

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 21ST DAY OF AUGUST 2015/30TH SRAVANA, 1937H

CRP.No. 874 of 2005 (D)

AGAINST THE ORDER IN EP 153/1992 in O.P.(A) 26/71 of
PRINCIPAL SUB COURT, THIRUVANANTHAPURAM.

REVISION PETITIONER(S) (ADDL. 8TH DECREE HOLDER):

CHELLAPPAN KALADHARAN,
JAGATHY HOUSE, VELI ROAD, BEACH,
TRIVANDRUM.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENT(S) (JUDGMENT DEBTOR & ADDL.DECREE HOLDERS 1 TO 7):

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1. THE KERALA STATE ELECTRICITY BOARD (KSEB),
REP. BY ITS SECRETARY, VYDHUTHI BHAVAN,
TRIVANDRUM.
 2. CHELLAPPAN KAMALASSANAN,,
T.C.15/500, JAGATHY, KOCHAR ROAD
TRIVANDRUM.
 3. CHELLAPPAN KAMALESWARAN,
T.C.16/849, JAGATHY, TRIVANDRUM.
 4. SMT. G.P. MANGALAM,
T.C.24/1899, MINICHI ROAD, JAGATHY,
TRIVANDRUM.
 5. SMT.G.P. MAHESWARY,
W/O. DR. M.N. SOMAN, 332/B/VI, KALPAKA LANE,
THOTTAKKATTUKARA, ALUVA-5.
 6. DR. CHELLAPPAN KAMADEVAN,
N.C. HOSPITAL, JAGATHY, TRIVANDRUM.

R1 BY ADV. SRI.RAJU JOSEPH (SR.)

BY ADV. SRI. K.T. POULOSE

R2 BY ADV. SRI.A.N.RAJAN BABU

BY ADV. SRI.P.GOPALAKRISHNAN (MVA)

R3 BY ADV. SRI.P.A.AHAMMED
ADV. SRI.THOUFEEK AHAMED
R4 & R5 BY ADV. SRI.BINDU SREEKUMAR

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 21-08-2015, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:

P. BHAVADASAN, J.

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C.R.P. No. 874 of 2005
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Dated this the 21st day of August, 2015.

ORDER

This revision is directed against the order dated 30.11.2004 in E.P. 153 of 1992 in O.P. (A) No. 26/1971 by the Principal Sub Court, Thiruvananthapuram. By the said order, the court below granted a decree to the decree holders entitling them to realize a sum of Rs.11,44,003/- with interest thereon at 12% per annum from 1.4.1973 till 27.8.1991 and thereafter at the rate of 6% per annum till realization from the Kerala State Electricity Board. Parties were directed to suffer their costs.

2. The predecessor-in-interest of the petitioner bid for a contract in respect of Power Tunnel contract in Idukki Hydro Electric Project and became successful in the bid. During the construction period, disputes arose between the parties and the matter was referred for

arbitration. An award was passed and subsequently a decree was passed in terms of the award. The decree holder put the decree in execution as per E.P. 153 of 1972.

3. During the pendency of the execution petition, the decree holder died on 30.4.1977. On the basis of a Will, his wife Gouri Ponnamma came on record as the legal representative and conducted the E.P. Subsequently Gouri Ponnamma also died and as per her Will the revision petitioner obtained the right to continue the proceedings and receive the amount and therefore he came on record as legal representative. The other legal representatives are respondents 2 to 6 in the C.R.P.

4. It is unnecessary to go into the complicated facts and other details etc., in the light of the order in C.R.P. 2161 of 1991 disposed of by order dated 17.3.2002 which was directed against the order dated 27.8.1991 in E.P. 153 of 1972 in E.A. 196(A) of 1990 in O.P.(A). 26 of 1971.

The history of the litigation and the issue that had arisen for consideration in the earlier C.R.P. have been succinctly referred to in the order dated 17.3.2003.

5. For the purpose of carrying out the contract bid by the predecessor-in-interest of the petitioner, equipments, machinery and tools were necessary. They were acquired in three different ways. 'A' schedule tools were those tools sold by the judgment debtor to the decree holder. 'B' schedule tools belonged to the decree holder and 'C' schedule tools were ones taken on hire by the decree holder from the judgment debtor.

6. It is not in dispute that money portion of the decree was satisfied and what remained was the dispute regarding the value of tools and equipments and damage claimed by the decree holder. To the E.P in that regard, the objection was that decree as regards the tools and plants was only declaratory in nature and therefore was not

executable. The executing court accepted the contention and rejected the prayer for injunction sought for in respect of tools and plants. Two appeals were filed as A.S.460 of 1972 and A.S. 474 of 1972 by the decree holder and judgment debtor respectively and this Court disposed of the appeals observing that the decree is executable as a whole and piecemeal execution was not possible.

7. As regards 'B' schedule items, it admittedly belonged to the judgment debtor. 12 items were taken over by the State and the claim of the decree holder remains confined to the balance materials.

8. In the present execution petition, the judgment debtor contended that the articles listed in Statements I and IV filed by the judgment debtor on 27.9.1972 are the only articles sold to the decree holder and item No.I contained 17 items. Statement IV contained 9 items. There were several proceedings with regard to those items. Suffice to

say that in A.S. 691 of 1972, this Court held that 'B' schedule in the E.P. and the items in Statements I and IV filed by the judgment debtor absolutely belonged to decree holder and they were in the possession of judgment debtor pending the arbitration proceedings.

9. It may be worth mentioning here that successive orders were obtained by the decree holder for removing the articles from the site. But they were not successful in doing so due to the adamant attitude of K.S.E.B. who contended that the tool and plant were under a lien to them and they effectively prevented the removal of the materials.

10. It will be useful to note that the judgment debtor had taken objection to the order allowing the decree holder to take away materials except three items. A.S. 320 of 1973 was preferred by the judgment debtor and they contended that all articles had been removed by the decree holder.

11. The decree holder filed E.A. 617 of 1982 for appointment of an expert commissioner along with an Advocate Commissioner for preparing an inventory with all necessary details of the tools, plants and machineries listed in B schedule and the items in Statements I and IV filed by the judgment debtor. That was allowed. The judgment debtor took objection to the order and filed C.R.P. 3571 of 1982 which was dismissed. The expert commissioner after giving due notice visited the site and prepared Ext.C1 report. An objection was filed by the judgment debtor and commissioner was examined as P.W.1. The report had been refereed to in detail by the order dated 17.3.2003 while disposing of C.R.P. 2161 of 1991. The Commissioner assessed the replacement value and damages caused as on March 1988 at a phenomenal amount of Rs.69,22,603/-.

12. The contention of the judgment debtor that the Commissioner had assessed the value of

tools and machinery without basis were rejected. The judgment debtor pursued their contention that the decree holder had removed all the articles and so were not entitled to receive any amount. This Court in C.R.P. 2161 of 1991 took note of the admission made by the judgment debtor in A.S.320 of 1973 and found that the judgment debtor had kept the articles with them. The judgment debtor also contended that they cannot be made liable to pay the hire charges as huge amounts were due to them. It thus became clear that the articles mentioned in 'B' schedule and Statements I and IV were with the judgment debtor and they were directed to fix hire charges after notice to the decree holder. The judgment debtor paid little heed to that order.

13. The decree holder then filed E.A. 665 of 1975 seeking appointment of an Advocate Commissioner to take possession of the articles. The judgment debtor objected and in the order in C.R.P. 2161 of 1991 these aspects have been dealt

with in considerable detail. In paragraph 15 at page 13 of the order, it is observed as follows:

"..... So it is clear that the tools and plants were in the possession of the judgment debtor and they were directed to fix the hire charges with notice to the decree holder. The Board has no case that they have fixed the hire charges as directed by this Court. No statement was also seen filed by the judgment debtor. They neither fixed hire charges nor paid the same and they disobeyed this order."

14. As per the order in E.A. 870 of 1975, the decree holder had filed a statement showing the articles removed and those lying at the site. The judgment debtor produced Exts. B1 to B14 contending that most of the articles were removed. The decree holder disputed the genuineness of Exts. B1 to B14.

15. Ext.C2 is another report filed by the Commissioner. The court while disposing of C.R.P. 2161 of 1991 referred to the amount arrived at by the expert commissioner in assessing the value of the articles as in March, 1988 at Rs.69,22,603/-.

16. Ext.C2 report relates to the value of articles received and mentioned about the value of articles and it was assessed at Rs.25,67,512/-. The executing court on earlier occasion found the amount due to the decree holder as Rs.69,22,603 - Rs.25,67,512 = Rs.43,55,091/-. A decree was granted for that amount with 12% interest from 1.4.1988 till the date of the order and thereafter at 6% per annum till realization. It was that order that was under challenge in C.R.P. 2161 of 1991.

17. One of the contentions raised by the judgment debtor was regarding the mode and method of assessment of value adopted by the Commissioner. It was contended that it was neither acceptable nor practical and it was contrary to the accepted norms of valuation.

18. This Court noticed that high officials of the judgment debtor were present at the time of visit of the Commissioner. This Court observed that if there was any error or deviation

from the normal mode of valuation, the officers of the judgment debtor ought to have taken objection thereto then. But, they kept quite. The court therefore refused to accept the contention raised by the judgment debtor that the mode of valuation was not acceptable. The court observed as follows:

".... The Commissioner has assessed the replacement value of the tools and plants in 1988. At any rate, the decree holder is not entitled to the replacement value of 1988. The plants are very old and if at all the decree holder is entitled to its value, he is entitled to get the value after depreciation for the age of the tools and plants. At the same time, it cannot be forgotten that if the tools, plants and machineries were in the possession of the decree holder, he would have made use it and make income either by doing contract work or by hiring the same. Due to the act of the judgment debtors, it was lost to him. The contention of the judgment debtors is that the tools and plants received under Exts.B1 to B14 are besides the tools and plants received as

per Statements I & IIV filed by the decree holder on 14.8.1976. This fact was not properly considered by the Execution court."

19. On going through the order in C.R.P. 2161 of 1991, it becomes clear that the executing court had to consider three things;

- 1) Exts.B1 to B14 and the two statements filed on 14.7.1976 are in respect of the same tools and plants or separate items of tools and plants appended to the E.P.,
- 2) The executing court has to consider whether the replacement value or value after depreciation could be given to the decree holder, and
- 3) While considering the above aspects, the executing court was also directed to consider whether compensation could be granted to the decree holder.

20. After remand, the executing court considered the above three aspects and passed the impugned order. After remand the judgment debtor examined D.W.3 and the decree holder recalled P.W.1. On the materials before it, the executing

court found that

- 1) There was no evidence to show that articles contained in Exts.B1 to B14 were not covered by Statements I and IV,
- 2) Replacement value as on 1988 cannot be taken as it does not have the approval of High Court,
- 3) The replacement value in 1972-73 is assessed at Rs.17,98,793/-. Value of the articles received back by the judgment debtor was assessed at Rs.6,54,790/-. The decree for balance amount which was assessed at Rs.11,44,003/- was allowed to be realized by the decree holder with interest made mention of in the order. The executing court found that there was no evidence of any loss or damages sustained by the decree holder.

21. Learned counsel appearing for the decree holder assailing the order of the lower court complained that the court below was not justified in taking value of the articles as on 1972-73 at Rs.17,98,793/- and after deducting the value of the articles received by the decree holder as Rs.6,54,790/- and assessing the amount due to

the decree holder at Rs.11,44,003/-. There was no justification for adopting the 1972-73 value and this Court had infact accepted the valuation made at Rs.69 Lakhs and odd, but had only observed that that amount could not have been granted without calculating the depreciation for the machinery. Therefore, it was contended that it is not as if that this Court had rejected the assessment made by the expert commissioner, but in fact it was otherwise. The amount due to the decree holder ought to have been calculated on the basis of the valuation in 1988 after allowing depreciation and the present mode adopted by the executing court cannot be accepted.

22. Learned counsel appearing for the revision petitioner has also pointed out that the court below has erred in law and on facts in not granting compensation claimed by the decree holder. The expert commissioner had adopted two different methods to compute the amount due to the decree

holder and under both the modes, the amount arrived at were almost same. It is inconceivable, according to the learned counsel for the decree holder, that the judgment debtor, who from 1972 onwards had been keeping illegal possession of the articles belonged to the decree holder causing loss of income and profit to him, is not liable to pay compensation to the decree holder and get away without paying any amount for the loss and damages suffered by the decree holder.

23. Learned counsel contended that either the value as in 1988 or accepting the amount now granted, compensation and other charges ought to have been granted. It is not correct to say that the quantum of damages or loss has not been assessed when the expert has in fact assessed the damages. No reason was given by the lower court as to why the same could not be accepted. Even assuming that the entire amount as assessed by the expert commissioner is not available to the decree

holder, he could not be denied damages for the loss and injury suffered by him.

24. Learned Senior Counsel appearing for K.S.E.B. contended that for the purpose of assessing the value, the value as in 1988 is not the criterion and that aspect is covered by the remand order. It has been found that the decree holder by no stretch of imagination could be allowed to realize Rs.69 Lakhs and odd as assessed by the Commissioner. The assessment of damages made by the expert commissioner is speculative and imaginary and has no sanction of law. Further, it is too remote a claim. It is also pointed out that as rightly observed by the executing court, there was no evidence of actual loss suffered by the decree holder. It was therefore contended that no interference is called for with the order of the court below.

25. The issue as to the genuineness of Exts.B1 to B14 and the inclusion or non-inclusion

of articles in Statements I and IV is found against by the lower court and there is no challenge in that regard before this Court and that portion of the order has become final. What now remains to be considered is the amount due to the decree holder and the heads under which he is entitled to claim amounts.

26. One fact has to be noticed. On the earlier occasion, i.e., while disposing of C.R.P. 2161 of 1991, this Court did not set aside the commissioner's report nor find it to be improper. The challenge against the mode of valuation adopted by the Commissioner was repelled in the earlier petition or the conclusion arrived at by the expert was not set at naught. The only hitch noticed by this Court is that the amount as such could not be granted without considering the question of depreciation. The court was very much conscious of the fact that had the articles been returned to the decree holder, he could make use of it either by

hiring it or using it for his own work and lack of opportunity to do either of those acts has caused loss to him.

27. It is claimed that as a result of the act of the judgment debtor, the decree holder suffered various damages. As regards the question of damages, learned Senior Counsel for the K.S.E.B. contended that the court below found that even accepting that the claim is sustainable, there are no materials in support of the claim and therefore, it has necessarily to fail.

28. One may refer to the principles of assessment or valuation of damages in such cases. The act of the judgment debtor in retaining possession of the articles belonging to the decree holder amounts, at any rate, to what is known as detention, if not conversion. The distinction between detention and conversion is very thin and delicate. However, in the facts and circumstances of the case, it may not be difficult to come to the

conclusion that there was illegal detention of the goods.

29. One has to notice that inspite of several attempts made including after obtaining court orders allowing the decree holder to remove the articles, the judgment debtor adopted one method or the other to forestall the taking away of the articles and it remained with him. It is clear that the retention of the articles was illegal.

30. As already noticed, even though the decree holder made various attempts to take back the articles, they could not succeed. It is also significant to notice that various contentions taken by the judgment debtor at various levels were all found against. At any rate, the conclusion is irresistible that the judgment debtor was in possession of the articles belonging to the decree holder. Be it either conversion or detention, the act committed by the judgment debtor is a tortious act apart from infringement of contractual

obligation.

31. Normally in case of conversion, measure of damage in the market value of the goods converted is taken. The normal criterion adopted is the market value method which is comparatively easy since the market price is readily available. Another accepted mode of remedy is to recover the cost for obtaining replacement. The time for assessment of value in case of conversion is the market value at the time of conversion.

32. **McGregor on Damages** - 17th Edition at page 1069, Note 33-001 observes as follows:

"Misappropriation of goods may, like damages or destruction, result from a number of torts, but whereas with damage or destruction the measure of damages is calculated in the same manner whatever the tort, with misappropriation certain differences in relation to damages have appeared as between the various possible torts in the field. The three common law torts have been conversion, detinue and trespass. Actions for wrongful distress

and actions of replevin are largely based on trespass, or on conversion in the alternative, but in some cases of wrongful distress the liability has for centuries been purely statutory."

At Note 33-003 it is observed as follows:

"Detinue took a claimant beyond the confines of conversion in two respects: it gave him a marginally larger right, and a substantially larger remedy. The right made its appearance wherever goods bailed were lost or destroyed through the negligence of the bailee: this was detinue but not conversion. The remedial difference, on the other hand, applied across the whole gamut of the overlap between conversion and detinue: conversion was no more than an action for damages, detinue was primarily an action for the return of the goods."

33. In **Halsbury's Laws of India** - Vol.9 in Note 115.103 at page 103, it was observed as follows:

"Detention. In an action for detention, the value of goods must be assessed at the date of judgment in the

plaintiff's favour and not that of the defendant's refusal to return them. The plaintiff has the option to pursue either remedy (to sue either for wrongful conversion of the goods or wrongful detention) against a bailee as it suits him having regard to all the circumstances of the case and the bailee cannot take advantage of his own wrong and ask the plaintiff to choose a remedy which may be less beneficial to him. Though this is the normal rule, the courts have tried to soften its rigour by importing the consideration that the plaintiff should not be allowed to delay his action in order to get the advantage of a rising market. A successful plaintiff in an action for detention is entitled to have assessed (1) the value of the chattel on the date of assessment; and (2) damages up to that date separately. The proper measure of damages for wrongful detention of property is the difference between the value of the property when seized and its value when restored."

34. In **Halsbury's Laws of England** - Vol.12(1) - 4th Edn. at Note 862 at page 862 it is observed as follows:

"862. Damage to chattels; in general. Where chattels have been damaged or destroyed by conduct which constitutes a tort, the measure of damages depends on the general principles set out earlier in this title, and on the particular rules set out below and in succeeding paragraphs.

The basic rule is that the measure of damages in the case of damage to a chattel is the cost of repair, but if it is unreasonable from a business point of view to repair the article, or if the article is damaged beyond repair, then the basic measure is the cost of replacement in an available market. If there is no available market and it is reasonable to take steps to have a substitute made, the cost of the substitute may provide the measure of damages; if there is no market and the making of a substitute is unreasonable, it would seem that the measure of damages is the value to the plaintiff at the time of the loss.

Special circumstances replacing the market measure need not be intrinsic to the chattel but may result from the difficulty of obtaining a substitute or an urgent need for the chattel. Excessive expense in repairs may result from a bad bargain with the repairer even though the work itself is reasonable. Repairs should be such as are required to restore the former condition of the chattel, not an improvement on that condition. If the plaintiff effects the repairs, expenses and overheads which would not otherwise have been incurred may be included in the claim, but not if they would have been incurred in any event. If partial repairs are effected, the cost of these can be recovered, together with damages to cover the harm not made good. The fact that repairs have not been effected by the time of the trial, or that they are never carried out, is no obstacle to an award of damages based on an estimate. Unreasonable delay in effecting repairs which results in an increase in costs will be a failure to mitigate, but delay resulting from the need to wait for the approval of insurers, for payment of

insurance monies, or for the resolution of liability, has not been held to be unreasonable. Wasted expenses and standing charges can also be recovered, as can insurance excess and no claims bonus.

If an article is repaired, but its value is still less than its pre-accident value, the difference may be recovered. No deduction is to be made from damages if there is necessary betterment due to repair. If the defendant damages an already damaged chattel, and repairs required for the original damage also made good the secondary damage, the defendant does not incur liability."

35. In **Law of Damages and Compensation by C. Kameshwara Rao** - Vol. 3, it is mentioned that there are three modes by which one may be guilty of conversion. They are;

- 1) By wrongfully taking the articles,
- 2) By wrongfully detaining them and
- 3) By wrongly disposing them of.

In the above book, at page 2410 under Note 56, it is observed as follows:

"56. Damages on account of wrongful detention of chattel.- In the instant case the question is what is the plaintiffs loss; what damages he has suffered by the wrongful detention. The plaintiff has three options-

(a) For value of chattel assessed and damages for its detention.

(b) For the return of chattel or for recovery of its value as assessed and damages for its detention.

© For return of chattel and damages for its detention.

Proper amount of damages is the amount of pecuniary loss which plaintiff has been put to by the defendant's conduct. Loss beyond that represented by the market value of the goods may be incurred by the plaintiff through being deprived of use and whether he can recover. Such consequential loss turns on the principle of remoteness of damage. Expenditure in hiring a substitute is recoverable less expenses saved in not having to keep maintenance of the vehicle or otherwise plaintiff would be able to recover market rate of hire for the goods between

conversion and judgment certainly where plaintiff was in the habit of hiring out the vehicle and possibly where he was not, this loss being ascertained on the analogy of recovery of mesne profits in the case of detention of land."

36. In **Law of Torts by Ratanlal & Dhirajlal** - 25th Edition at page 446, under the caption 'Detention' says that detention is the adverse withholding of the goods of another. The remedy is specific recovery as well for damages. The author refers to Sections 7 and 8 of the Specific Relief Act which provides for recovery of movables articles. At page 447 under the heading 'Damages', it is observed as follows:

"Damages.- In an action of detinue the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff, must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendant's refusal to return the goods, and the same principle applies whether the defendant

has converted the goods by selling them or has refused to return them for some other reason. A successful plaintiff in an action for detinue is entitled to have assessed separately (i) the value of the chattel at the date of assessment and (ii) damages up to that date. The proper measure of damages for wrongful detention of property is the difference between the value of the property when seized and its value when restored. In an action for wrongful detention the plaintiff is entitled besides the re-delivery of the chattel or payment of its value in the alternative also to damages for such wrongful detention."

37. In law, there is a distinction between conversion and detention, even though distinction is very thin. In England, the issue of detention no longer subsists in view of Torts (Interference with Goods) Act, 1977. As far as India is concerned, the distinction still remains.

38. Damages cover any monetary award by a court or tribunal in respect of a wrong committed

against the claimant by the defendant, in order to compensate the claimant of measure or vindicate his interests. An action in damages presupposes a wrong. It may be commission or omission and wrongs are actionable in common law also. In almost all text books dealing with law of damages or torts, it can be seen that wrong committed in respect of movable property is separately dealt with.

39. In **law of damages by Prof. A. Tettenborn, David Willoy QC and Daniel Bennet** at page 277 under Note 14.47, it is observed as follows:

"Where a chattel is damaged, the owner has a right (subject as always to questions of mitigation and remoteness) to be put in the position he would have been if the damage had never been done. This means that a he can generally recover losses under three heads: the cost of reinstatement (or the diminution in value), other out-of-pocket expenses, and consequential losses. We deal with each in turn."

Of some relevance is Note 14.24 in the same book, which reads as follows:

"However such cases must be carefully distinguished from those where the question of replacement does arise. If the aid is put the claimant in *statu quo ante* by awarding the cost of replacing the chattel destroyed with either something identical or a near equivalent, there is no reason to limit consideration to the cost of replacement at the time of destruction. As with claims for the cost of repair, provided that the cost claimed is reasonable and that the claimant has not failed to mitigate his loss, it is submitted that the claimant should recover the cost of replacement as at the time of judgment (or, if earlier, when the expense was actually incurred)."

40. The question as to the time of valuation has come up for consideration before various courts. Usually 'but for test' is applied in case of conversion and detention. In the decision reported in **Kuwait Airways Corp. v. Iraqi**

Airways Co. ((2002) 3 All.E.R. 209), this aspect has been considered in detail. In the said decision, it was observed as follows:

"67. I have no hesitation in preferring and adopting this view of the present state of the law. The aim of the law, in respect of the wrongful interference with goods, is to provide a just remedy. Despite its proprietary base, this tort does not stand apart and command awards of damages measured by some special and artificial standard of its own. The fundamental object of an award of damages in respect of this tort, as with all wrongs, is to award just compensation for loss suffered. Normally (prima facie) the measure of damages is the market value of the goods at the time the defendant expropriated them. This is the general rule, because generally this measure represents the amount of the basic loss suffered by the plaintiff owner. He has been dispossessed of his goods by the defendant. Depending on the circumstances some other measure, yielding a higher or lower amount, may be appropriate. The

plaintiff may have suffered additional damage consequential on the loss of his goods. Or the goods may have been returned.

72. The need to have in mind the purpose of the relevant cause of action is not confined to the second, evaluative stage of the twofold enquiry. It may also arise at the earlier stage of the 'but for' test, to which I now return. This guideline principle is concerned to identify and exclude losses lacking a casual connection with the wrongful conduct. Expressed in its simplest form, the principle poses the question whether the plaintiff would have suffered the loss without ('but for') the defendant's wrongdoing. If he would not, the wrongful conduct was a cause of the loss. If the loss would have arisen even without the defendant's wrongdoing, normally it does not give rise to legal liability. In *Barnett v. Chelsea and Kensington Hospital Management Committee* (1968) 1 All.ER 1068, 1 QB 428 the night watchman's death did not pass this test. He would have died from arsenic poisoning even if the

hospital casualty department had treated him properly. Of course, even if the plaintiffs loss passes this exclusionary threshold test, it by no means follows that the defendant should be legally responsible for the loss.

73. This threshold 'but for' test is based on the presence or absence of one particular type of casual connection: whether the wrongful conduct was a necessary condition of the occurrence of the harm or loss. In Barnett's case the hospital's negligence was not a necessary element in the conditions which led to the watchman's death. He would have died anyway. In every many cases this test operates satisfactorily, but it is not always a reliable guide. Academic writers have drawn attention to its limitation: see, for example, the late Professor Fleming's *The Law of torts* and Markesinis and Deacon *Tort Law*. Torts over a wide field and may be committed in an infinite variety of situations. Even the sophisticated variants of the 'but for' test cannot be expected to set out a formula whose mechanical application will

provide infallible threshold guidance on casual connection for every tort in every circumstance. In particular, the 'but for' test can be over-exclusionary."

In paragraph 79, it was observed as follows:

"Some aspects of this rule have attracted criticism. Vindication of a plaintiff's proprietary interests requires that, in general, all those who convert his goods should be accountable for benefits they receive. They must make restitution to the extent they are unjustly enriched. The goods are his, and he is entitled to reclaim them and any benefits others have derived from them. Liability in this regard should be strict, subject to defences available to restitutionary claims such as change of position. See *Lipkin Gorman (a firm) v. Karpnale Ltd.* (1992) 4 All ER 512. Additionally, those who act dishonestly should be liable to make good any losses caused by their wrongful conduct. Whether those who act innocently should also be liable to make good the plaintiff's losses is a different matter. A radical re-appraisal of the rot of

conversion along these lines was not pursued on these appeals. So I shall say nothing more about it."

41. In the decision reported in **Hillesden Securities Ltd. v. Ryjack Ltd.** ((1983) 1 WLR 959) it was observed as follows:

"Secondly, in the case of a profit earning chattel, in the Strand Electric Case Denning L.J. Said, at p.225:

"If the goods are retained by the wrongdoer up to judgment, the hiring charge runs up to that time, and in addition the owner will get the return of the goods or their value at the time of judgment (Rosenthal v. Alderton & Sons Ltd.; but if the goods have been disposed of by the wrongdoer the hiring charge will cease at the time of such disposal, but the owner will get in addition damages for the loss he has sustained by the conversion, which is usually the value at the time of conversion."

The action in that case was in detinue and not conversion, but there will in almost all cases of detinue have been an

original act of conversion also and what was in effect held in that case was that, in the case of conversion of a profit earning chattel which a defendant has used for his own benefit, the owner can recover by way of damages a hire charge plus either the return of the chattel or, if there has been a subsequent conversion by disposal, the value of the chattel at the date of such conversion.

Thirdly, although damages for conversion normally consist in the value of the goods at the date of conversion, consequential damages are always recoverable if not too remote.

Finally, there is clearly no basis upon which damages could be assessed as being the value at the date of original conversion plus interest, for the car has in the end been returned."

42. In the decision reported in **General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.** ((1963) 1 WLR 644), a distinction was drawn between a cause of action in conversion and cause of action in detinue and the remedies available in

each of the cases. In that case, it was observed as follows:

"There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the conversion; the latter is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue. It is important to keep this distinction clear, for confusion sometimes arises from the historical derivation of the action of conversion from detinue sur bailment and detinue sur trover; of which one result is that the same facts may constitute both detinue and conversion. Demand for delivery up of the chattel was an essential requirement of an action in detinue, and detinue lay only when at the time of the demand for delivery up of the chattel made by the person entitled to possession the defendant was either in actual possession of it or was estopped

from denying that he was still in possession. Thus if there had been an actual bailment of the chattel by the plaintiff to the defendant, the latter was estopped from asserting that he had wrongfully delivered the chattel to a third person or had negligently lost it before demand for delivery up, and the plaintiff could sue in detinue notwithstanding that the defendant was not in actual possession of the chattel at the time of the demand. (See Jones v. Dowle 7; Reeve v. Palmer.⁸ Alternatively the plaintiff could sue in conversion for the actual wrongful delivery of the chattel to the third person, though not for its loss. In the absence of bailment, an unqualified refusal to comply with a demand for delivery up of a chattel made by the person entitled to possession may amount to conversion as an alternative to detinue if the defendant at the time of the refusal was in actual possession of the chattel. If he has wrongfully delivered it to a third person before the date of the demand and prior wrongful delivery constitutes the conversion, not the subsequent refusal to comply with the

demand. (See *Sachs v. Miklos*. 9 But even where , as in the present case, the chattel is in the actual possession of the defendant at the time of the demand to deliver up possession, so that the plaintiff has alternative causes of action in detinue or conversion based upon the refusal to comply with the demand, he has a right to elect which cause of action he will pursue (See *Rosenthal v. Alderton & Sons Ltd.* 10 and the remedies available to him will differ according to his election.

The action in conversion is a purely personal action and results in a judgment for pecuniary damages only. The judgment is for a single sum of which the measure is generally the value of the chattel at the date of the conversion together with any consequential damage flowing from the conversion and not too remote to be recoverable in law. With great respect to the dictum of Goddard L.J. In *Sachs v. Milos* 11 this is not necessarily the same as the measure of damages for detinue where the same act constitutes detinue as well as conversion, although in many cases this will be so. This dictum was based upon the

headnote to *Rosenthal v. Alderton & Sons Ltd.* 12 which, in my view, misrepresents the effect of the last paragraph of the actual judgment. The law in in my view correctly stated in *Salmond on Torts*, 13th ed., pp.287 and 288. Notwithstanding that judgment for damages for conversion does not, until satisfied, divest the plaintiff of his property in the chattel (see the analysis of the cases in *Ellis v. John Stenning & Son*13, it does not entitle the plaintiff to the assistance of the court or the executive, videlicet the sheriff, in recovering possession of the chattel.

On the other hand the action in detinue partakes of the nature of an action in rem in which the plaintiff seeks specific restitution of his chattel. At common law it resulted in a judgment for delivery up of the chattel or to pay its value, and if the plaintiff wished to insist on specific restitution of the chattel e had to have recourse to Chancery. (See *In re Scarth*, 14 per Mellish L.J. 15 *The Common Law Procedure Act, 1854*, s. 78, gave the court power to order delivery up of the chattel by the defendant without

giving him the option to pay its value as assessed. Such an order was enforceable by execution, and if the chattel could not be found distraint could be had upon the defendant's lands and goods until he delivered up the specific chattel, or at the option of the plaintiff distraint could be had of the defendant's goods for the assessed value of the chattel. This, in effect, where the court thought fit to make such an order, gave the plaintiff an option to insist upon specific restitution of his chattel if the defendant did not deliver it up voluntarily; but this remedy was not available unless and until the value of the chattel had been assessed. (See *Chilton v. Carrington*.¹⁶ This remedy continues to exist under the modern law, but if the plaintiff does not wish to exercise his option to recover the assessed value of the chattel the assessment of its value is no longer a condition precedent to an order for specific restitution. (See *Hymass v. Ogden* 17; R.S.C., Ord. 48, r.1) In addition to an order for specific restitution of the chattel or for payment of its value as assessed, the plaintiff was

always entitled to damages for wrongful detention of the chattel.

In the result an action in detinue today may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and damages for its detention; or (2) for return of the chattel or recovery of its value as assessed and damages for its detention; or (3) for return of the chattel and damages for its detention."

43. The issue had come up for consideration before the Apex Court in the decision reported in **Dhian Singh Sobha Singh v. Union of India** (AIR 1958 SC 274). Noticing the distinction between conversion and detention and the remedies available in respect of each of them, in paragraphs 24, 50, 52 and 53, it was observed as follows:

"24. It is clear therefore that a bailor in the event of the non-delivery of the goods by the bailee on a demand made by him in that behalf is entitled at his election to sue the bailee either for wrongful conversion of the goods or the

wrongful detention thereof and if the bailor pursues his remedy against the bailee for wrongful detention of the goods it would be no answer for the bailee to say that he was guilty of wrongful conversion of the goods at an earlier date which fact of conversion of the goods the plaintiff knew or ought to have known at or about that time and is therefore not liable to the plaintiff for wrongful detention thereof. It is the option of the plaintiff to pursue either remedy against the bailee just as it suits him having regard to all the circumstances of the case and the bailee cannot be heard to say anything to the contrary for the simple reason that he cannot take advantage of his won wrong and cannot ask the plaintiff to chose a remedy with may be less beneficial to him.

50. It follows from the above that the position in law in regard to the measure of damages in an action for wrongful conversion is far from clear and the law in regard to the same cannot be said to be perfectly well settled. Whatever be the position in regard to the same in actions

for wrongful conversion, one thing is quite clear that in actions for wrongful detention the measure of damages can only be the value of the goods as at the date of the verdict or judgment. The tort is complete the moment the goods are wrongfully converted by the defendant and no question can arise in those cases of any continuing wrong. In a case of wrongful detention, however, the cause of action may certainly arise the moment there is a refusal by the defendant to re-deliver the goods on demand made by the plaintiff in that behalf. But even though the cause of action thus arises on a refusal to re-deliver the said goods to the plaintiff the wrongful detention of the goods is a continuing wrong and the wrongful detention continues right up to the time when the defendant re-delivers the goods either of his own violation or under compulsion of a decree of the Court. There is moreover this distinction between actions for wrongful conversion and those for wrongful detention that in the former the plaintiff abandons his title to the goods and claims damages from the

defendant on the basis that the goods have been wrongfully converted by the defendant either to his own use or have been wrongfully dealt with by him. In the latter case, however, the plaintiff asserts his title to the goods all the time and sues the defendant for specific delivery of the chattel or for re-delivery of the goods title bailed to him on the basis that he has a title in those goods. The claim for the re-delivery of the goods by the defendant to him is based on his title in those goods not only at the time when the action is filed but right up to the period when the same are re-delivered by the defendant to him. The wrongful detention this being a tort which continues all the time until the re-delivery of the goods by the defendant to the plaintiff, the only verdict or judgment which the Court can give in actions for wrongful detention is that the defendant do deliver to the plaintiff the goods thus wrongful detained by him or pay in the alternative the value thereof which can only be ascertained as on the date of the verdict or judgment in favour of the

plaintiff.

52. It is, therefore, clear that in actions for wrongful detention the plaintiff is entitled on default of the defendant in re-delivering the goods to him, to payment in the alternative of the value of the goods thus wrongfully detained as at the date of the verdict or judgment, in other words, at the date of the decree. We are, therefore, of opinion, that the appellants were entitled to recover from the respondent the value of the said trucks which, as has been already stated, was Rs. 7,000 in the alternative on default committed by the respondent in redelivery of the same to the appellants.

53. The next question to consider is what damages are the appellants entitled to recover from the respondent by reason of the wrongful detention of the said trucks from August 1, 1942, up to the date of the decree. It is well settled that in an action for wrongful detention the plaintiff is entitled besides the re-delivery of the chattel or payment of its value in the alternative, also to damages for such wrongful detention. There is

however no definite criterion laid down by the decided cases as to what the measure of such damages should be. As was observed by Denning L. J. in *Strand Electric and Engineering Co., Ltd. v. Brisford Entertainments*, 1952-2 QB 246 at p. 253 (X) :

"The question in this case is: What is the proper measure of damages for the wrongful detention of goods? Does it fall within the general rule that the plaintiff only recovers for the loss he has suffered or within some other, and if so what, rule? It is strange that there is no authority upon this point in English law : but there is plenty on the analogous case of detention of land. The rule there is that a wrongdoer, who keeps the owner out of his land, must pay a fair rental value for it, even though the owner would not have been able to use it himself or to let it to anyone else. So also a wrongdoer who uses land for his own purpose without the owner's consent, as, for instance, for a fair ground, or as a way-leave, must pay a reasonable hire for it, even though he has done no damage to the land at all :

Whitwham v. Westminster Brymbo Coal Company, (1896) 2 Ch 538 (Y). I see no reason why the same principle should not apply to detention of goods."

44. From the above materials, the remedies available to an aggrieved person in case of detention become very clear. Going by the above decisions he is entitled to the value of articles till the date of judgment and also to damages.

45. It is here one may recall that the expert commissioner had assessed the value at Rs.69,22,603/- as in 1988. It has already been noticed that this Court found no reason to interfere with that assessment and mode of valuation. However, this Court was of the opinion that depreciation had to be calculated and the decree holder is not entitled to the entire amount. In this regard, it will be useful to refer to the supplementary or additional commission report dated 6.3.1990. At page 29 in paragraph 15 - Checking and Abstract of Values, in column F, it is shown as

the figures arrived at in Stt.LXIII(a), (b) and © are for value of missing items at 36,04,299 as in March, 1988. Going by the principle laid down above, that valuation has to be taken and depreciation has to be calculated on that amount. For the purpose of calculating the amount due, the amount of Rs.36,04,299/- is rounded as Rs.36,04,300/-. It is reasonable to adopt 15% of depreciation value which works out to Rs.36,04,300 x 15/100 = 5,40,645/-. Deducting that amount, the amount due to the contractor will be Rs.30,63,655/-.

46. From the literature referred to above, in addition to the above amount, the decree holder is entitled to damages also under various heads. It has necessarily to be to certain extent is speculative in nature. But it has to be just, reasonable and fair. In the facts and circumstances of the case, it is felt that a sum of Rs.7,50,000/- would be adequate compensation for

the damages suffered by the contractor. The total amount comes to Rs.38,13,655/-.

In the result, this Civil Revision Petition is allowed, the impugned order is set aside and the decree holder is allowed to realize Rs.38,13,655/- with 12% interest from 1.4.1988 till 27.8.1991 and thereafter at the rate of 6% till realization from the judgment debtor, K.S.E.B. Amount, if any, deposited and interest paid shall be adjusted towards the amount allowed to be realized as per this order.

sb.

P. BHAVADASAN,
JUDGE