1934 *Present:* **Garvin S.P.J. and Poyser J.**

AMERESINGHE *v.* PERERA.

338—D. C. Negombo, 5,259.

Surety—Party to a mortgage bond—Partial loss of security through act of creditor—Surety's right to have his liability reduced.

Where a person has bound himself as surety under a mortgage bond and where, by the act of the creditor, a part of the securities hypothecated for the debt have been lost, the surety is entitled to claim that his liability be reduced by the amount which might have been realized by the sale of the securities so lost.

APPEAL from a judgment of the District Judge of Negombo.

N. E. Weerasooria (with him *Aluwihare*), for second defendant, appellant.

C. V. Ranawake, for plaintiff, respondent.

Cur. adv. vult.

January 26, 1934. GARVIN S.P.J.—

By a bond bearing No. 5,612 dated July 18, 1928, the first defendant as principal and the second and third defendants as sureties bound themselves to pay to the plaintiff and one Cecilia Fernando or either of them the sum of Rs. 1,750 with interest at 13½ per cent. per annum. For securing the payment of the said sum the first defendant in and by the said bond hypothecated three parcels of land. Interest was paid up to July 17, 1929, and on September 15, 1930, a further sum of Rs. 300, being the proceeds of sale of two of the three aforesaid parcels of land released by the plaintiff for the purpose, was paid. The plaintiff then brought this action praying for judgment for the sum of Rs. 1,975 being principal and balance interest payable up to March 17, 1931.

The first defendant did not file answer. The second and third defendants however did file answer and pleaded that they as sureties were absolutely discharged from their obligations by the act of the plaintiff in releasing two out of three lands hypothecated by first defendant as security for the payment of the debt.

The learned District Judge gave judgment for the plaintiff as prayed for less a sum of Rs. 200 which represents the measure of relief to which the Judge thought the second and third defendants were entitled on what appeared to him to be the broad, equitable ground that the lands released being worth Rs. 500 and not Rs. 300, the plaintiff should not have released them in consideration of a payment of Rs. 300 to the prejudice of the sureties who, he thought, were entitled to ask that they should be credited with the full value of the security thus released.

The second defendant has appealed from this judgment.

It was urged in support of this appeal—

(*a*) that the second and third defendants were sureties and only liable as such and not as principles ;

(*b*) that they were discharged from their obligation as sureties when the plaintiff released the two parcels of land above referred to from the hypothecation and thereby disabled himself from ceding to them all his actions against the first defendant.

The first of these points does not present any great difficulty. The bond shows that the second and third defendants bound themselves in terms " as sureties hereto for further securing the payment of principal and interest, we hereby renouncing the benefits which sureties are legally entitled to and also without distinction as to debtor or surety ".

The passage is not well drafted but it is reasonably clear that though the second and third defendants bound themselves as sureties they renounced all the benefits appertaining to persons who become sureties so that there should be in the matter of the obligation created by the bond no distinction between the principal debtor and the sureties.

It is apparently in this view the District Judge held that the second and third defendants were in effect principal debtors on the bond.

Although the interpretation of the language employed discloses an intention on the part of the sureties to renounce all the benefits to which sureties are entitled, it is well settled that such a general renunciation is insufficient in law unless the surety who makes it is himself a lawyer or declares in the writing that he has full knowledge of the rights he is so renouncing—*vide Wijeyewardene v. Jayawardene*[1].

There is here no such declaration nor have the privileges been specifically renounced. There is therefore nothing to prevent the second and third defendants claiming all or any of the benefits to which they as sureties are in law entitled.

Among the privileges to which sureties are entitled are the *beneficium excussionis* and the *exceptio cedendarum actionum*. The *beneficium excussionis* has not been specially pleaded and there is no reason therefore for considering what the position of the parties would have been had that privilege been pleaded. It is necessary however to bear in mind that that privilege has not been renounced. What the appellant pleaded was the *exceptio cedendarum actionum*. He contends that inasmuch as the plaintiff has by his own act released a part of the property hypothecated as security for the debt he is discharged.

A surety is entitled on payment of the debt to obtain from the creditor a cession of all his actions against the principal debtor. When a creditor has by his own act incapacitated himself from ceding his actions the surety is discharged—*vide* Pothier on *Obligations, p. 2., c. 6, Article 1 (Pothier—Evans' Translation, p. 260)*.

[1] *(1917) 19 N. L. R. 449.*

So also in a case in which a creditor has by his own act lost his rights in respect of property hypothecated the *exceptio cedendarum actionum* may be opposed to him. A creditor is a trustee of a surety for the security which he holds for the debt (*Mohammedo Tamby v. Aremecutty*[1]).

The question arises whether a surety is absolutely discharged or whether he is only discharged to the extent of the loss occasioned by the default of the creditor.

Now Pothier says: "When the creditor has by his own act incapacitated himself from ceding to the surety his actions, either against the principal debtor, or against the other sureties, whether because he has discharged them, or because he has by his neglect allowed his demand against them to be dismissed, the surety may, per *exceptionem cedendarum actionum,* obtain a declaration, that the demand of the creditor is inadmissible, for so much as the surety might have procured by the cession of actions, which the creditor has disabled himself from doing"— *Pothier, p. 111, c. 1, Article 6 (Pothier—Evans' Translation, p. 362).*

The inference may be drawn that the surety is only discharged to the extent of the amount he might have received had he obtained cession of action.

In a case such as the one under consideration where by the act of the creditor a part of the securities hypothecated for the debt have been lost, the surety may justly claim that his liability should be reduced by the amount which might have been realized by the sale of the securities so lost; but there seems to be no reason or equity which entitles him to claim to be absolutely discharged from all obligations arising from the contract of suretyship.

In the case of *Wijewardene v. Jayawardene*[2], Bertram C.J. in the course of a judgment where the law is fully discussed concluded as follows:—"In the case, however, of the *exceptio cedendarum actionum* it appears to be clear that the law, as laid down by Pothier and by the American jurists, limits the discharge of the surety to the loss that can be shown to have accrued to him from the creditor's misfeasance".

It only remains to apply the principle laid down in *Wijewardene v. Jayewardene* (*supra*) to the facts of this case. The property released from the hypothecation was sold for Rs. 300. The whole of this sum was paid to the creditor on the bond and has been set off against the monies due thereunder. It was urged however that Rs. 300 was considerably less than the true value of the land. The learned District Judge considered the evidence adduced on this point and came to the conclusion that the land was worth Rs. 500. There seems to be no reason for setting any higher value on the land. The surety was therefore entitled to claim that his liability should be reduced by that amount.

[1] *3 Lorensz' Reports 254.* [2] *(1923) 24 N. L. R. 336.*

The District Judge has directed that the creditor shall, in addition to the Rs. 200 for which credit has been given, further reduce his claim against the sureties by Rs. 200, the difference between the price said to have been paid and the amounts which the Judge thought should have been realized at a properly conducted sale. The sureties have therefore had their liability diminished by the amount of the loss which the Court found they had sustained by the release of this property from the hypothecation.

For these reasons the judgment will stand affirmed with costs of this appeal to the respondents.

POYSER J.—I agree.

Appeal dismissed.