1935 *Present:* **Soertsz A.J.**

PANDITHAN CHETTIAR *v.* SINGHAPPUHAMY.

129—C. R. Kurunegala, 8,802.

Surety—Party to mortgage bond—Renunciation of benefits—Action on bond—Subsequent claim against surety—Civil Procedure Code, s. 34.

Where a person bound himself as surety to a mortgage bond "renouncing all benefits to which a surety is legally entitled in respect of becoming a surety ",—

Held, it was open to the mortgagee to sue the surety after the mortgage property had been excussed, and that section 34 of the Civil Procedure Code was no bar to the action.

APPEAL from a judgment of the Commissioner of Requests, Kurunegala.

Navaratnam, for defendant, appellant.

Rajapakse, for plaintiff, respondent.

October 24, 1935. SOERTSZ A.J.—

In this case the plaintiff sued the defendant to recover a sum of Rs. 231.57, in the following circumstances. Odiris Appuhamy and his wife Jino Nona borrowed from the plaintiff a sum of Rs. 200, and to secure the repayment of this amount and interest gave him a mortgage

over a certain land belonging to them. The defendant became a party to that bond in these terms "And I, S. Singhappuhamy of Nakkawatta aforesaid, without regard to the difference between a debtor and a surety hereby renouncing all benefits to which a surety is legally entitled in respect of becoming a surety, do hereby for myself and my heirs, executors, administrators, and assigns further bind myself to pay the said principal and interest on demand as a surety for the said debtors".

Odiris and his wife failed to pay the amount due and the plaintiff sued them in C. R. Kurunegala, case No. 7,829, and having obtained judgment, realized a sum of Rs. 22.50 by the sale of the property mortgaged. He now sues the defendant to recover the balance.

The contention put forward for the defendant is that the plaintiff cannot maintain this action as he failed to make the defendant a party to the earlier case. As a matter of fact, after obtaining judgment against the mortgagors in the earlier case the plaintiff moved that the present defendant be made a party defendant. But on the day fixed for inquiry into this motion, the Commissioner made order "Application is disallowed without prejudice to the rights of the plaintiff and the party noticed".

In my opinion, the defendant was not liable to be sued till the plaintiff had sued the mortgagors and levied on the mortgaged property. Walter Pereira's "*Laws of Ceylon*" citing *Grotius* (*bk. III., tit. 3, p. 32*) and *Vander Keessel, p. 507* as authorities, says on page 701 "Persons who have become '*security*' for a debt for which a pledge or mortgage has been given may not be sued before the mortgaged property has been excussed, but only after such excussion for any balance that may remain due to the creditor . . . . unless it were expressly otherwise agreed upon". It is contended that in this case there was such an express agreement to the contrary as the defendant had declared that he would pay the amount "without regard to the difference between a debtor and a surety hereby renouncing all benefits to which a surety is legally entitled". But it must not be overlooked that the defendant goes on to say "bind myself to pay the said principal and interest on demand *as a surety* for the said debtors". Quite apart from that, it would have been open to the defendant, even if he had undertaken to pay the amount "without regard to the difference between a debtor and a surety and renouncing all benefits to which a surety is legally entitled", to say that such a general declaration did not debar him from pleading that the principal debtors should be excussed before he could be made liable. In the case of *Amerasinghe v. Perera*[1], Garvin and Poyser JJ. held with regard to a similar declaration in a bond that "although the interpretation of the language employed discloses an intention on the part of the sureties to renounce all the benefits to which the 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 *Wijewardene v. Jayewardene*[2].

There is in this case another view of the matter too. For, it seems to me that even in a case where a surety has succeeded in divesting himself of

[1] *35 N. L. R. 306.* [2] *19 N. L. R. 449.*

the benefits to which a surety is entitled, it is open to the creditor none the less to sue him after he has excussed the principal debtor, for the surety although he has deprived himself of the rights of a surety is still a surety. In this case, at any rate, clearly so, for even while attempting to renounce the benefits of a surety he binds himself "to pay the said principal and interest on demand as a *surety* for the said debtors". It is, however, contended that section 34 of the Civil Procedure Code debars a creditor in Ceylon from maintaining two actions, one against the principal debtor and the other against the surety. The words relied on are the concluding words in section 34 "an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action". But clearly that provision refers to cases where an obligation is incurred and the collateral security is given by the same person or persons, as was held in the cases of *Moraes v. Nallan Chetty*[1] and *Palaniappa Chetty v. Mortimer*[2].

I, therefore, think that the appeal must be dismissed with costs.

Appeal dismissed.

[1] *24 N. L. R. 297.*

[2] *25 N. L. R. 209.*