms and conditions set out in P 1 and P 3 died on 27th April, 1968, leaving his Last Will No. 380 dated 21st April, 1968 (P 4) by which he devised and bequeathed the said lands to the plaintiff.

The said Last Will P 4 was the subject matter in testamentary proceedings in case No. 24126, D.C., Colombo. In the said action the 1st and 2nd defendants claimed that the said lands were subject to the fidei commissum created by the Last Will P 1 and deed of gift P 3 in favour of the first defendant and that the said Lambert Cornis Fernando had no disposable interest in the said properties to convey to the plaintiff, and that the lands had vested on the 1st defendant. The plaintiff denied that the said Last Will P 1 and the deed of gift P3 created a fidei commissum in favour of the 1st defendant and pleaded that the said Lambert Cornis Fernando was legally entitled to and competent to devise and bequeath the said properties to the plaintiff.

The plaintiff has instituted the present action for a declaration of title and ejectment of the defendants from the properties described in the schedules 1-10 of the plaint on the basis that the said Lambert Cornis Fernando was legally entitled to and competent to devise and bequeath the same to the plaintiff by his Last Will (P 4). The defendants have in their answer disputed the claim of the plaintiff and have pleaded that under and by virtue of the instruments P 1, P 2 & P 3 the said properties were subject to a fidei commissum in favour of the 1st defendant and had devolved on the 1st defendant on the death of the said Lambert Cornis Fernando, and that the said Cornis Fernando could not in law have devised and bequeathed the said properties to the plaintiff.

The contention of the parties revolve round the question whether the said Lambert Cornis Fernando was legally entitled and competent in law to make, bequeath and devise by his Last Will (P 4) the said properties to the plaintiff, in view of the conditions and prohibitions contained in P 1 and P 3.

The conditions contained in P 1 & P 3 read as follows :

"P 1" I devise and donate unto my beloved son Lambert Cornis the following properties subject to the conditions that he shall not sell, donate, mortgage or lease for a period exceeding five years at a time or in any other way alienate the same till the 31st day of December, 1970, but shall possess the same during the said period and in the event of his contravening or violating the aforesaid condition the same shall pass to his children as if there was no such sale or alienation. That after the 31st day of December, 1970, he shall be able to do whatever he likes with the said properties as if no such condition or prohibition existed."

"P 3" That the said donee shall not on any date prior to 31st December, 1968, sell, mortgage, donate, lease for a period exceeding five years at any time or otherwise alienate the said premises but shall possess the same till the aforesaid date.

In the event of the said Donee in disobedience to the condition mentioned above were to sell, mortgage, donate, lease or otherwise alienate on any date prior to 31st December, 1968, the said premises shall not pass to the person or persons in whose favour such transfer, encumbrances or other alienation shall have been made but shall pass over to the lawful children

of the said donee in equal shares if there be any and on failure of such children the same shall pass over to my remaining children and their descendants in equal shares.

The said Donee shall have full power and authority from and after 1st January, 1969, to deal with the said premises as if there were no such restrictions and prohibitions against alienation whatsoever."

After trial the District Judge gave judgment for the plaintiff on the ground that the prohibitions contained in P 1 and P 3 could not be construed to prohibit an alienation by Last Will and that hence Lambert Cornis Fernando was entitled and competent to bequeath by the Last Will (P 4) the properties referred to in the schedules to the plaintiff who is his sister and that he had not by executing the Last Will (P 4) committed any breach of the conditions imposed by the documents P 1 and P 3.

On appeal by the defendants the Court of Appeal disagreed with the view of the District Judge and held that Lambert Cornis Fernando was not competent to deal with the properties by his Last Will (P 4) and that the alienation by Last Will (P 4) contravened the conditions set out in P 1 and P 3 and that such contravention operated to vest the title to the properties in question on the 1st defendant who was the only child of Lambert Cornis Fernando, the fiduciary on P 1 and P 3. The Court of Appeal therefore set aside the judgment of the District Judge and dismissed the plaintiff's action with costs in both courts. From the said judgment of the Court of Appeal the plaintiff-appellant has preferred this appeal to this court.

The decision of the appeal turns on the answer to the question whether alienation by Last Will within the period specified in the Last Will (P 1) and deed of gift (P 3) constituted a breach of the prohibition prescribed therein.

Counsel for defendant-respondents submitted that the terms in P 1 which provide that Lambert Cornis Fernando, the devisee, shall not sell, donate, mortgage or lease for a period exceeding five years at a time or in any other way alienate the same till 31.12.70, but shall possess the same during the said period; and the terms in P 3 which provide "that the said Lambert Cornis Fernando the donee shall not prior to 31.12.68, sell, mortgage, donate, or lease for a period exceeding five years at any time or otherwise alienate the said premises but shall possess the same till the aforesaid date," prohibit all forms of alienation, including alienation by Last Will till the expiry of the

dates mentioned in P 1 and P 3 and that hence Cornis Fernando who died on 27th April, 1968, could not have validly bequeathed the said properties to the plaintiff by his Last Will dated 21.4.68, prior to the dates referred to in P 1 & P 3. He contended that the Last Will P 4 took effect within the prohibited period mentioned in P 1 and P 3 and hence contravened the conditions set out in P 1 and P 3 and that such contravention operated in terms of P 1 and P 3, to vest the title to the properties on the 1st defendant-respondent, the only child of the said Lambert Cornis Fernando, and that the testator on P 4 had no disposable interest in the properties to convey to the plaintiff-appellant and that the latter had no title to the said properties.

It was submitted on the other hand by Counsel for the plaintiff-appellant that the alienation that was prohibited by P 1 & P 3 was alienation by act *inter vivos*, such as sale, donation, mortgage or lease and did not extend to alienation by Last Will. The intention of Cornis Fernando, testator of P 1 and donor on P 3 was that his son Lambert Cornis Fernando should possess the properties without alienating them prior to the dates mentioned in P 1 & P 3 and that by the execution of his Last Will (P 4), Lambert Cornis Fernando did not himself alienate the properties. His contention was that the bequest by Lambert Cornis Fernando was not alienation by an act *inter vivos*.

The ultimate question is whether the restrictions set out in P 1 and P 3 are wide enough to imply a prohibition against alienation by Last Will. Since there is no such express prohibition, having regard to the language of P 1 and P 3 does the phrase "in any other way alienate" in P 1 or "otherwise alienate" in P 3 catch up the execution of a Last Will which comes into effect within the prohibited period set out in P 1 and P 3.

A *fidei commissum* being essentially the divesting to some extent of an absolute gift, so as to cut down that absolute gift is regarded with disfavour by the court. It is a fundamental principle that where there is doubt whether a *fidei commissum* has been created, that construction should be approved which will pass the properties unburdened. When making a testamentary disposition a testator is presumed to place as few burdens as possible upon the affected property. If he institutes an heir he is presumed to have intended the heir to be dominus of all the property acquired with the full and unrestricted right of alienating and bequeathing the same and where he makes a bequest it will require clear words, not equivocal language to diminish the legatee's interest.

In keeping with this principle a prohibition against alienation must be strictly interpreted and ought not to extend to modes of alienation other than those expressly mentioned by the testator or donor (Voet 36 : 1 : 27). A prohibition against any alienation by act inter vivos must not be intended to include a testamentary disposition, (McGregor's Voet : page 68) A prohibition must be interpreted to impose the least possible restraint consistent with the testator's intention and the construction is favoured whereunder the burdened legatee is left with the free and unfettered possession of the bequest which he acquired from the testator or donor.

By the documents P1 and P3 though Lambert Cornis Fernando had become the owner of the properties in question he was prohibited for a limited period from alienating them to anybody, whether within or without his family. The prohibition created what is termed "fidei commissum conditionale". That is to say a fidei commissum conditioned or to come into existence on a breach of the prohibition.

Sande who is the accepted authority on the subject of "Restraints upon alienation," in Chapter I of his treatise defines "alienation" to be "any course of dealing by which dominium is transferred". He catalogues the various species of alienation covered by the term. According to him the following transactions come under the head of 'Prohibited Alienation' -

1. Sale,
2. Barter or Exchange,
3. Donation,
4. A datio in solutum (the immovable property of minors cannot be so bestowed without an order of court),
5. The Settlement of a law Suit,
6. Division,
7. Repudiation of immovable property, acquired as a legacy, or in any other way by a pupil,
8. Usucaption (Prescription),
9. A creation of a servitude,
10. Granting of a Usufruct,
11. Granting an Emphyteusis (leasing),
12. Finally under the term "Prohibited alienation" comes every course of action from which alienation can follow . . . . .  
When alienation is prohibited, therefore, pledging or an agreement of hypothecation is also prohibited."

Sande enumerates thus twelve ways in which breach of a prohibited alienation can take place. (Sande 1 : 3 : 16 – 49). It is significant that in this exhaustive enumeration of the different kinds of alienation he does not include or mention alienation by Last Will. According to the ordinary acceptance of the term "alienation," only transfers by act inter vivos appear to be embraced in that concept.

In Part 3, Chapter 3 of his book Sande, dealing with *"When is a thing considered to be done in breach of a prohibition and what is included under the term prohibition?"* states the rules of construction: "In order to decide whether anything has been done contrary to a prohibition against alienation, the chief point we should consider is whether the testator has prohibited only a special kind of alienation or has prohibited alienation in general. As if only some special form of alienation has been prohibited the kinds of alienation with the exception of that one special form are allowed. For, he who forbids only one thing out of many is considered to countenance the remaining things" (3 : 3 : 1).

"Therefore a prohibition to sell does not prohibit the making of a donation, unless a sale is mentioned only as an example of the class of alienation which is prohibited" (3 : 3 : 2 – 3).

"Moreover, when a sale, donation and a pledge are prohibited, alienation by Last Will is considered to be permitted" (3 : 3 : 6).

"Words used as a recommendation are inoperative and do not extend the provisions, nor do they give rise to any right; unless the words are used to express the motive, or final reason; as if the testator, after he has said 'I forbid the properties to be sold' adds as his motive and reason, 'Because I desire it to be kept in my family'. In this case the said property is considered to be prohibited from being transferred to a stranger by Last Will, because the expression of the motive explains and widens the provision" (3 : 3 : 7 – 8).

"But if the general term 'alienation' is placed in the midst of special terms – for instance, if it is said, "I prohibit a sale, a donation, an alienation or pledge" – then the general term 'alienation' is limited by the special terms by reason of the alternative article "or". If however the general term 'alienation' is placed last – for instance, if the testator has said, "I prohibit my property to be sold, donated, pledged, alienated" – then the generic term being placed last, includes every class of alienation." (3 : 3 : 9 – 10).

But if, no special class of alienation is mentioned, but alienation outside the family is in general terms prohibited ; when, unless the motive for such prohibition and the intention of the provision, as declared in words, lead to a different conclusion, every act is considered to be prohibited, by which anything is transferred by us to another person. (3 : 3 : 11).

Firstly, in a general prohibition of this kind\*are included these methods by means of which dominium is transferred *inter vivos* : sale, donation, exchange. (3 : 3 : 12).

Secondly a person who is prohibited in general terms cannot grant a usufruct, nor any real right or servitude over the prohibited property. (3 : 3 : 16).

Thirdly, a thing prohibited from being alienated cannot be pawned. (3 : 3 : 18).

Fourthly . . . . . a person who is prohibited from alienating is not considered to have acted contrary to the will of the testator even if he has granted a lease for a long period of time. . . . . But if he died before the years of the lease have expired, the next of kin are not bound to abide by such lease, but can by right of *fidei commissum* demand the estate from the tenant. (3 : 3 : 19).

Fifthly, when the alienation of a thing outside the family is forbidden in general terms, all forms of Last Will, such as the institution of an heir, the giving as a legacy, or as a *fidei commissum* are understood to be prohibited ; such is the common opinion. (3 : 3 : 21).

(Sande states that this view is rejected by certain authorities who contend that the institution of an heir is not included in such general prohibition. Sande however supports this common view but modifies it.)

. . . . . Therefore the fact remains that the making of a Will or the bequest of a legacy forms no exception from prohibition upon alienation when such prohibition is made in general and clear terms, unless the motive for the prohibition and the intention of the testator tend to a different view : for example, if the testator has confined himself to transactions *inter vivos*, as if he has said, "I forbid alienation by sale, by donation, by pledge etc., or if to the term alienation used in a general sense certain words are added from which it is clear that the

testator was thinking not of alienation by Will but of alienation *inter vivos* and of contracts ; or if the testator has several children and forbids them to alienate his property until the youngest come of age." (3 : 3 : 31).

Sixthly, there is just as much doubt as to whether a person forbidden to alienate outside the family can transmit the prohibited property by succession ab intestato to an heir who is not a member of the family or as to whether such prohibited person can institute as his heir by Will a stranger who would succeed him if he died intestate." (3 : 3 : 32).

"The more generally received view is that when alienation is prohibited, intestate succession or the institution of the legitimate heir is not considered to be prohibited unless he who would succeed ab intestato is especially prohibited from acquiring the property or unless the terms of the prohibition are so wide as to include alienation to the legitimate heir". (3 : 3 :33).

"I do not think that we ought to depart from the received opinion of the Doctors, when a testator simply prohibits alienation outside the family and adds nothing else to this prohibition. For it is nowhere laid down that in a simple prohibition of this kind, legitimate succession is also prohibited". (3 : 3 :37).

"Seventhly and lastly, property prohibited from alienation cannot be lost by committing a crime, so as to be confiscated for the crime of the prohibited person." (3 : 3 :41.)

According to Sande 3 : 3 : 12, a general prohibition refers to those methods by means of which dominium is transferred *inter vivos*. But, Sande qualifies the proposition by stating that when the alienation of a thing out of the family is forbidden in general terms, all forms of Last Wills such as institution of an heir, the giving of a legacy or as a *fidei commissum* are understood to be prohibited. (3 : 3 :21). It would thus appear that alienation by Will is impliedly prohibited only when alienation of a thing outside the family is forbidden in general terms.

But what Sande has stated in 3 : 3 : 31 above, isolated from the context, would appear to run counter to the view that a general prohibition against alienation is confined to alienation *inter vivos*, but it has to be noted that in the scheme of Chap. 3 of his book, Sande is enumerating the acts which are considered prohibited (firstly

3 : 3 : 12 to lastly 3 : 3 : 41), when alienation outside the family is in general terms prohibited (3 : 3 : 11). Hence what is stated in the above passage 3 : 3 : 31 has therefore to be understood in the context as applying only to instances where alienation outside the family is in general terms prohibited.

In the light of the propositions enunciated by Sande, it is relevant to consider whether one can spell out of the prohibitions contained in P 1 and P 3, a prohibition against alienation outside the family. There is no express prohibition against any such alienation ; nor is any motive or reason set out for such prohibition nor any desire manifested to keep the properties in the testator's/donor's family.

Heavy reliance was placed by Mr. Choksy, Counsel for the defendants, on the judgment of the Privy Council, in *Kanayson v. Rasiah*. (1) to support his contention that the prohibition contained in P 1 and P 3 impliedly included the prohibition of alienation by Last Will and that the fidei commissum constituted by P 1 & P 3 could be said to be a family fidei commissum. In that case a father, a Jaffna Tamil, donated certain properties to his two sons subject to the following conditions :

" I do hereby give and grant by way of donation unto them in equal shares the aforesaid lands, . . . . . subject to the following conditions :

I do hereby bind them and declare that they should not alienate the said lands by any instruments such as transfer, donation, dowry or any other documents and should not encumber the same by a document such as mortgage, otty, security, or any other instruments within 25 years after me except giving and granting the same to their children by way of mudusom or dowry and that the said lands shall not be liable for any debts incurred by them.

I do hereby nominate and appoint (X & Y) and give them power to jointly and severally look after and manage the said properties and utilise the produce and income thereof for the food, clothing and education of (the donees) and for their wives and children during the said period."

In that case one of the donees sold some of the lands subject to the deed to strangers in violation of the conditions imposed on him by the deed, and died within the period of 25 years prescribed in the deed.

The question of the effect of the donee bequeathing the lands, subject to the deed to strangers by testamentary disposition did not arise in that case for decision and hence the observation of the Privy Council that "the words of prohibition (in the deed) could hardly be wider and seem apt and indeed directed to include a prohibition of alienation by Will" must be regarded as obiter. The relevant clause in that deed of donation prohibits alienation to strangers, but permits the donees to give by way of donation or dowry or mudusom (patrimonial inheritance by way of testamentary disposition) to their children. From the nature of the provisions of the deed, the Privy Council in *Kanayson's case* concluded –

"The whole scheme of the deed, as it appears to Your Lordships, was to provide the donees' family for the term of 25 years. During the term the income was available for the support of the donee, his wife and children. He could only dispose of the property by giving or transferring it to his children. The property was, during this period, not to be liable for the donee's debts."

In view of these features the Privy Council held that the deed created a tacit fidei commissum in favour of the family. Any alienation of the lands by act inter vivos or by Last Will could be made only to the donees' children and not to strangers. The intention of the donor to forbid alienation outside the family was manifest there; but in the present case, there is a total prohibition against alienation by Lambert Cornis Fernando not only outside the family but even within it. Implicit in the contention of counsel for the defendants is the postulate that the defendants could not even execute a Will bequeathing the lands or any of them to any member of his family. It is to be noted further that the beneficiaries, in the event of a breach of the conditions in P 1 and P 3 are not all those who compose the family, his intestate heirs (Voet 36 . 1 :30) but only a segment of that family, i.e. his children. What seems to have been uppermost in the mind of the testator/donor in P 1 and P 3 was to invest Lambert Cornis Fernando with the power of alienating the lands, that he should not by any act of his own deprive himself of his property prior to the expiry of the specified period, rather than that the lands should remain in his family. Further unlike in *Kanayson's case* there is no provision in P 1 and P 3, that the property should not be liable for involuntary sale. It is significant that while P 1 and P 3 expressly empower the donee "to deal with the said premises as if there were no such restrictions and prohibitions" after the

stipulated period, the text of the Will in *Kanayson's* case as reported in 69 NLR, 557, does not contain any such express provision though, no doubt, such an authority is implicit.

The position in law thus appears to be that the term 'alienation' does not ordinarily catch up dispositions by Will. But there is an exception to that proposition ; when the alienation of a thing outside the family is forbidden in general terms, then testamentary disposition is also included in the prohibition. Sande states that this exception is not universally accepted. An exception has to be strictly construed. Since the prohibition in P 1 and P 3 does not accord with the prohibition of alienation outside the family, excepted by Sande (3 : 3 : 21), the defendant cannot claim the benefit of the exception. The ordinary concept of alienation could therefore apply to measure the dimension of the prohibition on alienation contained in P 1 and P 3 ; such prohibition is restricted to alienation by act inter vivos and not by Last Will. A Will is ambulatory during the life of the person making it, and does not operate as a disposing or putting away of any estate, until after the death of the person making it. *Doe Stevenson v. Glover*, (2). It is a mere declaration of his intention during the life of the testator and may freely be revoked. It requires the death of the testator for its consummation. It is of interest to note that in *Rambukwella Sidhartha v. Sumana Thero* (3) the Supreme Court in construing the words 'alienation' during the lifetime appearing in section 23 of the Buddhist Temporalities Ordinance, held that the disposition by Last Will of pudgalika property by a bhikku does not amount to an alienation during the lifetime of the deceased. The measuring of the ambit of the prohibitions contained in P 1 and P 3 is a matter of difficulty and doubt and it is not surprising that the lower courts took different views of the scope of the restrictions. The construction, contended for by the defendants does not lack attraction or merit. In such a context the rule applies that in the interpretation of Wills that construction is adopted in case of doubt which limits the scope of the fidei commissum. "If those words . . . . are capable of more than one construction, then Court would lean towards the one in favour of freedom of alienation." Per Innes, C. J., in *ex parte Van Eeden* (4).

Keeping in mind the above principles, I have to regretfully conclude that the prohibitions contained in P 1 and P 3 do not preclude disposition by Last Will and that it was competent for Lambert Cornis

Fernando to bequeath by his Last Will P 4, the lands, the subject-matter of this action, to his sister the plaintiff over the head of the 1st defendant, his only child.

In my judgment, the plaintiff is entitled to the declaration that she is entitled to the properties set out in the schedules to the plaint, by virtue of Lambert Cornis Fernando's Last Will P 4 and that the said properties are not subject to a fidei commissum in favour of the first defendant, and for an order granting possession of the said lands to her. The plaintiff has not claimed any relief by way of damages for the possession of the said lands by the defendants and has not led any evidence on that account and hence will not be entitled to any damages from the defendants on account of their possession of the said lands.

I allow the appeal of the plaintiff and set aside the judgment of the Court of Appeal and restore the judgment of the District Judge, *declaring the plaintiff entitled to prayers (a) and (b) of the plaint*. I however direct that, in the interests of justice no writ of possession be issued until 30.3.1985. In the circumstances a fair order to make with respect to costs is that the parties bear their own costs in all the courts and I so order.

**WIMALARATNE, J.**—I agree.

**ABDUL CADER, J.**—I agree.

Appeal allowed.

Judgment of the District Judge restored.

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