

Present: De Sampayo J. and Loos A.J.

1919.

PALANIAPPA CHETTY v. MATCHADO et al.

208—D. C. Kurunegala, 6,953

Surety—Sale of mortgaged lands by debtors with consent of mortgagee and acquiescence of surety—Is surety discharged?

A, B, and C executed a mortgage bond in favour of D. C was only a surety. A and B, with the consent of the mortgagee, sold the lands mortgaged by them, and paid the proceeds to the mortgagee in part satisfaction. C knew and acquiesced in the sales.

Held, that C was not discharged.

THE facts appear from the judgment.

Hayley (with *G. Koch*), for plaintiff, appellant.

Bawa, K.C., for second defendant, respondent.

E. W. Jayawardene (with *E. G. P. Jayatileke*), for fourth defendant, respondent.

De Fonseka, for third defendant, respondent.

October 27, 1919. DE SAMPAYO J.—

This is an action on a mortgage bond executed by the first defendant and the second defendant as debtors and the third defendant as surety. The amount of the bond was Rs. 5,000 payable with certain interest. There were three lands mortgaged, the first land belonging to the first defendant, the second land to the second defendant, and the third land to the third defendant. There are four other defendants in the case, and their presence is explained by these circumstances. In 1907 the first defendant, with the consent of the mortgagee, sold the first land to one Samuel de Silva, who in turn sold it to the fourth defendant. The second land was sold by the second defendant under similar circumstances to the fifth, sixth, and seventh defendants. It appears that on the sale of these lands to these defendants the purchase sum was paid to the mortgagee, who not only received it, but consented to the sales of the first and second lands. The District Judge has dismissed the case as regards the fourth to the seventh defendants. Mr. Hayley, for the plaintiff appellant, rightly concedes that in the circumstances he cannot press the appeal so far as these defendants are concerned. The appeal is, however, pressed as regards the third defendant, for the

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District Judge entered a money decree against the first and second defendants for the balance due on the mortgage, but no judgment was given against the third defendant. The question as regards the third defendant depends on the circumstances under which the two lands were sold by the first and second defendants, and the third defendant's connection with those transactions. There is, to my mind, good evidence that the third defendant was not only aware of the intended sales to the fourth to the seventh defendants, but approved and acquiesced in it in the case of the second land. He is proved to have been present in the office when the deed was executed by the second defendant. Even as regards the sale of the first land, I gather he was present at the execution of the deed of transfer, but even otherwise there is sufficient material in the case to show that the third defendant knew and approved of the sale, for the plaintiff received the proceeds sale in part payment of the money due on the bond and gave a written acknowledgment, which is signed at the back by the third defendant and also one of the other parties to the bond. The District Judge says that he was no consenting party to the sale of these two lands to the other defendants. I can only interpret that passage in the judgment as meaning that he did not give express consent, for the inevitable result of the evidence is that the third defendant, at all events, knew and acquiesced in the sales. The question in these circumstances is whether the third defendant as surety was discharged from his obligation on the bond. Counsel for the third defendant cites well-known authorities, which show that when the principal obligation is discharged, the accessory obligation of the surety is likewise discharged, but in any case where it can be shown that in respect of a partial discharge of a debtor the surety acquiesced and agreed in the transaction, the law does not declare that the surety is discharged. In a local case reported at page 193 of *Morgan's Digest*, it has been laid down that a surety who after notice does not object to the sale of the mortgaged lands is not thereby discharged. In the present case, not only did the third defendant not object, but his conduct was such that it must be presumed that he really consented to the sales of the lands. I think the judgment appealed from, so far as it does not give any decree against the third defendant, is erroneous.

I would dismiss the appeal as regards the fourth to the seventh defendants, with costs, but would modify the decree, so far as the third defendant is concerned, by declaring that the third land mortgaged by him be held bound and executable for the judgment entered against the first and second defendants. The plaintiff is, I think, entitled to the costs of this appeal.

Loos A.J.—I agree.

Varied.