1942 *Present* : **Soertsz and de Kretser JJ.**

SAIBO *v.* MOHIDEEN *et al.*

303—D. C. Colombo, 10,724.

Surety—Security by bond for payment of goods sold to another—Repudiation of liability by surety—Notice to obligee—Assignment of bond.

Where a person given security by bond for the payment of goods sold to another up to a certain amount, it is within the power of the surety to determine his liability by notice after a part only of the goods has been sold.

THIS was an action on a mortgage bond by which the second defendant gave security for the first defendant, who was Liptons agent, for the sale of certain goods. It was provided by the bond that the second defendant's security should cover the indebtedness of first defendant to Liptons in a sum of Rs. 4,861.32 and should extend to further credit up to a sum of Rs. 7,500. After some time second defendant gave notice to Liptons not to give credit to first defendant and determined his liability. At that time the liabiliy of the first defendant stood at Rs. 1,369.72. Liptons continued to give credit until the amount due rose to Rs. 4,038.67. Liptons, thereafter, assigned the bond to the plaintiff who sued upon the assignment. The learned District Judge held that the second defendant was not entitled to determine his liability by notice.

H. V. Perera, K.C. (with him *C. V. Ranawake, C. Thiagalingam, E. B. Wikremanayake* and *H. W. Jayewardene*), for the second defendant, appellant.—On the question of fact it is submitted that the bond P 5 was fully discharged and the assignment to the plaintiff took place too late, after the bond had been discharged.

Alternatively, the appellant would be liable only up to Rs. 1,369.72. Where a person who is in reality a surety binds himself as a co-principal he remains in law a surety. With regard to the bond P 5 it is clear that the second defendant was really a surety for the first defendant. On April 11, 1938, the liability was for Rs. 1,369.72. On that date the second defendant wrote to Liptons not to give further credit to the first defendant. The second defendant is not liable in respect of any sum lent to the first defendant after April 11, 1938. This case can be distinguished from *Wijeyewardene v. Jayawardene* [1]. The second defendant in the present case was in the position of a surcty and was entitled in law, after giving due notice, to withdraw from his position as surety in respect of any debts that might be given by Liptons to the first defendant after the date of the withdrawal. See *Van der Vyver v. De Wayer et al* [2]; *Voet 46.1.24 (Swift and Payne's Translations p. 61)* ; *Pothier on Law of Contracts, Vol. I, Part II., ch. 6, s. 4 (2)*. Apart from any question of suretyship, the matter can be looked at from the point of view of offer and acceptance. There was no more than a standing offer on the part of the appellant which could at any time be revoked before acceptance.

[1] *(1924) 26 N. L. R. 193.*

[2] *(1861) 4 Searle 27.*

N. Nadarajah, K.C. (with him *S. Subramaniam*), for the plaintiff, respondent.—The appellant cannot claim to be in the position of a surety. The bond must be considered as a whole. The two debtors bind themselves as principals. Vide *Wijeyewardene v. Jayewardene* (*supra*).

Once a security bond has been granted it cannot be withdrawn unless the obligations on the bond have been completely discharged. A surety cannot claim that the creditor shall release him from his suretyship, unless he can show that the principal obligation has been fulfilled—*3 Maasdorp's Institutes* (*3rd ed.*) *401-2*. Even if withdrawal was possible it could not be effected by merely giving notice. The notice should have been accompanied by actual tender of the money due on the date. of notice—*Burge's Law of Suretyship, p 138*; *Voet 46.3.29*; *Voet 46.1.38*.

The first and second defendents being both in the position of principals one of them alone could not withdraw. See *Egbert et al. v. National Crown Bank*[1].

H. V. Perera, K.C., in reply.—This is not a case of a surety seeking to withdraw while the principal obligation already exists. There was a continuing offer on the part of the appellant, and he cannot be made liable for sums given to the first defendant after the notice of repudiation.

Cur. adv. vult.

November 13, 1942. DE KRETSER J.—

According to the evidence, the first defendant did a small business in Bristol Buildings in the Fort and was Liptons' sole agent for the sale of tea, biscuits and condensed milk in the Fort area. He was allowed credit facilities and had deposited a sum of money by way of security. In March, 1938, he was indebted to Liptons in the sum of Rs. 4,861.32, and he arranged with the second defendant, the appellant, that the appellant should give Liptons security in the form of a mortgage and so release the money he had deposited, and Liptons agreeing to the arrangement the bond P 5 was drawn up. About this time the first defendant seems to have tempted the appellant by offering to make him a partner in his business, and he even went the length of informing the Registrar of Business Names that he was taking the appellant and one Haniffa, first defendant's brother, as partners. Once P 5 was drawn up, however, the partnership deed was not executed and the partnership terminated.

It was agreed during the argument that the partnership had nothing to do with the present case, although plaintiff seems to have been most anxious to bring it in as colouring to his case. The bond P 5 recited the existing arrangement between Liptons and the first defendant (the plural form "obligors" is used occasionally, presumably because the appellant was taking responsibility for the existing debt), and the bond continued that the obligors had requested the Company to *continue* to supply the *first defendant* with such further goods as *he* may order in connection with *his* trade and to afford the obligors (plural) further pecuniary aid and assistance but always only at such times and to such extent as the Manager of the Company may think fit, provided the total value of goods already supplied and to be thereafter supplied did not

[1] *(1918) A. C. 903 at 907.*

exceed Rs. 7,500 at any one time. The appellant was to give the security mentioned in the bond and each of the defendants undertook to pay to the Company the Rs. 4,861.32 already due and all moneys falling due later. The bond specially provided that the Company could decline to supply further goods to the first defendant without notice. Provision was made for the bond continuing to be effective even though at any particular time the full sum due may have been paid, and the appellant undertook to insure the premises mortgaged and also to pay all rates and taxes and empowered the company, in case of default, to pay them and charge the expenses to the sum due on the bond.

Now, the recitals and terms of the bond make it clear that it was the first defendant with whom Liptons would be dealing and that the appellant furnished the security. It is true he was liable as a principal debtor but not one of the parties could have failed to realise that he was really guaranteeing first defendant's credit with Liptons. The accepted evidence makes the position doubly plain. The trial Judge thought the evidence of the plaintiff and the appellant equally unreliable but he seems to have had a better opinion of the evidence of the witness Mohammed Mohideen. The appellant seems to have shaped badly in the witness-box but a close examination of his evidence shows that it is intrinsically reliable in the main and that it is the plaintiff who is utterly unreliable. However, accepting the trial Judge's findings, what do we get? In January, 1938, at the first defendant's request, Mohammed Mohideen arranged with the appellant for a loan to the first defendant. First defendant alleged that he desired to have a partner and Mohideen arranged for appellant to be a partner. The two defendants and Mohideen saw Mr. Spurrier of Liptons about a month and a half before the bond P 5 was executed. On February 20 the appellant refused to sign any bond unless he was admitted as a partner in writing, the first defendant having failed "to come to the scratch" (to use Mohideen's words). The first defendant then made application (2 D. 58 of February 25) for the alteration of the particulars in the Register of Business Names by bringing in the appellant and Haniffa as partners. On March 1 an agreement was signed by the defendants and it is alleged that the first defendant took the agreement to India to have it signed by his brother, Haniffa. The agreement was not produced at the trial. The plaintiff is closely related to the first defendant, who has failed to appear, and is interested in establishing a partnership but no document has been produced. Therefore, it must be that there was no such agreement though many details of it and the name of the attesting notary have been given, or there was only an incomplete agreement, as appellant says. On the strength of the agreement apparently P 5 was executed. Mohideen went into the first defendant's place of business as the representative of the appellant and he alleges that on April 9, a little over a month from the execution of P 5, he reported to appellant that he was dissatisfied with the way things were going. By 2 D.61 dated March 31, first defendant reported to the Registrar of Business Names that the partnership had terminated on March 31 and requested the deletion of the relevant items. On April 11, the first defendant left for India and returned on May 22. On April 11, the appellant informed Liptons by

2D2 that differences had arisen between first defendant and himself regarding certain accounts and he, therefore, requested them not to give him any more credit and he offered to see them and explain matters. A copy of this letter seems to have been sent to Messrs. F. J. & G. de Saram, Liptons' lawyers, on May 23. Liptons ignored this request and by letter dated April 12 stated that they had no objection to an interview. Mr. Mackie admits that the first defendant's liability at that date was Rs. 1,369.72. Liptons continued to give credit to first defendant and eventually the amount due by him rose to Rs. 4,038.67. Shortly after April 12 an interview took place and there is a divergence of evidence as to what transpired at it. Mackie, when giving evidence, originally was reticent regarding the interview and expressed reluctance to produce certain correspondence, and plaintiff's Counsel closed his case reserving his right to re-examine this witness! On the trial being resumed Counsel withdrew from this position and examined Mackie afresh. Mackie then said that another person had accompanied appellant at the interview but did not think he could identify the man and he had told the second defendant that he could do nothing until he had seen the first defendant. In re-examination later he alleged that the appellant had not asked him definitely to stop credit to first defendant and that he had explained that they had to carry on their business. Letter 2 D2 had been definite enough and Mackie had refused to stop credit without consulting the first defendant. On May 20 appellant caused 2 D3 to be sent by a proctor. This letter shows what took place at the interview and states that Mackie had said he would continue to deal with first defendant in spite of the appellant's protest. There was no written reply denying this allegation. The letter (2 D3) warned Liptons of the position the appellant would be taking up with regard to liability after April 11. The letter was drafted by plaintiff's Counsel, who later changed sides. There are aspects of this case and of the trial which are unsatisfactory but I deliberately confine myself to a bare recital of the facts.

On receipt of 2 D3 Liptons consulted their lawyers, who apparently got a copy of 2 D2, and thereafter Liptons stopped giving credit to the first defendant. Their bill had by now risen to Rs. 4,038.67. On the first defendant's return to Ceylon an attempt seems to have been made to settle the differences between the parties. It is alleged that plaintiff took a leading part but this is denied by him. But if he took no part in the "arbitration proceedings" he certainly took an active part in financing first defendant's business. On quite inadequate grounds plaintiff was allowed to give evidence and to call witnesses after the defendant had closed his case. Plaintiff admitted he had made loans to first defendant and had helped him to borrow money from Chettiars, sums amounting to Rs. 1,000 or Rs. 2,000. In August plaintiff opened an account with the Indian Bank, being introduced by first defendant. He had had no banking account before and seems to have been a man of small means. He says first defendant owed him money and could not pay and *then* told him about the bond P 5 and plaintiff offered to take an assignment of it, though first defendant had told him of his indebtedness to Liptons.

The first cheque issued by plaintiff on opening his bank account is P 6. His banking career started on August 13, and ended on January 20, 1939, and during that time most of the cheques had been drawn in first defendant's favour.

Of course, if the first defendant had paid Liptons, there would be no further liability on appellant's part. It was suggested during the trial that the plaintiff's banking account and payment by him was only a device to disguise a payment really made by the first defendant. The trial Judge rejected this view and it was not mentioned in appeal.

One matter which might have re-paid investigation was why Liptons refrained from taking action. They stopped credit to first defendant and dealt with him on a cash basis. They knew he was a man of straw and appellant had given substantial security. There is not a word suggesting any desire on their part to take action. Mackie, for some reason, preferred not to say when the question of an assignment first arose and he was allowed to retain his preference, although he professed absolute disinterestedness in the case and said the firm only wanted to be paid and he left the matter to his lawyers. It seems a likely possibility that Liptons knew that their claim against the appellant for any sum beyond Rs. 1,369.72 was at least doubtful and that the intervening time was taken in negotiations carried on by his lawyers.

The trial Judge rejected the evidence as to arbitration as almost absurd and I shall not disturb his view, but it seems to me that "arbitration" was only an interpreter's word and that all that was meant was that some friends had tried to settle matters. There is no question but that two of the alleged arbitrators are dead and there is nothing suspicious about that nor can appellant be blamed for their death, and in an effort of the kind indicated it is not likely that written evidence was taken or written awards made. In fact, it is not said that any award was made. The trial Judge's view is not, therefore, free from criticism and it seems to me that unless some such negotiations were on foot the delay on Liptons' part to sue is inexplicable and Mackie's reluctance to produce correspondence even more so.

During the trial, the appellant raised the question that he had not been given notice of the assignment before he received the letter of demand. That fact does not affect the case.

But I have rather anticipated matters. I should have said that on August 16 plaintiff issued cheque P 6 in favour of Liptons for Rs. 4,038.67. He was not then in funds and alleges he had arranged with Liptons' lawyer to present the cheque the next day. But the cheque was presented and dishonoured, and plaintiff paid the amount in cash next day. The arrangement was that on payment Liptons should assign their rights on bond P 5. He got part of the cash by drawing a cheque for Rs. 3,000 on the Bank and it was the first defendant who cashed it. Liptons issued a receipt in favour of the first defendant and it was not till August 30, 1938, that the assignment was made, Liptons expressly stating that they would not warrant the assignment.

There was no argument at the trial that plaintiff was an innocent assignee but only that he was an assignee for value, and this was to meet appellant's contention that it was really the first defendant who was

paying. It was not contended at the trial nor on appeal that plaintiff's rights on the assignment could be any greater than Liptons' rights on the bond and I do not see how they could have been greater. All the evidence clearly points to his knowledge of the relations between the parties to the bond, and he had been made aware that Liptons would not warrant the assignment and so put specially on guard. What more could the appellant have done than what he did do? He gave notice to the only party then entitled to notice, *viz.*, Liptons. On receiving notice of the assignment he promptly disclaimed liability. Even if plaintiff was not personally aware of the affairs of his close relative whose business he was financing (a most unlikely state of things), Messrs. de Saram knew the true position and it is scarcely likely they hoodwinked the plaintiff and kept him in ignorance. But it is really unnecessary to trouble on this score for Counsel have not raised any argument on this point and they are not likely to have missed any available argument.

I have recited the facts at considerable length. On these facts two questions were argued :—

(*a*) Was the bond discharged when Liptons gave their receipt and was it too late for them to assign it later ?

(*b*) In any case, is appellant liable beyond the sum due when he gave notice of repudiation, *viz.*, Rs. 1,369.72 ?

With regard to (*a*) it is clear that it was understood between Liptons' lawyers and plaintiff that there should be an assignment of the bond and plaintiff paid on that footing. The receipt was an acknowledgment of the money paid but it did not discharge the bond in terms and it cannot be said it discharged it in fact. It is useful to remember that according to the terms of the bond payment did not discharge it.

With regard to (*b*), I think too much emphasis has been laid on the terms "surety" and "co-debtor", and that what really matters is the true nature of the transaction. A and B may deal with C and the agreement may be that C should supply A and that B should be surety, and B may renounce all privileges and make himself a principal debtor, A and B may also deal with C and B may tell C to supply goods to A on his (B's) account, or that for the goods so supplied he would be liable, with A, *in solidum*. A and B may also take goods individually or together and each agree to be liable *in solidum* for the value of goods taken by both. There is a difference in form undoubtedly but is there any real difference in substance ? As a matter of procedure C may sue B alone in each instance but C knows quite well that B is paying for what A owes and A knows that, and whether B is called a surety, a guarantor, a mandator, a principal debtor, or a co-debtor, the relations are the same.

The real question seems to me to be—Is the contract so fixed and determined that B cannot withdraw, and that may depend on whether it is a single transaction or a series of possible contracts. Considerations proper to a single transaction obviously cannot apply to a running series of transactions. We are familiar with that in the case of prescription and have held that each item in a shop bill gets prescribed from the date of each separate contract of sale and not from the close of the running account.

If C has entered into a contract with A on the strength of B's mandate, both C and A cannot resile from it and it is only reasonable that B should not be allowed to do so, even though delivery under the contract may be deferred. But where no contract has been entered into, why should not B be free to resile on notice to C ? The strangest results would otherwise ensue. If a man authorises a shop to give his wife or child credit he would not be free to countermand his authority ! In the present agreement Liptons were free agents, so was the first defendant. Was the appellant alone to be a slave to it ? We repel agreements in restraint of trade and are strict in interpreting fetters placed on the free disposition of property, are we not to apply the same principle to a human being if it can be done regarding something not yet in being ? Faced with this difficulty Counsel for respondent could only say that a man can terminate his obligation in a way known to the law, assuming calmly that he may not terminate it by giving notice, the very point we have to decide. According to him, if I understood him aright, appellant had to pay what was due in order to be free. But this is not true, for the bond provided that payment by itself did not put an end to the agreement. So then he really meant that Liptons had to agree to release appellant, which was exactly the position they took up until advised by their lawyers. They never asked for payment, appellant was solvent and had given ample security, he had not repudiated liability for the past. That was not the difficulty. Liptons imagined they could bind him for as long as they chose to deal with the first defendant.

The position regarding Guarantors seems clear in the English law. In *Offord v. Davies*[1], it was held that a guarantee to secure moneys to be advanced to a third party on discount, to a certain extent, for the space of twelve calendar months, was countermandable within that time. The defendants pleaded that before plaintiff had discounted the bills and advanced the moneys they had countermanded the guarantee and requested plaintiff not to advance such moneys. The plaintiff alleged this was no defence and that defendants had no power to countermand without the assent of the person to whom the guarantee was given. The plaintiffs there took up exactly the position taken up by the plaintiff in this case.

The arguments of Counsel and the comments of the Judges are interesting. Many cases were cited and reliance was placed on an American work of great authority, *Parsons* on *Contracts,* where it was said—" A promise of Guarantee is always revocable, at the pleasure of the guarantor, by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted and unless it be founded upon a continuing transaction, the benefit of which the guarantor cannot or does not renounce. If the promise be to guarantee the payment of goods sold up to a certain amount and, after a part has been delivered, the guarantee is revoked, it would seem that the revocation is good . . . . . "

Erle C.J., in giving the judgment of the Court, said—" This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to

[1] *English Reports 142 Common Pleas, p. 1336.*

the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. *In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted upon did not appear to be disputed.* Then, are the rights of the parties affected either by the promise being expressed to be for twelve months or by the fact that some discounts had been made before that now in question, and repaid? We think not. The promise to repay for twelve months creates no additional liability on the guarantor but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid . . . . ."

In *Coulthart v. Clementson* [1], it was held that the death of a guarantor, of which the creditor had *incidental notice,* terminated the guarantee with regard to future advances. Bowen J. said—"In the case of such continuing guarantees as the present, it has long been understood that they are liable, in the absence of anything in the guarantee to the contrary, to be withdrawn on notice." He gave the explanation given in *Offord v. Davies* (*supra*) and said the proposition was established by authority and that "a limitation to that effect *must be read into the contract*". It must similarly be taken, he said, that parties contemplated the possible death of the guarantor and intended that it should terminate his obligation. Notice of the death was constructive notice, and it would be idle to insist on special forms of withdrawal of a guarantee which nobody has a right to continue.

In *Beckett & Co. v. Addyman* [2], a co-surety claimed that the death of the other surety terminated the whole obligation: in other words, that the sureties, bound jointly and severally, were inseparable. Lord Coleridge C.J. said that the co-surety was clearly still liable. It could not have been contemplated that the death of one surety would discharge the other; and he added—"It is probable that the defendant could have terminated his liability by notice; for it seems to be clear that in the case of a continuing guarantee for goods to be supplied or money to be advanced, it is in the power of the guarantor to determine his liability." Brett L.J. said—"The defendant might have given notice to determine his liability. . . . . At law the defendant is clearly liable until he has given notice."

In the case of *Lloyds v. Harper* [3] Lush L.J. said—"They are (*i.e.,* instances of the more familiar class of guarantees) where a guarantee is given to secure the balance of a running account at a bankers, or a balance of a running account for goods supplied. There the consideration is supplied from time to time, and it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. He remains answerable for all the advances made or all the goods supplied upon his guarantee before the notice to determine it is given; but at any time he may say 'I put a stop to this: I do not intend to be answerable any further, therefore do not make any more advances or supply any more goods upon my

[1] *5 Q.B.D. 42.* [2] *9 Q.B.D. 783.*

[3] *16 Chancery Div. 290, at p. 319.*

guarantee'. As at present advised, I think it is quite competent for a person to do that where, as I have said, the guarantee is for advances to be made or goods to be supplied, and when nothing is said in the guarantee about how long it is to endure. In that case, as at present advised, I cannot entertain a doubt that the judgment of Mr. Justice Bowen in *Coulthart v. Clementson* (*supra*) is perfectly right, that notice of the death of the guarantor is a notice to terminate the guarantee, and has the same effect as a notice given in the lifetime of the guarantor that he would put an end to it."

Offord v. Davies (*supra*) is the only authority most directly in point and still retains its authority and has often been referred to in other connections. As its reasoning commends itself even in the case of two co-debtors, I think we should follow it.

The Dutch writers do not deal with a similar case but only with the case of a single contract. In *Pothier,* however (Vol. I., P. 2, c. 6, s. 4 (2) para. 399), we have the following passage :—

> "Lastly, a person may become surety not only for an obligation already contracted but for one to be contracted in future, so that the obligation resulting from this engagement shall only begin to arise from the time when the principal obligation is contracted ; for it is the essence of such obligation that it cannot subsist without a principal one. According to these principles, I may agree now to become surety to you for £1,000, which you propose to lend hereafter to Peter ; but the obligation resulting from this engagement will only begin to have effect from the time when you actually lend the money ; as long as you have not yet lent it, and the thing is entire, I may change my intention, giving you notice not to lend the money to Peter, and that I no longer intend to be surety for him."

Vander Linden says that an indulgence granted by the creditor in delay of payment without the concurrence of the surety would not necessarily release the surety since, if he was unwilling to remain bound, he should have given notice to the creditor. The termination of an obligation by notice is therefore approved of.

In my opinion, the decree entered in this case should be modified and decree should be entered only for Rs. 1,369.72 with legal interest thereon from date of action till date of decree and thereafter on the aggregate amount of the decree at 9 per cent. per annum. Both parties having succeeded to some extent, each party will bear his own costs both on appeal and in the court below.

SOERTSZ J.—I agree.

Judgment varied