1943 *Present:* **Hearne and Wijeyewardene JJ.**

KANDIAH *et al.*, Appellants, *and* SIVAKANUPILLAI *et al.*, Respondents.

224—D. C. Jaffna, 16,179.

Mortgage—Sale of property subject to payment of mortgage debt—Discharge of mortgage by vendee—Seizure in execution of property—Claim by vendee—Right to payment of mortgage debt.

On January 1, 1940, third defendant conveyed the property in question to the plaintiff, subject to a mortgage which the plaintiff undertook to discharge and to pay the third defendant a certain sum of money in addition. On July 29, 1940, first and second defendants issued writ against the property and seized it. On August 5, 1940, the plaintiff discharged the mortgage debt. On seizure of the property plaintiff claimed it, but his claim was disallowed and the present 247 action followed.

***Held*, that the property was liable to be sold under the writ issued by the first and second defendants subject to a right of mortgage in favour of the plaintiff to the extent of the mortgage debt.**

APPEAL from a judgment of the District Judge of Jaffna.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for first and second defendants, appellants.

S. J. V. Chelvanayagam (with him *P. Navaratnarajah*), for plaintiff, respondent.

N. Kumarasingham for third defendant, respondent.

Cur. adv. vult.

August 4, 1943. HEARNE J.—

The facts relevant to this appeal are these. On August 22, 1937, the third defendant, a woman, mortgaged on P 2 two properties, Iniyavudai and another called for short S, to one Kanthappillai. On January 1, 1940, she conveyed both the properties by P 1 to the plaintiff "subject to mortgage No. 5,321" (P 2). The plaintiff undertook to discharge the mortgage debt of Rs. 1,260 and to pay the third defendant Rs. 240. On July 29, 1940, the first and second defendants issued writ against Iniyavudai which was seized. On August 5, 1940, the plaintiff, according to his evidence, discharged mortgage bond No. 5,321.

On the seizure of Iniyavudai by the first and second defendants the plaintiff claimed it by virtue of P 1 but his claim was disallowed and the present 247 action which was filed in November, 1940, was the result.

The trial Judge held that P 2 was a genuine transaction and that the plaintiff had paid the mortgage debt on bond 5,321. But he also held that P 1 was collusive and fraudulent and, in the result, made the order that the land described in the plaint, viz., Iniyavudai, was liable to be seized and sold under the writ issued by first and second defendants against the third defendant subject, however, to "a right of mortgage in favour of the plaintiff to the extent of Rs. 1,260 over the properties Iniyavudai and S Described in P 1". The first and second defendants have appealed.

Counsel for the plaintiff, the respondent to this appeal, did not argue that the order of the learned Judge which reserved to his client "a right of mortgage over Iniyavudai and S" was justified by the provisions of section 11 of the Mortgage Ordinance under which he purported to act. He argued that as the Judge had found there was consideration for P 1, which he did, he could not have found that it was fraudulent and collusive. This argument was disposed of by Garvin J. in *Meera Saibo v. Ayan Sinnavan* [1]. P 1 was clearly fraudulent and collusive. It was designed to save the third defendant's properties from creditors and the transfer rendered her insolvent.

What remains to be considered is this. If the order of reservation in favour of the plaintiff cannot be justified by section 11 of the Mortgage Ordinance which applies to sales in hypothecary actions and not to private sales can it be justified at all ?

In *Haniffa v. Silva* [2] A's property was purchased by the plaintiff at a Fiscal's sale held under a writ issued against A. Subsequently A was adjudicated bankrupt and thereafter sold the same premises to the defendant. The purchase money paid by the defendant was applied in discharge of a mortgage decree against A with respect to the same land. It was held that the defendant was entitled to a *jus retentionis* till the purchase amount was paid to him.

These facts are not, of course, precisely similar. In particular it is to be noted that the plaintiff in *Haniffa v. Silva* (*supra*) was not permitted "to get the benefit of a payment which the defendant had made in the *honest* belief that the property was his": while, in the present case, the whole transaction (P 1) was tainted with fraud *ab initio*. The plaintiff did not, as he had undertaken to do, discharge the mortgage (P 2) at once. He did so only after the seizure by the first and second defendants. No doubt he regarded it as a step that was necessary in order to make the fraud unassailable. Was the Judge justified in these circumstances, in giving the plaintiff the relief he did ?

With reluctance I have come to the conclusion that he was, though not, as I have indicated, for the reasons he gave. Civil Courts interfere in cases of fraud from a civil and not a criminal point of view. It is not their function to punish the wrong doer. Their function is to avoid the fraud and thereafter, as far as it is possible to do so, to place the wrong doer and the person or persons he has wronged or attempted to wrong in *statu quo*. Even where a party to a contract alleges and proves, *e.g.*, misrepresentation, the Court, after making all just allowances aims at restoring the parties precisely to the state in which they were before they entered into the contract. It is sometimes a difficult matter when the rights of innocent third parties intervene.

In this case no such complication arises. If the attempt to defraud the third defendant's creditors had never been made, if P 1 had never been executed, the first and second defendants could only have seized and sold Iniyavudai subject to the rights of Kanthappillai. As the plaintiff has paid off Kanthappillai he must be regarded as standing in his shoes and this is the effect of the Judge's order.

[1] *(1927) 29 N. L. R. 84.*

[2] *(1912) 15 N. L. R. 362.*

If the first and second defendants were permitted to sell the land (Iniyavudai) free of any encumbrance, they would be enriched at the expense of the plaintiff, and a civil Court would in effect be inflicting a penalty on the latter.

The appeal is dismissed. While the appellants have failed to disturb the order of the trial Judge the respondent, in the face of authority and of well established facts, has right up to this Court persisted in maintaining a claim to the full benefit of a fraud to which he was a party and which he probably inspired. Such ill-advised pertinacity must be discouraged. I therefore make no order of costs of appeal.

WIJEYEWARDENE J.—I agree.

Appeal dismissed.