*Present :* Lascelles C.J. and Middleton J.

*May 30, 1911*

RAMANATHAN CHETTY *v.* CASSIM *et al.*

102—*D. C. Matara*, 4,835.

*Mortgage bond—Action by mortgagee—No notice to subsequent lessee—Subsequent action against lessee does not lie—Civil Procedure Code, ss. 643, 644—Merger.*

A mortgagee who fails to give notice of his action on the mortgage bond to a subsequent lessee, who had duly registered his lease and address under section 644 of the Civil Procedure Code, cannot after sale of the mortgaged land under his decree bring an action against the lessee to have the lessee's interest in the land sold declared bound and executable for the balance of the debt.

A mortgage is, as a general rule, extinguished when the mortgagee, by purchase or otherwise, becomes the owner of the mortgaged property.

THE facts of this case are set out by Middleton J. as follows :—

In the present case the plaintiff, as mortgagee of certain property, got a mortgage decree against his mortgagors—the first five defendants—without citing the sixth, seventh, and eighth defendants, lessees of the land by deed of lease from the first five defendants

[1] *(1874) L. R. 9 C. P. 400.*

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dated subsequently to the mortgage. The ninth defendant was a sub-lessee of one-fourth from the sixth, seventh, and eighth defendants.

The land was sold in execution and bought by the plaintiff at the Fiscal's sale, who obtained a Fiscal's transfer. The sixth, seventh, and eighth defendants refused to give possession to the plaintiff. Later, the plaintiff, who had still some Rs. 10,000 to recover under his mortgage debt, sued all the lessees in this hypothecary action, making the mortgagors again defendants, claiming that the leasehold interest of the sixth to the ninth defendants should be declared bound and executable under his mortgage.

The sixth defendant only answered, and the District Judge gave judgment dismissing the plaintiff's action, holding apparently that there was a merger of plaintiff's mortgage bond in his former decree, and that the sixth defendant's interest under his lease was not executable under the mortgage bond, as the lessee was not joined in the hypothecary action, and his lease was prior in date and registration to the plaintiff's Fiscal's transfer.

The plaintiff appealed.

*Sampayo, K.C.*, for the appellant.—The District Judge is wrong in holding that the mortgagee's and mortgagor's rights have become merged. What the plaintiff bought was the land minus the lease. The right of the plaintiff as mortgagee is, therefore, not merged altogether in his ownership of the land.

*Lebbe v. Siddik*[1] relied on by the District Judge is no authority in this case ; if the plaintiff had sued the lessee in ejectment, that case would apply. In the present action we seek to have the lessee's interest declared bound and executable. The plaintiff did not know of the existence of the lease till after the decree. The plaintiff was, therefore, unable to gather up all the interests in the first action.

*A. St. V. Jayewardene*, for the respondent.—The mortgagee is now the owner of the property. He cannot now get a hypothecary decree. [Middleton J.—Is the plaintiff barred by section 34, Civil Procedure Code ?] Yes ; he should have included every claim in the first action.

The plaintiff had not complied with the provisions of sections 643 and 644 of the Civil Procedure Code ; if he had, the lessee would have been bound to give him notice of his lease ; and if the lessee did not, he would lose his rights.

The old hypothecary actions are no longer available under our law ; the provisions of the Civil Procedure Code have to be followed. Counsel cited *Punchi Kira v. Sangu*[2], *Santiago v. Fernando*,[3] *Goonawardene v. Silva*,[4] and *Bank of England v. Vagliano*[5].

[1] *(1906) 3 Bal. 225.*
[2] *(1900) 4 N. L. R. 42.*
[3] *(1901) 2 Br. 126.*
[4] *(1900) 1 Br. 254.*
[5] *(1891) A. C. 107.*

*Sampayo, K.C.*, in reply.—All that Bonser C.J. holds in the cases cited is that a mortgagee cannot bring a hypothecary action without joining the mortgagor, and nothing more. Under the Roman-Dutch law the mortgagee could either sue the debtor, or sue the party in possession without suing the debtor. Bonser C.J. has merely held that this second action is not open now.

*Cur. adv. vult.*

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The first five defendants mortgaged certain property to the plaintiff. Subsequently to the mortgage the mortgagors leased the property to the sixth, seventh, and eighth defendants, who assigned one-fourth of their leasehold interest to the ninth defendant. Whether the mortgagee had notice of the lease is not clear. The averment in the answer of the sixth defendant, that the plaintiff was well aware of the lease, and that it was executed with the plaintiff's knowledge and consent, stands untraversed. But the point is not referred to in the statement of facts to which the parties agreed, nor is it the subject of an issue.

The lessees and their assignor were not made parties to the action, nor did they receive notice of the summons under section 643 of the Civil Procedure Code ; presumably because the mortgagee, by failing to furnish an address to the Registrar under section 644, had not given the lessees the opportunity of notifying their lease to the mortgagee in accordance with section 643.

The plaintiff proceeded to seize and sell the land under this decree, and at the sale he purchased it himself, and it was duly conveyed to him by a Fiscal's transfer. A balance of the mortgage debt is still due, and the plaintiff by this action claims that the property may be declared executable as against the sixth, seventh, eighth, and ninth defendants for the balance of the debt. His claim for other relief has not been pressed either at the hearing or at the appeal.

The appellant contends that it is now open to him notwithstanding his purchase of the mortgaged property, to enforce his mortgage against the leasehold interest of the respondent.

On the other hand, it is contended that the occasion for the present action is the appellant's failure to comply with the provisions of chapter XLVI. of the Civil Procedure Code, and that the appellant, having failed to comply with the procedure there laid down, cannot be allowed to maintain this action. It is clear that if the appellant had registered an address as provided by section 644, the respondent and the other lessees would have been bound by the decree, unless they had taken the steps prescribed by section 644 to be joined as defendants.

Sections 643 and 644 of the Civil Procedure Code were clearly enacted with the intention of enabling all rights with regard to the mortgaged property coming into existence subsequently to the date

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of the mortgage to be disposed of once and for all in the course of the mortgage action. A mortgagee who has registered his mortgage bond, and also furnished an address to the Registrar, is amply protected. Subsequent encumbrancers must either give him notice of their encumbrances, so that they may be joined as defendants, or, if they fail to do so, they are bound by the decree in the action. To allow a mortgagee to neglect this procedure (the object of which is to avoid expense and litigation) would be to drive a coach and six through the statutory provisions of chapter XLVI. of the Code. It is true that it would have been open to the mortgagee to have joined the lessees as defendants, the *actio hypothecaria* being still available against puisne encumbrancers (*Meyappa Chetty v. Rawther*[1]) but the question here is, whether, having failed to do this in the first instance, and also having failed to protect himself by the procedure laid down in chapter XLVI., he can now maintain this action.

On the view which I take of the scope of Chapter XLVI. the answer must be in the negative.

There is another, and perhaps an even more substantial objection to the present action. A mortgage is, as a general rule, extinguished when the mortgagee, by purchase or otherwise, becomes the owner of the mortgaged property (*Voet* 20, 6, 1). Though there are some exceptions to this rule, it has not been shown, and I am unable to see, that the plaintiff in this case is entitled to the benefit of any of these exceptions, and on this ground, if no other, his action must fail. I would dismiss the appeal with costs.

MIDDLETON J. (after setting out the facts, continued) :—

The doctrine of merger of the mortgage bond in a judgment laid down in *The Government Agent v. Hendrick Hamy*[2] has been repudiated apparently by the judgments of this Court in *Madar Lebbe v. Nagamma*[3] and *O. L. Meera Saibo Lebbe v. M. B. Mohamadu Ibrahim*,[4] and I think this case must be decided under chapter XLVI. of the Civil Procedure Code. The lessees duly registered their lease and their addresses under section 643 of that chapter, and the plaintiff did not cite them, as he ought to have done, if he desired to bind them by his original hypothecary decree.

The purchase by the plaintiff under the Fiscal's transfer was, therefore, as Mr. de Sampayo admits, subject to the lessees' rights. The remedy the plaintiff had against the lessees was available to him at the date of his first hypothecary action, and his cause of action on the bond would entitle him to include a claim against the lessees, which he failed to make.

I think, therefore, that he is now barred by section 34 from bringing a second action without having obtained the leave of the Court to do so.

[1] *(1903) 6 N. L. R. 220.*
[2] *(1894) 3 C. L. R. 86.*
[3] *(1902) 6 N. L. R. 21.*
[4] *(1901) 2 Browne 210.*

As regards this view being an infringement of the substantive law of a mortgagee's rights to follow the mortgaged property—if this be the effect—the Legislature, and not the Courts, must be deemed responsible.

I cannot see also that counsel for the respondent in the arguments raised by him has gone behind the first issue, which would have had to be answered in the negative at the inception of the present action as at this stage. I would dismiss the appeal with costs.

*Appeal dismissed.*