[PRIVY COUNCIL.]

1924

Present: Viscount Cave, Lord Dunedin, and Lord Carson.

WIJEYEWARDENE *v.* JAYAWARDENE.

D. C. Colombo, 45,217.

Surety—Guarantee—Plaintiff forbearing to sue debtor at defendant's request—Bond by defendant agreeing to pay after twelve months whatever sum may then be due from debtor—Plaintiff to execute an assignment of debtor's bond to defendant on his paying the money due —Provision in defendant's bond that "this guarantee shall be a continuing guarantee"—Construction of bond—Effect of descriptive terms "guarantee" in bond.

When W who held a bond from the Ceylonese Union Company was about to put his bond (5,112) in suit, J intervened and granted him a bond (5,279) which contained, *inter alia*, the following clauses:—

In consideration of W granting the indulgence aforesaid, and forbearing at the request of J to claim and enforce payment of the moneys due to him by the Company, J doth hereby covenant with W as follows:—

1. That J shall and will, at the expiration of twelve months from date hereof, if there shall be due, owing, and payable to W upon the said bond (5,112) the whole or any part of the principal . . . . well and faithfully pay to W the full amount so due.
2. Upon such payment W shall execute an assignment in J's favour of the said bond (5,112), but with the express provision that the defendant shall have no remedy or recourse against W, if J, from any reason or cause, fails to recover the said moneys.
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 W as aforesaid.
4. In order to give full effect to the provisions of this guarantee, J doth hereby expressly waive all suretyship and other rights inconsistent with such provisions, and which he might otherwise be entitled to claim and enforce.
5. W, in consideration of the guarantee and covenant aforesaid, hereby covenants with J 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.

Held, that under the bond (5,279) J was liable as principal debtor and not merely as surety.

The words "this guarantee shall be a continuing guarantee" did not change the character of the obligation created by paragraph 1 into one of suretyship. The mere use of a descriptive term cannot affect the reality of the transaction.

1924.

Wijeyewardene v. Jayawardene

THE facts are set out in the judgment. The judgments of the Supreme Court are reported in *19 N. L. R. 449* and *24 N. L. R. 336.*

De Gruyther, K.C. (with him *R. W. Lee* and *B. F. de Silva*), for the appellant.

Dunne, K.C. (with him *W. R. Bisschop*), for the respondent.

Cur. adv. vult.

July 30, 1924. Delivered by LORD CARSON:—

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

The action was brought by the appellant as plaintiff against the respondent as defendant to enforce a deed No. 5,279 dated August 3, 1914, 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 October 28, 1913, he had financed the company to the extent of Rs. 10,200. On October 28, 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. 5,112 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 Rs. 46,375.59 computed up to the 31st day of July 1914:
>
> "And whereas the said Theodore Godfred Jayawardene, who is the managing director of the company, hath requested the said Don Philip Alexander Wijeyewardene to forebear 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 Jayawardene, undertaking and making himself answereable 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 Wijeyewardeue has consented so to do upon the said Theodore Godfred Jayawardene 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 forebearing at the special request of the said Theodore Godfred Jayawardene to claim and enforce payment of the moneys due to him by the company, he, the said Theodore Godfred Jayawardene, 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 Jayawardene, 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. 5,112 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 Jayawardene, execute an assignment in his favour of the said bond No. 5,112 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 Jayawardene, 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 Jayawardene 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 Jayawardene 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 October 28, 1913, up to March 31, 1917, the sum of Rs. 58,654.34 in account, and accordingly brought

1924.

LORD CARSON

Wijewardene v. Jayawardene

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 March 23, 1917, before the District Judge, who held in his judgment on April 23, 1917, that upon the true construction of the deed of August 3, 1914, the defendant was liable as a guarantor merely and not as a principal debtor, and further that the words in paragraph 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 May 3, 1917, appealed to the Supreme Court, who by order of July 5, 1917, confirmed the judgment and order of the District Court. In consequence of this decision, the appellant on August 15, 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 August 3, 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 judment dated July 17, 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 August 3, 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 August 3, 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 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 October 28, 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

1924.

LORD CARSON

Wijewardene v. Jayawardene

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 the contract of suretyship.

It is perhaps worth noticing that on the day on which the deed of August 3, 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 July 5, 1917, and of March 20, 1923, should be set aside, and that judgment should be entered for the plaintiff in the terms of the judgment dated July 17, 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.

Set aside.