Privy Council Appeal No. 115 *of* 1923.

Don Philip Alexander Wijeyewardene - - - - *Appellant*

v.

Theodore Godfred Jayawardene - - - - - *Respondent*

FROM

THE SUPREME COURT OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1924.

Present at the Hearing:

VISCOUNT CAVE.
LORD DUNEDIN.
LORD CARSON.

[*Delivered by* LORD CARSON.]

This is an appeal by the plaintiff from a judgment of the Supreme Court of the Island of Ceylon, dated the 20th March, 1923, setting aside a decree of the District Court of Colombo in favour of the plaintiff dated the 17th July, 1922.

The action was brought by the appellant as plaintiff against the respondent as (defendant) to enforce a deed No. 5279 and dated the 3rd August, 1914, and which is hereafter set out in full. This deed was entered into under the following circumstances. The plaintiff was a director of a company known as the Ceylonese Union Company, the proprietors of a certain newspaper, and up to the 28th October, 1913, he had financed the company to the extent of Rs.10,200. On the 28th October he took a bond from the company to secure the payment of that sum and such other sums of money as he might advance to the company. In 1914 the debt due to the plaintiff by the company amounted to Rs.46,375.59. He was about to enforce his bond when the defendant, who was himself a director of the company and had been appointed to the post of managing director, intervened, whereupon the deed sued upon in this action was entered into between the plaintiff and the defendant, and is in the following terms:—

> "Whereas the Ceylonese Union Company Limited (hereinafter called and referred to as the Company) is indebted unto the said Don Philip Alexander Wijeyewardene for moneys lent and advanced to it by him the payment whereof is secured by the Bond and mortgage No. 5112 of the 28th day of October 1913 and attested by Arthur William Alvis of Colombo

Notary Public and upon which said Bond there is due owing and payable by the Company the sum of Rupees Forty-six thousand three hundred and seventy-five and fifty-nine cents computed up to the thirty-first day of July 1914.

"And whereas the said Theodore Godfred Jayewardene who is the Managing Director of the Company hath requested the said Don Philip Alexander Wijeyewardene to forbear from enforcing his said claim against the Company and to give one year's time for the payment of the moneys so due and to become due to him he the said Theodore Godfred Jayewardene undertaking and making himself answerable and responsible to the said Don Philip Alexander Wijeyewardene for the payment to him of the full amount of the said moneys with interest thereon.

"And whereas the said Don Philip Alexander Wijeyewardene has consented so to do upon the said Theodore Godfred Jayewardene entering into these presents and the covenants and agreements herein contained on his part.

"Now this indenture witnesseth that in consideration of the said Don Philip Alexander Wijeyewardene granting the indulgence aforesaid and forbearing at the special request of the said Theodore Godfred Jayewardene to claim and enforce payment of the moneys due to him by the Company he the said Theodore Godfred Jayewardene doth hereby for himself his heirs executors and administrators covenant with the said Don Philip Alexander Wijeyewardene his heirs executors administrators and assigns as follows that is to say :—

"1. That he the said Theodore Godfred Jayewardene shall and will at the expiration of twelve months from the date hereof if there shall be due owing and payable to the said Don Philip Alexander Wijeyewardene or to his heirs executors administrators or assigns upon under and in respect of the said in part recited Bond and mortgage No. 5112 of the 28th day of October 1913 the whole or any part of the principal moneys and interest secured thereby and payable thereunder well and faithfully pay to the said Don Philip Alexander Wijeyewardene or to his aforewritten the full amount so due and owing at the said date.

"2. Upon such payment the said Don Philip Alexander Wijeyewardene shall at the cost of the said Theodore Godfred Jayewardene execute an assignment in his favour of the said Bond No. 5112 of the 28th day of October 1913 but with the express provision that the said Theodore Godfred Jayewardene shall have no remedy or recourse against and to him the said Don Philip Alexander Wijeyewardene and his property and estate if he the said Theodore Godfred Jayewardene from any reason or cause whatsoever fails to recover the said moneys or any part or parts thereof.

"3. This guarantee shall be a continuing guarantee and shall extend to and be applicable to the full amount of the principal due and owing and to become due and owing to the said Don Philip Alexander Wijeyewardene as aforesaid.

"4. In order to give effect to the provisions of this guarantee the said Theodore Godfred Jayewardene doth hereby expressly waive all suretyship and other rights inconsistent with such provisions and which he might otherwise be entitled to claim and enforce.

"And this Indenture further witnesseth that the said Don Philip Alexander Wijeyewardene in consideration of the guarantee and covenant aforesaid hereby covenants with the said Theodore Godfred Jayewardene that he will not during the term of twelve months from the date hereof enforce his claim for the moneys due and owing to him as aforesaid.

"In witness whereof the said parties have to these presents and to two others of the same tenor and date set their hands at Colombo on the day month and year first above-written."

The plaintiff claimed that there was due and owing to him by the said company under the bond of the 28th October, 1913, up to the 31st March, 1917, the sum of Rs.58,654.34 in account and accordingly brought this action to recover the amount due. The respondent defendant pleaded as a matter of law (Roman Dutch Law being applicable) that the action was not maintainable, as he was a surety only, unless and until the plaintiff had sued and had failed to recover the amount claimed from the Ceylonese Union Company Limited. He also denied his liability in respect of certain items in the account of particulars with which their Lordships are not now concerned, as the plaintiff's counsel agreed on the hearing of the appeal that he would not press his claim in regard to them thereby reducing the amount of his claim to Rs.46,375.59. The action came on for trial on the 23rd March, 1917, before the District Judge, who held in his judgment on the 23rd April, 1917, that upon the true construction of the deed of the 3rd August, 1914, the defendant was liable as a guarantor merely and not as a principal debtor, and further that the words in para. 4 of the deed were not sufficient to waive the rights of a surety under the Roman Dutch law applicable in Ceylon and were ineffectual to preclude the defendant from requiring that the plaintiff should before proceeding against the defendant, excuss the Ceylonese Union Company Limited, and he ordered accordingly that the action should stand out of the trial roll until the principal debtor had been excussed.

Against this judgment and order the plaintiff by appeal dated the 3rd May, 1917, appealed to the Supreme Court, who by order of the 5th July, 1917, confirmed the judgment and order of the District Court. In consequence of this decision the appellant on the 15th August, 1917, proceeded to excuss the assets of the Ceylonese Union Company Limited instituting an action against that company on his mortgage bond. During the pendency of that case the company went into liquidation and a liquidator was appointed. It is unnecessary, in the view that the Board take of the construction of the deed of the 3rd August, 1914, and of their disagreement with the judgments on this matter of the District Judge and the Supreme Court, to follow out the proceedings in such action further than to say that after the excussion of the assets of the debtor and of the liquidator it ended without having produced practically anything.

The appellant thereupon moved the District Court to restore the action against the respondent for a recovery of the debt after the excussion of the debtor's assets had produced practically nothing. The action was restored to the trial roll and by judgment dated the 17th July, 1922, the District Judge decided contrary to the contention of the respondent that the mortgage property had been properly excussed and in consequence that the respondent

had not been released from his liability as guarantor towards the appellant. Upon appeal, however, the Supreme Court allowed the appeal with costs and declared the respondent as surety altogether discharged by reason of certain alleged defaults in the conduct of the excussion.

The first question that arises in the case is whether upon construction of the deed of the 3rd August, 1914, the defendant was liable as principal debtor and not merely as surety, and as their Lordships are of opinion that the answer to this question must be in the affirmative, it will be unnecessary to discuss the second branch of the case, namely, whether through the misfeasance of the creditor in the conduct of the proceedings for excussion the surety has lost the benefit of the security to which he was entitled.

Turning then to the deed of the 3rd August, 1914, the question to be decided is whether on the proper construction of the deed the defendant has bound himself to the plaintiff as principal debtor or has made himself liable only as a surety. This question must be answered by a consideration of the deed as a whole. It was not seriously disputed at the hearing before this Board by counsel for the respondent that the covenant contained in Clause 1 was an absolute promise to pay the full amount that would be due and owing on the expiration of twelve months from the date of the deed, and indeed it would be difficult to frame a clause more clearly imposing such a liability. It was, however, alleged that the statement in Clause 3 " that this guarantee shall be a continuing guarantee " changed the character of the obligation created by paragraph 1 into one of suretyship only. Their Lordships cannot agree with this contention and do not think that such a description of the document can alter the real nature of the contract as appearing in the express terms contained in paragraph 1. It is settled law that the mere use of a descriptive term cannot affect the reality of the transaction. Their Lordships are further confirmed in this view by the terms of Clause 2, under which the plaintiff undertook upon payment of the money to execute an assignment to the respondent of the security held by him, namely, the bond of the 28th October, 1913, and which provision would have been entirely unnecessary if the deed was one of guarantee only. There was a good deal of discussion before the Board as to the effect of Clause 4, and it was argued that assuming the deed to be apart from this clause a deed of guarantee, the words of this clause " doth hereby expressly waive all suretyship and other rights inconsistent with such provisions and which he might be entitled to claim and enforce " were not sufficient to bring about a renunciation of the surety's rights of excussion which could only it was alleged be effected by a recital of the special rights it was intended to waive.

In the view, however, which has already been expressed of the true construction of the contract, it is unnecessary to determine this question, and it appears to their Lordships that whatever

might have been the legal effect of Clause 4 if the contract had been held to be one of suretyship its introduction can be readily explained by a desire upon the part of the contracting parties to make it clear that the contract was not intended to have the incidents of a contract of suretyship.

It is perhaps worth noticing that on the day on which the deed of the 3rd of August, 1914, was executed the defendant took from the company a bond of indemnity in respect of any payments that he might be obliged to make to the plaintiff under the deed of August, and although this fact cannot be called in aid to assist in the construction of the deed it is entirely consistent with the conclusion the Board has arrived at, and seems to show that the defendant considered he was entering into a liability as co-debtor and not as a surety only. Their Lordships are, therefore, of opinion that the judgments of the Supreme Court of the 5th of July, 1917, and of the 20th of March, 1923, should be set aside and that judgment should be entered for the plaintiff in the terms of the judgment dated the 17th July, 1922, and pronounced by the District Judge.

The defendant must pay the costs of the proceedings in the Courts below and the costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

DON PHILIP ALEXANDER WIJEYEWARDENE

v.

THEODORE GODFRED JAYAWARDENE.

DELIVERED BY LORD CARSON.

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