1943 *Present:* **Howard C.J. and Keuneman J.**

BODIGA *et al*, Appellants, *and* NAGOOR, Respondent.

217—D. C. Kandy, 738.

Mortgage—Sale of property to mortgagor set aside on ground of laesio enormis—*Buyer consents to decree setting aside sale—Mortgage unaffected by annulment of sale.*

Where a sale of property is set aside by the seller on the ground of *laesio enormis* and where the buyer consented to the decree setting aside the sale,—

Held, that a mortgage of the property granted in the meantime by the buyer would not be affected by the annulment of the sale.

APPEAL from a judgment of the District Judge of Kandy. The facts appear from the argument.

H. V. Perera, K.C. (with him *H. W. Jayewardene*), for the 2nd and 3rd defendants, appellants.—The question for decision is whether when a mortgagor's title to the mortgaged property is extinguished on the ground of *laesio enormis* the mortgage still attaches to the property. It is submitted that the consent decree in action No. 357 wiped out the mortgage of which the plaintiff is the assignee. That decree set aside, on account of *laesio enormis*, the deed of sale which conferred title on the mortgagor. The mortgage bond, therefore, cannot thereafter be sued upon. See *Wille on Mortgages (1920 ed.) p. 295; Voet XX. 6, 9; Burge on Colonial Law, Vol. 3, p. 241.* The person who moved to have the sale set aside in action No. 357 was the seller and not the purchaser. The fact that the decree was entered of consent does not affect the position as long as there was no collusion; it must be presumed that the purchaser (the mortgagor and 1st defendant in the present case) gave his consent to that decree because the case against him was irresistible.

The District Judge refers to *Silva v. Wijesinghe* [1], but his attention was not drawn to the statement of the law in *Voet and Burge*. *Silva v. Wijesinghe* deals with the interpretation of a statutory provision. The doctrine of *laesio enormis* is part of the law of Ceylon—*Walter Pereira's Laws of Ceylon (1913) p. 657.*

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the plaintiff, respondent.—There is a simple answer to the question in this case, namely, that the decree in an action binds no one except the parties and their privies. In action No. 357 neither the present plaintiff nor the mortgagee were parties, *Gooneratne v. Ebrahim and another* [2] is applicable.

[1] *(1917) 20 N. L. R. 147.*

[2] *(1910) 2 Cur. Law Rep. 222 at 224.*

The jurist is doubtful of his opinion in *Voet XX. 6, 9.* Nor is it certain whether in that passage he does not contemplate the mortgagee as being a party to the suit. *Voet XX. 4, 2* is referred to in *Vol. 2, Maasdorp's Institutes (5th ed.) p. 330.*

H. V Perera, K.C., in reply.—The mortgagee could easily have been made a party in action No. 357. The question is whether even if he had been a party the decree in that case wiped out his interests as mortgagee.

Cur. adv. vult.

November 11, 1943. HOWARD C.J.—

In this case the plaintiff claimed a hypothecary decree by virtue of a mortgage bond dated November 23, 1939, made by the 1st defendant in favour of one Nagarajah. This bond was assigned to the plaintiff by Nagarajah on June 16, 1941. The land which was the subject of this mortgage bond was transferred by the 3rd defendant to the 1st defendant by deed dated May 29, 1939. On March 1, 1940, the 1st defendant commenced action No. 357 in the District Court of Kandy against the 2nd defendant claiming a declaration that he was entitled to the said land. Subsequently the 3rd defendant and others were added as defendants to the said action. On December 3, 1941, by consent it was ordered that the deed of May 29, 1939, be set aside on the ground of *laesio enormis* on the 2nd defendant in this action depositing in Court the sum of Rs. 175 to the credit of the 1st defendant as representing the sum advanced by the 1st defendant to the 3rd defendant as consideration for the said deed. The 1st defendant took no part in the present action, but on behalf of the 2nd and 3rd defendants it was contended that the consent decree in action L. 357 wiped out the mortgage that had been assigned to the plaintiff. The learned Judge did not accept this contention and entered judgment for the plaintiff as claimed together with costs. In coming to this conclusion the learned Judge conceded that the deed in favour of the 1st defendant was set aside on the ground of *laesio enormis* but held in favour of the plaintiff on the ground that at the time of the mortgage the 1st defendant had title. In so holding he was guided by the decision in *Gooneratne v. Ebrahim and another*[1].

The question as to the effect on the mortgage of the setting aside of the conveyance by the 3rd defendant to the 1st defendant by reason of *laesio enormis* is not easy to answer. The mortgagee was not a party to this action. His assignee, the plaintiff, cannot be in any worse position. In *Gooneratne v. Ebrahim* (*supra*) a husband on March 25, 1905, transferred to his wife property which, on April 9, 1905, and July 31, 1906, was mortgaged by both husband and wife. On August 25, 1908, action was brought by the plaintiff against the husband and wife on this bond. On August 19, 1908, the deed of March 25, 1905, was cancelled and set aside in an action by the defendant on a promissory note. The plaintiff was not a party to this action. Hutchinson C.J. in his judgment stated that the decree cancelling the conveyance to the wife was not binding on the plaintiff; it was only effectual as between the husband and wife and the defendant. The mortgages to the plaintiff by the wife were

[1] *(1910) 2 Cur. Law Rep. 222 at 224.*

valid and were duly registered and nothing that the wife might do or suffer afterwards could deprive him of his rights under them. The following passage from the judgment of van Langenberg J. on page 224, is also of interest:—

> "I think that there is no justification for departing from the ordinary principle that a judgment in an action binds only the parties to it, and their privies, and that plaintiff's rights having accrued before the institution of case No. 8,385 his rights as mortgagee remain untouched."

The case of *Gooneratne v. Ebrahim* (*supra*) was distinguished in *Silva v. Wijesinghe*[1] to which our attention has been invited by Mr. Perera on behalf of the appellant. The head-note of this case was as follows:

"A co-owner who had mortgaged his share of a land was not allotted any share of the land in a partition action, but was only given a planter's interest and a house. Under the partition decree the land was ordered to be sold.

Held, that the mortgagee, who was not a party to the partition action, was entitled to draw only the share of the money due to the mortgagor under the decree out of the amount realized by sale of the land. A purchaser of the share under a mortgage decree will be in the position of the mortgagee.

'A mortgage security is no higher or more extensive than the mortgagor's title to the property, and if the title is by any legally effective means extinguished, and not merely transmitted to another by contract or descent, the mortgagee is affected equally with the mortgagor. The effect of the partition decree is to wipe out the fifth defendant's (mortgagor's) title as if he never had any, and I think the mortgage must be taken to have gone with it. It is different if the mortgagor suffers defeat in an ordinary action for title to which the mortgagee is no party.'

The main provision of section 12 of the Partition Ordinance deals with a mortgage of the whole land which is the subject of action. The proviso to the section does not touch the case of a mortgage of an undivided share in the event of a sale in the partition action, and in such a case the right of a mortgagee is confined to the proceeds of the sale."

The following passage occurs at page 152 in the judgment of de Sampayo J.:—

> "The effect of the partition decree is to wipe out the fifth defendant's title as if he never had any, and I think the mortgage must be taken to have gone with it so far as the respondents are concerned. It is, of course, different if the mortgagor suffers defeat in an ordinary action for title to which the mortgagee is no party, and the present case is, therefore, distinguishable from *Gooneratne v. Ebrahim*, which was cited on behalf of the appellant. It may be that the result is to defeat the just claim of the appellant, who purchased on the strength of the mortgage decree; but the appellant is bound to yield to the effect of an imperative statutory provision."

[1] *(1917) 20 N. L. R. 147.*

This decision turned on the interpretation to be given to section 12 of the Partition Ordinance and, in my opinion, does not affect the question that arises for decision in the present case.

It is claimed by Mr. Perera that the decree of December 3, 1941, setting aside the deed of May 29, 1939, on the ground of *laesio enormis* wiped out the mortgage although the mortgagor consented to such decree and the decree was made in an action in which the mortgagee was not a party. It is contended that the mortgagee's title could not be greater than that of his mortgagor which was a defeasible one. In this connection we have been referred to such authorities as exist on the doctrine of *laesio enormis*. This doctrine must be accepted as applicable in Ceylon as part of the Roman-Dutch law even though the tendency in South Africa is to restrict its operation and in Cape Colony it has been abolished. The subject receives only cursory treatment in *Walter Pereira's Laws of Ceylon*. At page 657 of the second edition the learned author seems to think that a contract which is afterwards set aside on the ground of *laesio enormis* is voidable, but not void. The following passages at page 298 of *Wille's Mortgage and Pledge in South Africa* are of interest:—

> "Mortgage of Property bought subject to a Title defeasible by the Seller.—If a purchaser mortgages property which he has bought subject to the *lex commissoria*, *e.g.*, that the sale shall be annulled if the vendor receives a more advantageous offer. and the sale is subsequently annulled by the seller for this reason, the mortgage is extinguished (*Ulpian, Dig. XX, 6, 3; Voet, XX. 6, 3*). The same is the case if the sale is annulled by the seller on account of *laesio enormis* (*Voet XX. 6, 9, Burge, Vol. III., p. 242*).
>
> *Laesio enormis* has been abolished in the Cape Province (*Act 8 of 1879, sec. 8*), but is still recognised in the Transvaal—*Kingsley v. African Land Corporation (1914) T. P. D. 666.*
>
> If the termination of the mortgagor's title or interest depends on his own act, the mortgage is not extinguished (*Voet XX, 6, 9; Burge, Vol. III., p. 241; Pothier, Hyp. 3, 3*).
>
> This rule may be illustrated by the mortgages of property bought in the following circumstances:—
>
> Where the purchaser buys property on the condition that he may return it if he does not approve of it, and he mortgages it before he expresses his disapproval; in such a case the mortgage is not extinguished (*Ulpian, Dig. XX. 6, 3; Voet, XX. 6, 8; Burge, Vol. III, p. 241*).
>
> Where the purchaser of property mortgages it and thereafter sets the sale aside on the ground of *laesio enormis* (*Voet XX. 6, 9; Burge, Vol. III, p. 241*)."

In the present case the seller took action to annul the sale, but on the other hand the buyer by his own act consented to such annulment. In *Volume III. of Burge's Comments on Colonial Law at pp. 241-242* the author states as follows:—

> "If a sale of property should be set aside at the instance of the purchaser *ob enormem laesionem*, who had in the meantime granted a mortgage of it, the property will not, it seems, be discharged of the mortgage. But if the vendor had been the person on whose suit it had been set aside, it would not continue subject to the mortgage."

The authority for this proposition is given by Burge as *Voet, lib. XX., tit, 6, n. 9.* On reference to *Berwick's Voet's Commentaries*, we find at page 462 the following passage:—

> "But whether when a sale has been rescinded on the ground of enormous lesion the thing sold and meanwhile mortgaged by the purchaser returns to the vendor freed *ipso jure* from the burden of the pledge, or whether it remains bound even after it has reverted to the power of the vendor, until, by payment of the debt or otherwise, it has been freed by the purchaser, is doubtful. Bartolus denied, and Baldus asserted, that it returns free of the incumbrance, and each had notable followers who are enumerated by Pinellus ad 1. 2. *Cod. de rescind. vend.* part 2, cap. 3, num. 11 *et seq.; Fachineus controv.* lib. 2, cap. 23; Vinnius *select. quaest*, lib. 2, cap. 5. But adopting, on the footing of what has been said above, a middle course in the determination of this question, I think we ought to distinguish whether the vendor proceeds by the remedy provided by the *lex.* 2, of the *Cod. de rescind. vend.* (4.44), he having sold the thing for much less than its true value; or whether the purchaser does so when he has purchased it for much more than it was worth and therefore complains that he has been prejudiced beyond a half. For if an injured vendor sues, the rule is rather that on the dissolution of the sale the thing returns to the vendor free (from the burden); because the dissolution of the contract proceeded not from the purchaser, but from the vendor who by the suit has compelled the purchaser to recede from the sale if he will not make up what is wanting to complete the just price. For one is considered to recede from the contract not of his own free will, but under compulsion, who can be compelled by the decree of the judge to restore the thing purchased unless he adds more than as much again to the price he has already paid. Dig. 13.5, fr. 25, S 1 (*de constit. pecunia*). Nor is it, as you might object, that the ownership had from the first been immediately transferred from the vendor to the purchaser in the most full and irrevocable right. For, as it is requisite *inter alia* to (the validity of a) purchase, that the price should be just and correspondent with the thing sold, the full and irrevocable ownership of the thing cannot be considered as transferred to the purchaser so long as a just price, or at least one tolerably equitable, has not been paid. If, on the other hand, the purchaser, being the injured party, sues by this remedy of the *lex.* 2, you will very properly say that the *jus pignoris* is not *ipso jure* resolved, but rather the same is to be approved in this case that has been stated above of a purchaser returning a thing on account of disease or vice; for the dissolution of the sale here proceeds from the free will of the purchaser, since it was competent to him not to have prosecuted that remedy."

It is obvious from the passages I have cited that the various authorities were in considerable doubt as to the position of a mortgage in the circumstances that arise in this case. These authorities do not supply the answer having regard to the fact (*a*) that the plaintiff is an assignee, (*b*) that neither he nor the mortgagee were parties to the action in which decree was made setting aside the sale, and (*c*) that the purchaser consented

to the decree. The question does not previously seem to have received consideration in the Courts of Ceylon. If mortgagees had to make inquiry as to the reality of the consideration on a previous transfer of property, it seems to me that the raising of money by mortgage would be very severely restricted. Any extension of the doctrine of *laesio enormis* in this direction would hamper the legitimate raising of money by mortgage and hence contrary to public policy. I think that the 1st defendant having consented to the decree annulling the sale was not compelled to recede therefrom. Hence the mortgage is valid. Moreover neither the assignee nor mortgagee were parties and their rights under the mortgagee are therefore unimpaired by such annulment. Moreover the title of the 1st defendant not being void but merely voidable gave a good title to the mortgagee which passed by assignment to the plaintiff. In this connection I would invite attention to the distinction drawn between contracts that are void and those that are voidable in the 18th edition of *Anson's Law of Contract, pp. 4 & 5.* As the transaction between the 1st and 3rd defendants was not void, but merely voidable, Nagarajah obtained a good title. So also did the plaintiff by the assignment of June 16, 1941. Both the mortgage and its assignment were prior in date to the decree of December 3, 1941, setting aside the sale.

For the reasons I have given the appeal is dismissed with costs.

KEUNEMAN J.—I agree.

Appeal dismissed.