[STRONGE, C.J., AND THOMAS, J.]

1935.
June 18.

THEOCHARIS GAVRIELIDES

v.

1. MEHMED HASSAN
2. ALI OSMAN.

THEOCHARIS GAVRIELIDES *v.* MEHMED HASSAN AND ALI OSMAN.

(*Civil Appeal No.* 3509.)

Suretyship — The Contract Law, 1930, *Section* 143 *and Section* 145 — *Circumstances in which a Surety can claim to be discharged by reason of the Creditor's Forbearance to press the principal Debtor for Payment.*

Defendant No. 1 was the principal debtor and defendant No. 2 the surety on a bond given to the plaintiff. In May, 1933, the surety hearing that the debtor was going to mortgage his land, requested the creditor to sue on the bond, but the creditor did not do so until October. In the meantime the debtor mortgaged his land, and had no property left free wherewith the plaintiff's claim on the bond could be satisfied. The Judge of first instance held that the surety was no longer liable to the creditor in the circumstances. On appeal the District Court reversed his decision, and the surety thereupon appealed to the Supreme Court.

Held, that in the absence of provision in the guarantee to the contrary, the creditor's delay to sue the principal debtor (notwithstanding the surety's request to do so forthwith) did not, since no binding agreement to give time had been entered into, discharge the surety, although the result of such delay was to make it impossible to recover anything from the principal debtor.

Appeal by defendant No. 2 (the surety) from the decision of the District Court of Nicosia reversing the judgment of the Assistant Judge of Lefka.

N. G. Chrysafinis for the appellant:

In this case the surety informed the creditor of the principal debtor's intention to mortgage his land, and requested him to sue on the bond without delay, but the creditor did not take any steps until long after. In the meantime the land was mortgaged, and the creditor's delay in bringing the action had the effect of making it impossible for anything to be recovered from the principal debtor. The surety's remedies against the principal debtor have been impaired because the creditor " has omitted to do an act which his duty to the surety requires him to do ", within the wording of section 145 of the Contract Law, and the surety is therefore discharged. " Duty " there means " high moral duty ".

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A. Emilianides for the respondent:

I rely on section 143 of the Contract Law. Mere gratuitous forbearance cannot discharge a surety. See *Heath* v. *Key*, 26 English and Empire Digest, p. 175, paragraph 1315, and Chitty on Contracts, 18th Edition, p. 617. In this case the plaintiff did not preclude himself from suing at any time he pleased after the bond became payable. The guarantee given by the appellant did not contain any provision against mere forbearance. The circumstances of this case are fully covered by section 143, which is in my client's favour.

The judgment of the Court was delivered by the Chief Justice.

JUDGMENT:—

STRONGE, C.J.: In this case the Assistant District Judge at Lefka held that defendant No. 2 in the action who was guarantor on a bond of defendant No. 1 for payment to the plaintiff of £13. 0*s*. 2*d*. was not liable on the ground that the guarantor had on several occasions told the plaintiff to sue defendant No. 1 on the bond and that the plaintiff's subsequent delay in doing so had afforded defendant No. 1—the principal debtor—an opportunity of which he availed himself of mortgaging his immovable property before the plaintiff brought action against him.

On appeal the Nicosia District Court reversed this decision and from their judgment the guarantor has appealed to this Court.

Mr. N. G. Chrysafinis contends that while section 143 of the Contract Law, 1930, provides that " mere forbearance " on the part of the creditor to sue the principal debtor will not discharge the surety, the creditor's conduct in delaying to sue the principal debtor after having been told to do so by the guarantor amounts to more than " mere forbearance ". The learned editors of the Indian Contract Act, however, point out in their observations upon section 137 of the Indian Act (corresponding exactly with section 143 of the Cyprus Contract Law) that the term " mere forbearance " is used in contradistinction to the forbearance springing from a contract which is dealt with by section 135 (section 141 in Cyprus). Forbearance consequently continues to be " mere forbearance " even where the creditor delays action against the principal debtor though he has been enjoined by the guarantor to sue, and there is no suggestion in the present case of any such binding arrangement between the creditor and the principal debtor to postpone suing as would bring the case within the provisions of section 141 and entitle the surety to be discharged. Mr. Chrysafinis further relied upon section 145 of the Contract Law of 1930, contending

that the word " duty " in the provision discharging the surety, if the creditor omits to do any act which his duty to the surety requires him to do, means a " high moral duty ". In our view, however, the term " duty " occurring in a legislative enactment, unless accompanied by some expression tending to show that it is used to import moral obligation, is to be regarded as referring to legal obligation only. The English decisions on the point taken in this appeal are clear and authoritative. Lord Kingsdown, for example, says in his judgment in *Black* v. *The Ottoman Bank*, 137 R.R. at p. 108:

> " Mere passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account in a reasonable time and to enforce payment against him does not discharge the surety; there must be some positive act done by him to the prejudice of the surety or such degree of negligence as in the language of Vice-Chancellor Wood in *Dawson* v. *Lawes* ' to imply connivance and amount to fraud '."

In *Price* v. *Kirkham*, 140 R.R. at p. 545 Pollock, C.B., says—

> " The general rule of law where a person is surety for the debt of another is this—that though the creditor may be entitled after a certain period to make a demand and enforce payment of the debt he is not bound to do so; and provided he does not preclude himself from proceeding against the principal, he may abstain from enforcing any right which he possesses. If the creditor has voluntarily placed himself in such a position that he cannot sue the principal, he thereby discharges the surety. But mere delay on the part of the vendor, unaccompanied by and any valid contract with the principal will not discharge the surety."

Eyre v. *Everett* (26 English and Empire Digest at p. 187) is to the same effect. In Halsbury's Laws of England (Hailsham Edition, Vol. 16. at p. 146) the law is stated as follows:—

> " Mere omission on the part of the creditor to press the principal debtor for payment will not, if there be no binding agreement to give time, discharge the surety even if the debtor subsequently becomes insolvent unless the creditor is bound to use, before suing the surety the utmost efforts against and to obtain payment from the principal debtor."

In the light of these authorities I am of opinion that this appeal must be dismissed.

THOMAS, J., concurred.

Appeal dismissed.