1954 *Present :* **Gratiaen J., Sansoni J. and Fernando A.J.**

R. SINGARAYER, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 457 of 1951—D. C. Point Pedro, 3,905M

Customs Ordinance (Cap. 185)—Section 146—Security for costs of action—Form in which it may be given—Meaning of word " security ".

Security for costs of action required under section 146 of the Customs Ordinance may be furnished in some other form than cash. In the context, the word *security* includes " every document or transaction by which the payment of money is assured, or its recovery facilitated ". Security may therefore be given in the form of the personal guarantee of a surety coupled with a mortgage in favour of the Crown of the surety's interest in a specified allotment of land.

APPEAL from a judgment of the District Court, Point Pedro. Owing to a difference of opinion between the two Judges before whom it was first argued, it came up for hearing before a Bench of three Judges, in terms of section 38 of the Courts Ordinance.

E. R. S. R. Coomaraswamy, with *E. B. Vannitamby* and *D. R. Perera,* for the plaintiff appellant.

M. Tiruchelvam, Crown Counsel, with *V. S. A. Pullenayagam,* Crown Counsel, for the defendant respondent.

Cur. adv. vult.

July 26, 1954. GRATIAEN J.—

On 29th October, 1950, certain Customs officers seized a motor launch, of which the appellant claims to be the owner, off the coast of Thaiaidy for an alleged contravention of regulations framed under section 68 of the Customs Ordinance. On 10th November, 1950, the Collector of Customs of the Northern Province wrote to the appellant confirming the seizure of the launch " as forfeited under the Ordinance ". The letter added that " for purposes of action under section 146 of the Ordinance security for the launch had been fixed in a sum of Rs. 35,000 plus a further sum of Rs. 3,000 for costs of action ".

That section 146 applies to a situation of this kind is now conceded by Mr. Coomaraswamy. The section provides *inter alia* that all ships, boats, goods and other things " seized as forfeited under the Ordinance " shall be " deemed and taken to be condemned " unless the person from whom they are seized or their owner shall within one month give notice in writing to the Chief Officer of Customs at the nearest port that he intends to enter a claim for them, " and shall further give *security to*

prosecute such claim before the Court having jurisdiction to entertain the same, *and to restore the things seized or their value, and otherwise to satisfy the judgment of the Court and to pay costs* ".

Section 147 provides that no claim to anything seized under the Ordinance shall be admitted by the Court " *unless the claimant shall at the time of filing his libel or plaint to establish his claim satisfy the Court that he has given notice and security as in the preceding section enacted* ".

On 28th November, 1950, the appellant gave notice in writing to the Collector of Customs of his intention to institute the present action, and at the same time tendered a bond in a sum of Rs. 3,000 (i.e., the amount fixed by the Collector as security for costs under section 146) conditioned for the due prosecution of the action and the payment of any costs that might be awarded against him. This bond was executed by the appellant and by his surety V. Velupillai who, in addition to his personal guarantee, hypothecated in favour of the Crown his interests in certain immovable property " for further and better securing the payment of all moneys due under the bond ".

The appellant had explained in his letter that he was unable to tender security in a sum of Rs. 35,000 fixed by the Collector as security for the launch ; he therefore consented to the vessel continuing to remain in the possession of the Customs authorities pending the final decision of the action which he proposed to institute. The Collector replied (1) that security " for costs of action alone " could not be accepted, and (2) that " the required securities should be furnished *in cash*". On the next day, he returned the notice and bond to the appellant on the ground that the security was " insufficient ".

On 3rd January, 1951, the appellant filed a plaint in the District Court of Point Pedro together with (1) the notice and bond tendered on 28th November, 1950, to the Collector, and (2) his affidavit in which he incorporated the correspondence to which I have already referred. He asked that the plaint, in which he claimed the recovery of his launch from the Crown, be accepted by the Court. The learned District Judge made order accepting the plaint and ordering summons to issue for 2nd February, 1951. This order must necessarily be construed as having been passed on an *ex parte* judicial decision under section 147 of the Ordinance that, upon the materials before him, the learned judge was satisfied that the appellant had " given notice and security as in the preceding section enacted ".

Several issues were framed at the trial, but, by agreement, the learned judge gave his ruling on certain preliminary issues arising from the Crown's objections to the nature and sufficiency of the security furnished by the appellant. He held in favour of the Crown (1) that the appellant was obliged to give security to restore the launch or its value even though he did not require it to be delivered up to him pending the action, and (2) that the security for costs that was tendered was insufficient. For these reasons, the appellant's action was dismissed without an adjudication on the merits. The present appeal is from that decision, and,

owing to a difference of opinion between the judges before whom it was first argued, the matter came up for hearing before a Bench of three judges in terms of section 38 of the Courts Ordinance.

Since the judgment under appeal was pronounced, this Court has decided in *Seyaratnam v. Hudson* [1] that no security need be given under section 146 for the restoration of the seized property in cases where the claimant does not ask that it should be handed over to him pending the litigation. Mr. Tiruchelvam therefore agrees that the only question before us is whether the nature of the security tendered by the appellant as security for costs was objectionable, and, alternatively, whether it ought to have been rejected on the ground of insufficiency. The first of the issues introduces a question of law, the second a question of fact.

As to the form and nature of the security given by the bond, there was no substance in the Collector's original objection that it ought necessarily to have been furnished *in cash*. He was entitled under section 146 to determine the amount of the security, but not (as for example, in cases arising under section 70) to decide what particular kind of security would alone be approved by him. Compliance with the requirements of section 146 is in truth a prerequisite to the institution of a claim to the property " seized as forfeited " ; and it was ultimately for the Court, not the Collector, to rule whether or not those requirements had been complied with by the claimant.

The purpose of section 146 in requiring security to be furnished either for costs or (where applicable) for the restoration of the property is clear enough : it is to prevent the authorities being harassed with litigation without some adequate assurance that, if the claim is rejected, their costs will be met and that the property (if released pending the action) or its value will be restored to them.

In this context, the word *security* includes " every document or transaction by which the payment of money is assured, or its recovery facilitated ". *Encyclopaedia of the Laws of England* 13,204. " The security would generally consist of a right to resort to some fund or property for payment ; but I am not prepared to say that some other forms of security (*such as a personal guarantee*) are excluded. In each case however, where the word is used in the normal sense, some form of secured liability is postulated "—*per* Viscount Cave in *Singer v. Williams* [2]. There are many precedents in the English Courts for accepting *solvent persons* or even solvent foreign corporations " as security ".

In my opinion, the nature of the securities given by the appellant in the present case—namely, the personal guarantee of a surety coupled with a mortgage in favour of the Crown of the surety's interest in a specified allotment of land, was unobjectionable in form. There remains the question whether these securities were in fact inadequate. On this issue, the burden was clearly on the Crown to establish inadequacy, because a judicial order had previously been made (under section 147) accepting the plaint and therefore inferentially (even though not expressly) deciding that the requirements of section 146 had been complied with.

[1] *(1951) 53 N. L. R. 145.* [2] *(1921) 1 A. C. 41 at 49.*

As such an order is necessarily made *ex parte*, the other party would of course be entitled to have it vacated by placing before the Court material which establishes that the acceptance of the plaint had in the first instance been improperly obtained by the claimant. In that event, the action as such is not dismissed ; it is the permission to institute the action which is withdrawn *nunc pro tunc*.

The value of the surety's interest in the property hypothecated under the bond was admittedly only Rs. 1,000. But the Crown could not succeed in its objections by proof of this circumstance alone. Even if we assume that section 46 of the Mortgage Act, No. 6 of 1949, does apply to a mortgage unilaterally executed by one party in favour of the other as security for costs in a litigation, the Crown is not bound by its provisions and could therefore enforce the personal bond against the surety in order to recover any balance amount due to it by way of costs. No evidence was led at the trial to prove that the monetary value of the surety's personal guarantee was insufficient. For these reasons, the preliminary objections raised at the trial should have been over-ruled.

I would allow the appeal and remit the case to the lower Court for the trial of the issues that remain to be tried. The appellant is entitled to his costs of this appeal and the costs of the abortive proceedings.

SANSONI J.—I agree.

FERNANDO A.J.—I agree.

Appeal allowed.