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

In the matter of an Appeal under and in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 (as amended), read together with Sections 755(3) and 758 of the Civil Procedure Code.

Malabage Indika Damayanthi Sigera,
No. 752/98, "Country Homes",
Dambagahawatta Road,
Thalahena,
Malabe.

SC/CHC Appeal No. 54/2019 **PLAINTIFF**

HC Civil Case No. 177/2010/MR

vs.

1. The Finance and Guarantee Company Limited,
No. 36/A, Sir Marcus Fernando Mawatha,
Colombo 07.

2. The Finance and Guarantee Property Developments Limited,
No. 24, Sir Marcus Fernando Mawatha,
Colombo 07.

Presently at:

No. 46/46, 2nd Floor,

Green Lanka Towers Building,
Nawam Mawatha,
Colombo 02.

1ST AND 2ND DEFENDANTS

AND NOW BETWEEN

1. The Finance and Guarantee Company Limited,
No. 36/A, Sir Marcus Fernando Mawatha,
Colombo 07.
*(Presently known as **U. B. Finance Company Limited** having its Registered Office at No. 10 Daisy Villa Avenue, Colombo 04.)*

1ST DEFENDANT-APPELLANT

vs.

Malabage Indika Damayanthi Sigera,
No. 752/98, "Country Homes",
Dambagahawatta Road,
Thalahena,
Malabe.

PLAINTIFF–RESPONDENT

2. The Finance and Guarantee Property Developments Limited,
No. 24, Sir Marcus Fernando Mawatha,

Colombo 07.

Presently at:

No. 46/46, 2nd Floor,
Green Lanka Towers Building,
Nawam Mawatha,
Colombo 02.

2ND DEFENDANT-RESPONDENT

BEFORE : **MAHINDA SAMAYAWARDHENA, J.**
K. PRIYANTHA FERNANDO, J.
K. M. G. H. KULATUNGA, J.

COUNSEL: Dananjaya Jayasundara with Upendra Walgampaya
Instructed by Piyal Weerakoon 1st Defendant-Appellant.

Priyantha Alagiyawanna with Ms. Kishodari Bandara instructed by Pasindu Silva the 2nd Defendant-Appellant.

G.Wijemanne with P.S.W Dissanayake for the plaintiff-Respondent

ARGUED ON: 24.03.2026

DECIDED ON: 29.04.2026

JUDGMENT

K. M. G. H. KULATUNGA, J.

1. The plaintiff-respondent (hereinafter referred to as "the plaintiff"), instituted action in the Commercial High Court for the recovery of a sum of Rs. 8,892,153.00 together with legal interest against the 1st

defendant-appellant and the 2nd defendant-respondent (hereinafter referred to as the respective "defendant"). The trial in the Commercial High Court has proceeded *inter partes* as against the 1st defendant and *ex parte* against the 2nd defendant. After trial, the learned Commercial High Court judge, by judgment dated 05.07.2019, whilst holding that the 1st and 2nd defendants are jointly and severally liable, granted relief in favour of the plaintiff in a sum of Rs. 8,892,153.00 together with legal interest thereon calculated from 25.02.2009, along with costs. The 1st defendant has preferred this appeal against the said judgment. Upon sending out notices, when the matter was taken up for argument, all three parties were represented by counsel.

2. The facts that led to the institution of this action may be summarised as follows. The plaintiff, with the intention of acquiring land and a house, paid an advance of Rs. 5 million on 19.05.2006 to the 1st defendant. Then the plaintiff and the defendants entered into the agreement bearing No: 263 dated 19.10.2017 (P2). According to which the purchase price of the land and the proposed house to be constructed was Rs. 23,849,458/-.

3. The purchase price was paid in advance. However, the plaintiff instituted action in the Commercial High Court of the Western Province (HC/Civil Case No. 177/2010/MR) seeking to recover a sum of Rs. 8,892,153/- from the 1st and 2nd defendants jointly and severally, alleging failure to complete the construction of a house purchased under a housing scheme known as "Country Homes" situated in Thalahena, Malabĕ.

4. The plaintiff stated that she initially paid an advance of Rs. 5,000,000/- on 19.05.2006 to secure the construction of a house on Lot 75 and subsequently entered into a Sale and Purchase Agreement dated 19.10.2007 with both defendants for a total consideration of Rs. 23,849,458/-, which included the cost of the land and the construction

of a house. According to the plaintiff, she paid a total sum of Rs. 23,392,153/- to the defendants, but the construction of the house was not completed as agreed. Thereafter, by Deed of Transfer dated 25th February 2009, the defendants transferred to her the land together with a partially constructed house, which was valued by the defendants at Rs. 14,500,000/-, and undertook to complete the balance construction within four months, which they failed to do. There had been no further construction since 25th February 2009. On this basis, the plaintiff claimed the difference between the amount paid and the value of the partially completed property being a sum of Rs. 8,892,153/- together with interest.

5. The 1st defendant, in its answer, denied liability and maintained that it is a finance company whose role in the project was limited to the sale and transfer of land, while the 2nd defendant, a property development company, was solely responsible for the construction of the house. The 1st defendant asserted that under the Sale and Purchase Agreement, its obligation was confined to transferring title to Lot No. 75, which it duly performed by executing the Deed of Transfer in favour of the plaintiff (vide consequential issues 25, 26 and 27 of the 1st defendant).

6. It was further contended that any failure to complete the construction was attributable to the 2nd defendant, who had encountered financial difficulties, and that the plaintiff had failed to establish what construction work remained incomplete or to prove that she incurred the alleged sum of Rs. 8,892,153/- to complete the house. The 1st defendant also challenged the reliability of the receipts produced by the plaintiff and argued that the total purchase price included cost of common amenities within the housing scheme, which could not be treated as construction costs.

7. Following trial, at which the Plaintiff and her witnesses testified and the CEO of the 1st defendant gave evidence, the Commercial High Court by

judgment dated 05.07.2019, held in favour of the plaintiff. The Court found that the plaintiff had paid Rs. 23,392,153 to the 1st defendant; that the value of the land and the partially constructed house at the time of transfer was Rs. 14.5 million; and that the plaintiff was therefore entitled to recover the difference of Rs. 8,892,153/-.

8. The Court held both defendants are jointly and severally liable to pay that sum with interest and costs. Aggrieved by this decision, the 1St defendant preferred the present appeal, contending that it had fully discharged its contractual obligations by transferring title to the land and that the High Court erred in holding it liable for construction-related obligations on the basis of joint and several lability.

9. The main argument advanced on behalf of the 1st defendant company is that the liability of the 1st defendant arising out of the agreement to sell P-2, read along with the subsequent agreement P-8, dated 25.02.2009, is only in respect of the sale and transfer of the land bearing Lot No. 75. It was argued that the 1st defendant has no liability as far as the construction of the house is concerned. It was submitted that the construction of the residential house referred to in the Second Schedule to the original agreement to sell P-2, was the responsibility and obligation of the 2nd defendant alone. Accordingly, the learned Commercial High Court Judge's judgment was primarily assailed on this basis.

10. As to the legal basis, where a contract is made by two or more parties it may contain a promise or obligation made by two or more of those parties and such promise may be joint, several, or joint and several. As to whether the liability is joint, several, or joint and several in contract is basically a question of fact and construction which is dependent upon the intention of the parties as evidenced in the contract or agreement. This aspect was considered in the case of **Rhinegold Publishing Ltd v Apex Business Development Ltd** [2012] EWHC 587

(Ch), where statutory demands were served on Rhinegold Ltd, and a related company, Tannhauser Ltd, in the sums of approximately £22,000 and £31,000 respectively. A settlement agreement was subsequently entered into under which the parties agreed to pay the amounts due, but Tannhauser failed to fully do so. Although the settlement agreement was silent on the question of liability, the High Court held that on a proper construction of the agreement, the parties were jointly and severally liable. The court agreed with the defendant. It held that although the two debts were separately referred to in the settlement agreement, looking at the agreement as a whole, the obligation to pay under that agreement was joint and several. Accordingly, the true nature of the relationship between the plaintiff and the defendants and their respective rights and liabilities must be determined by an examination of the agreements P2 and P8. The wording of the agreements, should be looked at as a whole to determine the question of joint and several liability.

11. On a perusal of the learned Commercial High Court Judge's judgment dated 05.07.2019, I find that, this aspect of joint and several liability has been extensively considered by the trial judge. Firstly, the initial acceptance of a sum of Rs. 5 million on receipt P-1. Admittedly, the purchase price of the land is Rs. 3,705,000/-. The initial payment received and accepted by the 1st defendant on P-1 has exceeded the said purchase price of the land. As observed by the learned Commercial High Court Judge, if the 1st respondent's liability and participation was simply limited to the sale of the land, the 1st defendant ought to have immediately transferred the said land at that point upon the receipt of the initial payment. The 1st defendant has not done so but accepted by itself, the entire sum of Rs. 5 million. Then by receipts P-4, P-5, and P-6, the 1st defendant has received and accepted a total of Rs. 18.3 million. All these receipts are issued by the 1st defendant. In the said receipts it is clearly stated that, it is a joint venture housing project, with the 2nd

defendant. 1st defendant receiving a total of Rs. 23,392,153/- from the plaintiff is admitted, (admission no: 6).

12. As rightly observed by the learned High Court Judge, the fact that the 1st defendant continued up until the last to collect and accept the money well beyond the purchase price of the land clearly leads to the inference that the 1st and 2nd defendants were acting jointly in the execution of this project as a joint venture. The project that is depicted on the perusal of the several agreements (P1 and P8) and the evidence is clearly for the purchase and block out land and to construct residential houses to be sold to prospective buyers. The two defendants have clearly engaged in this joint venture. Thus, I find that the inference drawn and the finding of the trial judge that, this venture was to share the profits made from the said project between both the defendants is reasonable and correct.

13. It is opportune at this juncture to consider the several clauses and covenants of the agreement and the deed of transfer marked and produced as P-2, P-7, and P-8, respectively. P-2 is the initial sales and purchase agreement bearing No. 263. The 1st and 2nd defendants are referred to as the 1st party and the 2nd party respectively. At the commencement of this agreement, the recitals clearly provide as follows:

> *AND WHEREAS the Party of the FIRST PART and the Party of the SECOND PART have agreed to sell and the Party of the THIRD PART have agreed to purchase to 75 in the said Plan No:2007/89 (hereinafter called and referred to as the said land and premises) together with the rights of way over Lots R4, R3,R1 and R17 in the said Plan No: 2007/89 and more fully described in the SECOND SCHEDULE hereto together with the residential house type (new) being constructed thereon more fully described in the THIRD SCHEDULE hereto.*

14. This recital provides the background, the purpose and object of this agreement. It clearly provides that both defendants have agreed with the plaintiff to sell the land described in the second schedule (Lot No. 75)

together with the residential house type (new) constructed thereon, as described in the third schedule.

15. Clause 7 of P-2 stipulates that, *the house shall be constructed within 12 months,* and Clause 15 provides as follows:

> *Upon the condition under clause 2(a) above being fulfilled the Party of the FIRST PART shall sell, transfer and convey to the Party of the THIRD PART or her nominee/s by a valid Deed of Transfer prepared at the cost of expense of the Party of the THIRD PART the title to the said land and premises more fully described in the SECOND SCHEDULE hereto together with the house constructed thereon free of encumbrances.*

16. The agreement thereby is that *the Party of the FIRST PART* (the 1st defendant), to sell and the transfer *the title to the said land and premises more fully described in the SECOND SCHEDULE hereto together with the house constructed thereon free of encumbrances*; however, it is common ground that the defendants have not kept to the time frames and failed to construct and complete the house on the said land as scheduled and agreed. This has necessitated the signing of a subsequent agreement to complement this agreement to sell. On 25.02.2009, the defendants together have transferred Lot No. 75 by deed bearing No. 553, attested by Notary Public Jeewananda Waidyadasa, dated 25.02.2009. What is significant and relevant is that the transferors or the vendors are both the 1st and the 2nd defendants. This is further evidence of and it buttresses that the entire exercise of the construction and sale of the said land is a joint exercise between the two defendants.

17. That being so, the defendants then enter into the supplementary agreement on the same day, i.e., 25.02.2009, which is marked and produced as P8. The *PARTIES of the first part* of this agreement are the 1st and 2nd defendant companies. This agreement is referred to as a

'*contract agreement'*. The purpose of it is evident from the recital which reads as follows;

AND WHEREAS the completion of the house has not been occurred as per the agreement and therefore the two parties to this agreement further agreed as follows:

1. *The parties of the First Part agree to execute the Deed of Transfer today in favour of the Party of the Second Part.*

2. *The Parties of the First Part undertake to complete the remaining unattended/incomplete construction within the period of four months time from today, the most required and important areas of work shall be as follows:*

A. .....

B. .....

18. This recital clearly establishes the fact that the defendants together have sold the said land to the plaintiff and the fact that the completion of the construction has not occurred as agreed. The two defendants together then undertake to complete the remaining unattended/incomplete portions within 4 months. This puts it beyond doubt that the defendants have, in fact, been acting together, and this project including the construction has been, in fact, a joint venture between the two. Both the defendants have agreed and jointly undertaken *to complete the remaining unattended/incomplete construction within the period of four months*. It is also relevant to note that, though the two defendants are two distinct legal entities, the directors who have signed the '*contract agreement'* P8 on behalf of the two defendants happen to be identical and the same persons and the registered addresses are the same.

19. As aforesaid the learned High Court Judge has correctly observed that the 1st defendant, by accepting Rs. 5 million initially, being a sum well

above the purchase price of the land and not transferring the land, prevented the plaintiff from engaging a third party of her choice to construct the house. The High Court Judge observed that the 1st defendant ought to have transferred the property upon accepting Rs. 3,705,000/- and thus enabled the plaintiff to engage a third party to construct her house. This opportunity was not afforded to the plaintiff, and the 1st defendant has clearly been acting in together and in joint venture with the 2nd defendant for the sale of the land as well as the construction of the house thereon. To my mind the trial judge was quite entitled and correct to have so decided these issue of fact on the evidence. Thus, I find that the said argument advanced on behalf of the 1st defendant is baseless and misconceived.

20. In the written submissions of the 1st defendant, it is also submitted that the plaintiff has failed to prove that she incurred certain sums to complete the house. To this end, it is argued that certain receipts alleged to have been tendered to establish payment made during a period of time are false documents for the reason that the said receipts acknowledging payments during a period of time are issued on receipts bearing consecutive serial numbers. The learned High Court Judge has adverted to and considered this issue too. The case of the plaintiff is that the defendants have accepted a sum of Rs. 8.8 million on 25.02.2009 on the specific undertaking that the balance construction would be completed within four months by the party of the 1st Part of P 8. They are both the 1st and 2nd defendants. The parties admit that a sum of Rs. 23,392,153/- was paid and received by the 1st defendant (Admission No. 06). It is also admitted that the parties did enter into the agreement dated 25.02.2009 (Admission No. 07). This agreement is marked P-8. Clauses 3,4 and 5 establish that both 1st and 2nd defendants have acquired money in a sum of Rs. 23,392,153/- and that the plaintiff has the right to enforce it against both of them if the party to first part default in the construction as agreed.

21. Clause 1 of the agreement to sell bearing No. 263(P-2), clearly provides that the land value is Rs. 3,705,000/- and the cost of the construction of the house up to then is Rs. 20,144,458/-. P-8 acknowledges the receipt of a sum of Rs. 22,392,153/-. Rs 1 million was paid on the execution of the deed of transfer. Accordingly, as at the date of entering into agreement P-8, a sum of Rs. 88,092,153/- has been paid for the proposed work to be completed within 04 months. The plaintiff, giving evidence, has very clearly testified that no construction was done after the signing of the agreement P-8 on 25.02.2009. This evidence remains uncontradicted and unassailed. The trial judge has accepted and acted on this evidence.

22. It is settled law that, whenever the opponent has failed to cross examine and assail the opponent's evidence and also declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be considered as admitted and accepted. Then in ***Alwis v. Piyasena Fernando*** (1993) 1 Sri L.R. 119, G. P. S. de Silva, C. J., held as follows:

> *"It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings in this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge."*

Thus, I find that the trial judge accepting the said evidence is lawful and reasonable.

23. Then a letter of demand has been sent to the defendants to which they have not responded. In these circumstances, what is sought by the plaintiff is an amount of Rs. 88,092,153/- from the sum paid to the defendants. By deed No. 553 (P7) it is admitted that the total value of the land and the construction as at 25.02.2009 is Rs. 14,500,000. The receipt of Rs. 23,392,153/- is admitted. The fact that no construction

or any work has been done since 25.02.2009 is in evidence. Thus, the trial judge found that, the amount the plaintiff may have incurred or, as to how much she may have to spend to complete the balance construction is of no relevance in deciding this liability. This finding of the learned High Court Judge is correct in view of the said evidence. In these circumstances, the 1st respondent's argument assailing the credibility of the alleged expenses incurred to complete the construction is irrelevant and misconceived.

24. This is a clear instance of the two defendants venturing into a joint housing project. The 1st defendant appears to be the lead partner in this joint venture and has been the sole party who has accepted and recovered all payments. This fact is admitted. It is clear that the 1st defendant has brought in the 2nd defendant company for the purposes of constructing and selling the residential house.

25. Whilst the receipts P-1, P-4, P-5, and P-6 expressly hold out that this is a joint venture housing project between the two defendants, the initial agreement to sell included the 1st and 2nd defendants as parties to the first part and party to the second part, respectively. Then, when the transfer was effected by P-7 on 25.02.2009, they were both referred to as vendors. Similarly, agreement P-8, executed on the same date, refers to the defendants as parties of the first part. This, considered along with the evidence, has clearly established that the 1st and 2nd defendants have been in a joint venture, and in these circumstances, the finding that their liability is joint and several is correct. The trial judge was quite entitled to decide this issue of fact so upon weighing the evidence. This is a basic, and standard task of any fact finding court or tribunal, and should not be interfered with by an appellate court unless there be very good reason. As I see there is no such good reason in the present appeal.

26. This appeal is based on challenging the findings of fact by the learned trial judge. As evaluated hereinabove, I find that the said findings of fact

of the learned High Court Judge are well-supported by evidence and are correct and reasonable inferences and findings that any reasonable trial judge could have reached. Justice Buwaneka Aluwihare, P.C., J. in ***Hettiarachchige Kusumalatha v. Ranawaka Arachchige Brigette Alwis*** (S.C. Appeal No. 243/2014, decided on 13.12.2017) opined as follows:

> *"Part of the function of an appellate court is to ascertain whether there may have been serious and material errors in the manner in which the learned District Judge reached his conclusion as to the facts.*
>
> *In the case of* ***McGraddie v. McGraddie*** *2013 UKSC 58 [2013] 1 WLR 2477, commenting on the approach of the Appeal Court to a finding of fact, the Supreme Court of United Kingdom held,*
>
> > *'It was long settled principle, stated and restated in domestic and wider common law jurisdictions that an appellate court should not interfere with the trial judge's conclusions on the primary facts unless satisfied that he was plainly wrong.'"*

27. When this matter was taken up for argument, Counsel for the 1st defendant submitted that upon a Section 86 (2) application, a fresh trial has been ordered in respect of the 2nd defendant. Since the liability is joint and several this fact would have no bearing on the judgment entered against the 1st defendant and the execution thereof. The judgment creditor is entitled to execute a decree against one of the parties when the liability is found to be joint and several.

28. In the above circumstances the arguments advanced on behalf of the 1st defendant are devoid of merit. I find that the 1st defendant-Appellant has failed to make out any ground of appeal of any significance, so to say. As I see, the appeal preferred by the 1st defendant is devoid of merit. In these circumstances, I find that the plaintiff has been unreasonably put through the ordeal of prolonged litigation. A person may have a right to prefer an appeal, but when such appeal preferred is found to be devoid of merit and not reasonable it is a circumstance which may warrant the imposition of substantial costs.

29. In these circumstances, the appeal is dismissed, and the judgment dated 05.07.2019 is hereby affirmed. The Appeal is so dismissed subject to costs in a sum of Rs. 500,000/-, to be paid by the 1st defendant to the plaintiff.

    Appeal is dismissed.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE SUPREME COURT