

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

Ahangama Vithanage Pedirick Appuhami of
Nakanda, Ahangama.

Plaintiff (deceased)

CA.529/2000(F)
District Court Nuwara Eliya
No.25/89/P

Ahangama Vithanage Dayawansha of Nakanda,
Ahangama.

Substituted Plaintiff (deceased)

Vs.

1. Ahangama Vithanage Bandula Jayathilaka of
Atambagahawila Watta, Kananke, Imaduwa.
At Present No. 48, Berdi Place, Colombo 06.
2. Ahangama Vithanage Herbert Jayathilaka of
Atambagahawila Watta, Kananke, Imaduwa.
At Present No. 48, Berdi Place, Colombo 0.
- 2A.

Ranasinghe Kilipiti Kankanamge Nandawathie
of Kananke, Imaduwa, (Substituted Legal
representative of 2nd Defendant)
3. Ahangama Vithanage Chandra Jayathilaka of
Nakanda "Mills", Ahangama, Galle.
4. Ahangama Vithanage Dammika Jayathilaka of
Nakanda "Mills", Ahangama, Galle. At Present:
570 Ganagarama Road, Werahera,
Boralessgamuwa.
5. Ahangama Vithanage Theja Jayathilaka of
Nakanda "Mills", Ahangama, Galle. At Present:
Suriya Sevana, Makewita, Matara.

6. Ahangama Vithanage Nanda Jayathilaka of Nakanda "Mills", Ahangama, Galle. At Present: Idowita, 1st Lane, Templers Road, Mt. Lavinia.
7. Ahangama Vithanage Thilaka Jayathilaka of "Sithuruwana", Waragoda, Kelaniya.
- 7A. Stanly Rajapakshe of No: 228, "Sithuruwana", Waragoda, Kelaniya.
- 7B. Stanly Rajapakshe of No. 228, "Sithuruwana", Waragoda, Kelaniya.
8. Ahangama Vithanage Somasiri Jayathilaka of A.V. Hinni Appuhami Company, Thalawakele.
9. Ahangama Vithanage Darmapala Jayathilaka of A.V. Hinni Appuhami Company, Thalawakele At Present: Lanka Filing Station, Thalawakele.
10. Mahanama Geganage Piyadasa of Weerasinghe Hotel, Nuwara Eliya Road, Thalawakele.
11. Medda, Watta Gamage Peter of Weerasinghe Hotel, Nuwara Eliya Road, Thalawakele.
12. Rajan Rajagopal of Midiltion Kada Weediya, Thalawakele Watta.
13. Kariyapathiranage Albert of Midilton Kada Weediya, Thalawakele Watta.
14. Mohomad Abdulla Ahamed Sabeer of Midilton Kada Weediya, Thalawakele Watta.
15. Ahamed Stthree of Midilton Kada Weediya, Thalawakele Watta.

Defendants.

And Now

Ahangama Vithanage Pedirick Appuhami of Nakanda, Ahangama.

Plaintiff (Deceased)

Ahangama Vithanage Dayawansha of Nakanda, Ahangama.

Substituted Plaintiff Appellant (Deceased)

1A. Padma Banduwathie Jayasinghe of "Piyasevana", Nakanda, Ahangama.

1B. Ahangama Vithanage Tharanga Chandimal of 63/81, a 1/1, Dambahena Road, Maharagama.

1C. Ahangama Vithanage Neranja Chandima of No. 18, Sesatha Watta, Waduramulla, Panadura.

1D. Ahangama Vithanage Sadun Chandimal of "Piyasevana", Nakanda, Ahangama.

Substituted Plaintiff Appellants.

Vs.

01. Ahangama Vithanage Bandula Jayathilaka of Atambagahawila Watta, Kananke, Imaduwa. At Present No. 48, Berdi Place, Colombo 06.

1A. Ahangama Vithanage Somasiri Jayathilaka of A.V. Hinni Appuhami Company, Thalawakele.

2. Ahangama Vithanage Herbert Jayathilaka of

Atambagahawila Watta, Kananke, Imaduwa,

- 2A. Ranasinghe Kilipiti Kankanamge Nadawathie of Kananke, Imaduwa. (Substituted Legal representative of 2nd Defendant.)
03. Ahangama Vithanage Chandra Jayathilaka of Nakanda "Mills", Ahangama, Galle.
04. Ahangama Vithanage Dammika Jayathilaka of Nakanda "Mills", Ahangama, Galle. At Present: 570 Ganagarama Road, Werahera, Boralesgamuwa.
05. Ahangama Vithanage Theja Jayathilaka of Nakanda "Mills", Ahangama, Galle. At Present: Suriyasevana, Makewita, Matara.
- 5A. Mahinda Suryaarachchi .
- 5B. Heshan Theikshana Suryaarachchi.
- 5C. Harindi Therushini Suryaarachchi.
- 5D.Thilini Nuwandi Suryaarachchia all of suriyasevana, Makewita, Matara.
- 06.Ahangama Vithanage Nanda Jayathilaka of Nakanda "Mills", Ahangama, Galle. At Present: Idowita, 1st Lane, Templers Road, Mt. Lavinia.
- 07.Ahangama Vithanage Thilaka Jayathilaka of "Sithuruwana", Waragoda, Kelaniya.
- 7A. Stanly Rajapakshe of No: 228, "Sithuruwana", Waragoda, Kelaniya.

7B. Stanly Rajapakshe of No. 228, "Sithuruwana", Waragoda, Kelaniya.

08. Ahangama Vithanage Somasiri Jayathilaka of A.V. Hinni Appuhami Company, Thalawakele.

09. Ahangama Vithanage Darmapala Jayathilaka of A.V. Hinni Appuhami Company, Thalawakele At Present: Lanka Filing Station, Thalawakele.

10. Mahanama Geganage Piyadasa of Weerasinghe Hotel, Nuwara Eliya Road, Thalawakele.

11. Medda, Watta Gamage Peter of Weerasinghe Hotel, Nuwara Eliya Road, Thalawakele.

12. Rajan Rajagopal of Midilton Kada Weediya, Thalawakele Watta.

13. Kariyapathiranage Albert of Midilton Kada Weediya, Thalawakele Watta.

14. Mohomad Abdulla Ahamed Sabeer of Midilton Kada Weediya, Thalawakele Watta.

15. Ahamed Sthree of Midilton Kada Weediya, Thalawakele Watta.

Defendant Respondents.

Before : A.H.M.D. Nawaz. J
E.A.G.R. Amaraskara. J

Counsel: Harsha Soza P.C. with Athula Perera for the Substituted Plaintiff-Appellants.
Thishya Weragoda with Sanjaya Marambe, Piyumi Jayamanne, Chinthaka Sugathapala and Iresh Senaviratne for the Substituted 1A Defendant -

Respondent.

Kapila Suriyaarachchi with Anuradha Bandara for the 6th Defendant –
Respondent

Decided on: 21.09.2018

E.A.G.R. Amarasekara. J

The substituted Plaintiff-Appellant filed this appeal before this court praying inter-alia, to set aside the Judgment dated 23.08.2000 of the Learned District Judge in the case No. 25/89/P of the District Court of Nuwara Eliya. The substituted Plaintiff-Appellant, 1st Defendant-Respondent and 6th Defendant-Respondent took part in the arguments through written submissions as well as oral submissions of their counsel.

The main point of contest in this Appeal is whether the corpus sought to be partitioned in the partition action before the learned District Judge was an asset of a partnership business run under the name and style of A.V. Hinniappuhamy and Company or whether it is a co-owned property which could be a subject matter of a partition action. As per the plaint, the corpus is a divided portion of the Middleton Estate in extent of 2 Roods and 38 perches. While the plaintiff prayed for the partition of the corpus as per the pedigree set out in the plaint, 1st to 9th Defendant Respondents except the 2nd Defendant-Respondent filed their statement of claims and sought a dismissal of the Plaintiff's case on the ground that the corpus was an asset of the partnership business. They specially pleaded that as per Section 55(1) of the Partition Act, the Plaintiff was not entitled to file this partition action. The

learned District Judge upheld the aforesaid position of the Defendant - Respondents and dismissed the Plaintiff's action with costs.

The Substituted Plaintiff-Appellants in their 1st written submissions dated 27/04/2015 have made submissions referring to section 18 of the Prevention of Frauds Ordinance, but that section is relevant only in relation to the establishment of a partnership where the capital exceeds one thousand rupees. In this action as per the evidence led, it is common ground that there existed a partnership business among Ahangama Vithanage Hinniappuhamy, Ahangama Vithanage Pedrick Appuhamy alias Punchi Appuhamy (Plaintiff) and Gammanpilage Dharmadasa until 1962. Even the document marked P14, on which all the parties rely on their arguments, establishes that there was a partnership business among the aforesaid partners. However, as per the evidence led and P14, said Ahangam Vithanage Hinniappuhamy died on the 10th April 1962. It must be remembered, unlike a corporation or company that has a legal personality irrespective of its members, a partnership lacks continuity. Death, Bankruptcy, retirement or insanity of any partner may lead the partnership to an end. The substituted Plaintiff Appellants in their 1st written submissions dated 27.04.2015 refer to Pate V Pate 11 NLR 254, Browns V Davis 41 NLR 176, Underhill's Principles of the Law of Partnership (12th Edition) page 79 and bring to the attention of this court that;

1. The law applicable to partnership matters is the law of England,
2. A partnership is dissolved ipso facto by the death of a partner, in the absence of an agreement to the contrary.

There is no evidence placed before the court that there was an agreement among the aforesaid 4 partners with regard to the continuation of the partnership after the death of one party. Therefore, with the death of aforesaid Hinniappuhamy, the partnership that existed among the aforesaid 4 partners has to be considered as dissolved as per law. P14 proves that the property in question was bought by the said deceased Hinniapphamy and Dharamadasa Gammanpila from the money advanced to them from the assets of the partnership business and the said investment in the property bought were considered as part of the assets of the partnership business.

However, with the death of said Hinniappuhamy the remaining partners should have settled the accounts of the partnership as it is dissolved by operation of law, but it appears from P14 that the 3 remaining partners continued to be engaged in a partnership business along with the son of deceased Hinniappuhamy under the same name and style 'A.V. Hinniappuhamy & Company. This partnership has to be considered as a new partnership among the 3 partners of the previous partnership and Bandula Jayathilake, the son of the deceased Hinniappuhamy. Under normal circumstances, Bandula Jayathilake, the 1st Defendant can consent only with regard his share of the interests of the deceased Hinniappuhamy in the assets of the previous partnership to be made part of the assets of new partnership created after the death of said Hinniappuhamy, but this court observes that the other heirs of the deceased Hinniappuhamy, namely the 1st to 9th Defendant Respondents but except the 2nd Defendant Respondent stood together with 1st Defendant Bandula in filing a statement of claim in the original court. Even the 2nd Defendant was silent

with regard to the position of the other heirs of the deceased Hinniappuhamy. This shows that they were in agreement with Bandula the 1st Defendant in stating that the property was part of the partnership business. This situation makes it appear that they consented to Bandula, the 1st Defendant to carry on with the new partnership business created after the death of Hinniappuhamy their father, using Hinniappuhamy's share and or interests in the previous partnership as assets of the new partnership. Otherwise other heirs of said Hinniappuhamy would have contested the position taken up by the 1st Defendant A.V. Bandula Jayathilake. On the other hand, there is no evidence to show that deceased Hinniappuhamy's other heirs asked for or filed an action for the settlement of accounts of the previous partnership. The aforesaid circumstances together with the contents of P14 confirm on balance of probability that there was a new partnership from 1962 onwards between the remaining partners of the previous partnership and A.V. Bandula Jayathilake representing the heirs or estate of the deceased Hinniappuhamy and the corpus of the partition action was part of the assets of that new partnership too. As per the evidence, the existence of a partnership business up to the dissolution referred to in P14 too is not disputed, but according to the law it cannot be the same partnership that existed previously. However, P14 though titled at the beginning as a Dissolution of Partnership at page 5 states as follows;

"And whereas the said **business is continued** to be carried on from 01.09.1969 by the Pedrick Appuhamy and said Bandula

And whereas for the purpose of the **winding up the affairs of the said partnership** being dissolved in **so far as the said partners Janis Appuhamy and Dharmadasa**

were concerned as aforesaid in the partnership until 31st ,August 1969 and to settle all matters in **so far as they are concerned** the Janis Appuhamy the party of the First part ,Pedrick Appuhamy the party of the Second part, Dharmadasa the party of the Third part and Bandula the party of the fourth part have agreed to enter in to these presents.”

Even in the 1st clause on page 6 of P 14 following phraseology can be observed.

“1. The said business carried on in partnership by the said Janis Appuhamy, Pedrick Appuhamy, Dharmadasa and Bandula until 31st August 1969is hereby agreed and declared to have been dissolved as from 31st August 1969 **as far as the said partners Janis Appuhamy and Dharmadasa are concerned.**” (Highlighting is done by me)

The matter that this court has to consider now is whether;

- a. The said partnership carried on by Bandula Jayatilaka and the reamaining partners of the previous partnership from 1962 continued after the dissolution referred to in P14, or it is another new partnership under the same name and style between Bandula Jayatilaka and Pedrick Appuhamy.
- b. Whether the corpus in the partition action relevant to this appeal is part of the assets of the said partnership that existed after the execution of P14 at the date of filing the plaint in the said partition action.

A careful perusal of P14 shows that;

1. It is titled as ‘Dissolution of partnership’, indicating that the main intention was to dissolve the then existing partnership that had four partners.

2. It has contemplated the lands bought by the partners of the previous partnership as asset of the said partnerships, the lorries it had and the values lying to the credit of each partner at the death of partner A.V. Hinniappuhamy.
3. It has also contemplated the values lying in to the credit of the partners of the partnership that carried on the business after the death of Hinniappuhamy as at 31.08.1969 which is the date of retirement of two partners as well as the date of dissolution (It should be noted that the value lying to the credit of Bandula, the 1st Defendant has been further described by adding the words ' for estate of A.V. Hinniappuhmy' indicating that accounts of the previous partnership was not settled after the death of Hinniappuhamy but what was owed to the Hinniappuhamy's estate was invested in the new partnership in 1962 and the partner Bandula, the 1st Defendant was representing that estate.)
4. It has further contemplated the lorries belonging to the 2nd partnership as at the date of dissolution which is the date of retirement of two partners namely, Janis Appuhamy and Dharmadasa.

The above indicates that the partners in executing P14 were considering the assets and the share values that came from the previous partnership and the assets and share values as at the date of retirement of the two partners or the date of dissolution of the 2nd partnership. Unless they wanted to settle dues of the partnerships of 4 partners they need not have considered all these. This gives a weight to think that the partners wanted to terminate the partnership started by them in 1962 after the death of Hinniappuhamy.

The Defendant Respondents argue that the partnership continued even after the execution of P14 stating the dissolution was done only as far as the two retiring partners were concerned.

However, the careful reading of the above quoted paragraphs will show that 1st Defendant Bandula and Peddrik Appuhamy (original Plaintiff) continued to carry on the same business after 01.11.1969 but not the same partnership and aforequoted paragraphs further show that the partners intended to wind up the affairs of the partnership business that they carried on. Trade name has a good will. It has a proprietary value. It is something that can be transferred. Therefore, mere use of the same trade name by some of the partners after the dissolution of a partnership will not make the new business relationship a continuation of the previous partnership. Partnership generally means an arrangement of two or more persons by which they agree to share in all assets, profits, and financial and legal liabilities. So, it is a relationship between the partners. If two retires from the partnership business and the other two continue with the same business, the relationship between the two who continue with the business forms a new partnership as far as the retired persons do not share profits, losses and pool assets to continue the business. There is no evidence to show that the two partners when retired on 31.08.1969 continued to contribute to the assets, capital, or shared the profits of the business after the dissolution by P14. In such a situation dissolution of the partnership that existed between 1st Defendant, Bandula and the remaining 3 partners of the original partnership has to be considered as the termination of the partnership business relationship between them. Even two of them carried on the same businesses under the same name and style, it is a new partnership between and limited to those two. In such a backdrop the phrases such as 'partnership

being dissolved in so far as the said partners Janis Appuhamy and Dharmadasa....” has to be interpreted giving a limited meaning. Such words only indicate the continuation of business name and the business by the remaining partners. However, there is no evidence to show that the remaining two partners after the dissolution of the partnership by P14 agree to include the corpus of the partition action as an asset of the new partnership between those two partners.

On the other hand, for the sake of argument, if it is considered that the continuation of business by aforesaid two partners under the same name and style after the dissolution referred to in P 14 as a continuation of the partnership that existed prior to the dissolution referred to in P14, clauses 4 and 5 of P14 are important in resolving the dispute with regard to the corpus whether it is a property of any partnership at the time of instituting the partition action. As per the said two clauses the partners in winding up the partnership agreed to give absolute and personal entitlement Dharmadasa of the share of the corpus purchased by him and he in turn agreed to transfer it to the original Plaintiff. Accordingly, said Dharmadasa has executed P12 transferring the same to original Plaintiff and P12 confirms that said Dharmadasa transfer his right in the corpus to the original Plaintiff. The said deed does not mention that the transfer is subject to any interest of the partnership between the original Plaintiff and the 1st Defendant Bandula. It is clear that, as Dharmadasa got absolute entitlement, the original Plaintiff got clear title to his share of the corpus as a co-owner without any encumbrance.

Though the learned District Judge has said in his Judgement that the corpus is mentioned in the account sheets of the Partnership, it is not correct with regard to the balance sheet as at 31.03.1974 (1974) which is the only balance sheet relevant to a year after the dissolution by P14. It does not describe the land and buildings belonging to the partnership, but only state 'as per the last balance sheet' but the Defendants have not tendered the balance sheets for the year 1973, 1972, 1971 and 1970 which are the years following the dissolution of the partnership by P14. Under such circumstances the term 'as per the last balance sheet' cannot be construed to indicate as same as the assets of the partnership that was dissolved by P 14.

For the foregoing reason this court cannot agree with the decision of learned District Judge that the corpus of the partition action forms part of the assets of an existing partnership and that it cannot be partitioned. The learned District judge erred in evaluating evidence before him and applying law relating to partnerships. Therefore, this court has to vacate the judgment dated 23.08.2000 of the learned District Judge of Nawara Eliya in case No P 25/89.

Though this court vacate the judgment of the learned District Judge, this court cannot proceed to make an order to partition the whole corpus depicted in the preliminary Plan No. 2632 dated 09.10.1997 for the reasons given below in this judgment.

It is true parties have admitted the corpus depicted in the aforesaid plan and the deeds tendered by the Plaintiff to support his pedigree were not challenged at the closure of the Plaintiff's case or when they were marked. There is nothing to

suspect the credibility of those deeds. However, it is the duty of the judge in a partition action to investigate title. To investigate title, he must identify the co-owned property and the relevant pedigree. His duty is not limited by the points of contest raised or the admission made by the parties. It must be remembered the decree in a partition action is a decree in REM.

As per the pedigree presented in the plaint, the co-owners who held $\frac{1}{2}$ share each, namely A.V. Hinniappuhamy and D. Gammanpila have disposed undivided 37 perches by පැ. 3, පැ. 4, පැ. 5, පැ. 9, පැ. 11 and as per the plaint and the evidence led, it is included in the Plan made by the preliminary survey. However, schedules to the said deeds as well as the Plaintiff's evidence (see page 1 of the proceedings dated 28.11.1997) establish that those deeds conveyed to the vendees of those deeds specific and divided portions mentioned in those schedules. Since both the co-owners of that time got together to transfer those specific and divided portions totaling up to 37 perches all together, those deeds give sole ownership to the specific and divided portions mentioned in the schedules of those deeds to the respective vendees of those deeds. Since those deeds do not create co-ownership, specific and divided portions mentioned in the schedule to the deeds marked පැ. 3, පැ. 4, පැ. 5, පැ. 9 and පැ. 11 have to be identified and excluded from the land depicted in the preliminary survey plan. It is only a co-owned land that can be a subject matter of a partition action. Therefore, the relevant lots referred to in the said deeds, as per the plan No. 419 dated 13.02.1958 have to be superimposed on the preliminary plan to identify the co-owned land of the Plaintiff and the 1-9th Defendant. It is necessary to lay the boundaries on the ground as per the

superimposition to see someone or many have encroached the boundaries and have claims to any portions within the real co-owned corpus to be identified by the superimposition.

Hence this court in hearing this appeal;

1. Vacate the judgement dated 23.08.2000 of the District Court, Nuwara Eliya in case No. 25/89/P.
2. Direct the learned District Judge to issue a commission to superimpose plan No. 419 dated 13.12.1958 on the preliminary Plan to identify the co-owned portion of the land surveyed in the preliminary Plan and lay the boundaries on the ground as per the superimposition to identify the co-owned property.
3. Direct the learned District Judge to exclude the 37 perches disposed by පැ.3. පැ.4. පැ.5. පැ.9 and පැ 11 from the land surveyed in the aforesaid preliminary plan No. 2632.
4. After excluding the 37 perches, if there is no dispute with regard to the laying of boundaries on the ground as per the superimposition, divide the rest between the original Plaintiff and 1-9 Defendant's giving each side a ½ share.
5. If there arises any dispute or claim with regard to the laying of superimposed boundaries on the ground in identifying the co-owned land which should be the corpus to be partitioned, the learned District Judge is empowered to hear evidence to that extent which is needed to identify the co- owned land by the plaintiff and the defendant.

Thus, the appeal is allowed but with the above directions to the learned District Judge.

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E.A.G.R. Amarasekara. J
Judge of the Court of Appeal

I Agree.

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A.H.M.D. Nawaz, J
Judge of the Court of Appeal