(1969) 07 MAD CK 0027

In the Madras High Court

Case No : Second Appeal No. 940 of 1965 etc.

Arunachala Gramani and Others — APPELLANT

Vs

Bijairaj Sowcar and Others — RESPONDENT

Date of Decision : 15-07-1969

Acts Referred:

Contract Act, 1872 — Section 73
Transfer of Property Act, 1882 — Section 60, 65
Trusts Act, 1882 — Section 90

Citation : (1969) 07 MAD CK 0027

Hon'ble Judges : Ramamurti, J

Bench : Single Bench

Advocate : M.S. Venkatarama Iyer, for K. Swamidurai, for the Appellant; R. Desikan, for C. Natarajan and C.N. Sivakumar, for the Respondent

Judgement

Ramamurti, J.—The Plaintiffs are the Appellants in this second appeal. One Govindaraja, the father of the Plaintiffs had executed a usufructuary mortgage, exhibit A-1 dated 15th February, 1933 in favour of one Bijairaj Sowcar, the first Defendant In the suit for a sum of Rs. 1,500/- over properties comprising of three items, 4.36 acres in S.F. No. 174/2, 3.09 acres in S.F. No. 175 and 1.79 acres in S.F. No. 176. The mortgage deed expressly provides that the mortgagee should pay kist for these three items. The Plaintiffs filed the suit on 21st January, 1958 for redemption, depositing a sum of Rs. 250 into Court, their contention being that under the Madras Debt Relief Act, the balance of the principal amount of Rs. 1,250/- had been wiped out as the mortgagee was in possession throughout. The second Defendant is a prior mortgagee and no further reference need be made to him. The first Defendant filed a written statement on 5th March, 1958, contending (inter alia) that there was a lease back of the property to the mortgager and the mortgager should have paid the kist and the properties were sold in revenue auction on account of the mortgager''s default, that the first Defendant purchased items 2 and 3 from the purchaser who had purchased the property in the revenue auction, that the first item was purchased in the revenue sale by one Kesarimull Sowcar, that Kesarimull as purchaser obtained possession of the first item and later on had sold it to some other person and that the latter was in possession of it. The substance of the defence was that the first Defendant was in possession of the items 2 and 3 in his own right and that the first item was in the possession of some other third party whose name was not mentioned in the written statement. An ex parte preliminary decree was passed for redemption and possession on 31st March, 1959, and the Plaintiffs were put in possession. The ex parte decree was set aside on proceedings taken for that purpose and a direction was given in those proceedings that the Plaintiffs will continue to be in possession till the disposal of the suit. It is at this stage that the Plaintiffs came to know that the third Defendant (one Rickab Chand) was making a claim that he was in possession, of the property in pursuance of purchase from Kesarimull alleged to be the purchaser in the revenue auction on 30th June, 1938. Rickab Chand Sowcar, was subsequently impleaded as the third Defendant, on application made by the Plaintiffs and the Plaintiffs also amended the plaint adding a separate paragraph 8-A. In the affidavit filed in support of the application to implead the third Defendant as well as in the amended plaint, the Plaintiffs have alleged that the revenue sale was only a dummy for the first Defendant and that even Kesarimull the alleged purchaser in the revenue sale was an alias or dummy for the first Defendant and that the first revenue sale in favour of Kesarimull and the subsequent sale by Kesarimull in favour of the third Defendant were all fraudulent, collusive and bogus transactions, all resorted to defeat the rights of the Plaintiffs and to clandestinely secure the property for the first Defendant. After the third Defendant was impleaded, the Plaintiffs, first Defendant and the third Defendant filed supplemental pleadings and rejoinder, the Plaintiffs reiterating their stand that the third Defendant was a dummy and a name lender and a creature of the first Defendant while the case of Defendants 1 and 3 being that as a result of the revenue sale in 1938, Kesarimull the first purchaser was in possession of item 1 as owner with patta in his name and was paying kist throughout and that after the third Defendant purchased the property from Kesarimull under exhibit B-4 dated 25th March, 1957 for Rs. 1,000/- the third Defendant has been in possession of the property and also has been paying kist.

2. Exhibit B-1, the proceedings in the revenue sales shows that item 1 of an extent of 4 acres 36 cents was brought to sale for the recovery of a petty sum of Rs. 1-2-0 and was purchased by one Kesarimull Sowcar for Rs. 90/- and the revenue sale was confirmed on 30th June, 1938. Under exhibit B-4 dated 25th March, 1957, this Kesarimull has sold the property to the third Defendant for a sum of Rs. 1,000/- expressly referring to the revenue sale as the root of title of Kesarimull. On behalf of the Defendants the first Defendant''s agent was examined as D.W. 1, the first Defendant''s son as D.W. 2 and Kesarimull as D.W. 3. Neither the first Defendant nor the third Defendant gave evidence. Both the Courts have concurrently found that the arrangement of lease back relied upon by the Defendants was wholly false and that if there had been any revenue sale,

it was solely due to the default and the negligence of the first Defendant. The trial Court found that the case of the first Defendant that items 2 and 3 were also sold at the revenue auction and were purchased by one Jugraj Sowcar and that subsequently the first Defendant purchased from this Jugraj Sowcar was equally false. No documentary evidence was placed to establish the revenue sale of items 2 and 3. Jugraj Sowcar was not examined. No sale certificate was filed and a perusal of the judgment of the Courts below shows that this plea of the first Defendant concerning items 2 and 3 was thoroughly dishonest and that the first Defendant himself could not have had the slightest faith in that case. I may also add, the finding of the trial Court that there was no revenue sale of items 2 and 3 was not challenged before the Lower Appellate Court nor before me. The result is that the Plaintiff is entitled to a decree for redemption and possession of items 2 and 3, there being no appeal by the first Defendant.

3. In the second appeal we are only concerned with Stem 1, survey number 174/2 of an extent of 4.36 acres. The findings of the Courts below that there was no lease back, that as per the terms of the deed of mortgage, the first Defendant should have paid the kist and that the revenue sale of item 1 for arrears of revenue was solely due to the default and culpable negligence of the first Defendant was not questioned. The Courts below, however, refused the relief of redemption and possession of item 1 on the ground that the first purchaser Kesarimull was a bona fide purchaser at the revenue sale, that he acquired good title and that he was in possession of the property in his right and that the third Defendant who purchased the property from Kesarimull equally acquired a good and valid title as against the Plaintiffs.

4. On the findings of the Courts below, it is obvious that even assuming that Kesarimull acquired a good title at the revenue sale, the Plaintiffs should have been awarded a decree for damages as against the first Defendant representing the value of item I, because on redemption, it was his obvious duty as a mortgagee to restore back possession of the property failing which he is bound to reimburse the Plaintiffs with regard to the value of the property. Learned Counsel for the first Defendant did not and could not support the total dismissal of the Plaintiffs'' suit and he fairly conceded that the Plaintiffs will be in any event entitled to a decree for money against the first Defendant, but on the question of the value of the property his contention was that the value, or the measure of damages, should be ascertained as on the date of mortgage or in any event only as in 1959, when in pursuance of the ex parte decree the Plaintiffs obtained possession of the property. The fact that the Plaintiffs did not make an alternative claim, till now, cannot affect their legal right because they can fight till the end, to recover possession of the property from the third Defendant, and if they finally failed, in their attempts, they are at that stage entitled to ask for the alternative relief of damages as against the mortgagee the first Defendant. The suit for redemption is still pending and even if the third Defendant were to succeed, the Court will have ample jurisdiction to work out the rights and obligations of the mortgagee in this suit. Indeed the law does not permit or

contemplate separate suits between the mortgagee and the law compels both the parties to work out all their rights in one single suit, that there should be a final single account taken between the mortgager and the mortgagee in respect of all matters and equities till a final decree for redemption is passed, even if it be that between the preliminary decree and the final decree some events have happened giving rise to fresh equities. My attention was drawn to a decision of a Bench of this Court of which I was a member, reported in Kanakaraj v. Sundararaja ILR [1968] Mad. 152. This Bench decision on the point has pointed out that the nature of the account between a mortgager and mortgagee is one single integrated account, that the suit brought by either of the parties should comprise all the reliefs and should afford a ground for a final decision and that neither of the parties could be harassed by a plurality of Court proceedings in respect of matters arising out of the same mortgage. Multiplicity of proceedings between the mortgager and the mortgagee is discountenanced and law does not permit piecemeal or truncated litigations reserving the adjudication of a dispute for future occasions. The procedural law regarding litigations between mortgagor and mortgagee is very strict and insists upon a final and complete settlement of claims and rights between them up to the moment of the final decree whether in a suit for sale or in a suit for redemption and every claim either by way of defence or set off or a counter claim or even an original claim of the Plaintiff should be made in the suit itself. In this view it is clear that the liability of the first Defendant, if any, for restitution will have to be decided and relief awarded to the Plaintiffs. Learned Counsel for the first Defendant did not contend anything to the contrary in view of this established position of law.

5. I may refer to the Bench decision of the Bombay High Court in Anandrao Purshottam v. Bhikaji Sadashiv I.L.R (1992).46 Bom. 218.

In that case, the mortgage was one with possession and on account of the negligence of the mortgagee some of the items were lost and the mortgagee was not in a position to restore possession. The appellate Court did not afford any relief to the mortgager in the view that the question whether third parties have acquired indefeasible right by adverse possession in respect of those items could not be decided in the suit for redemption and that the claim for restitution against the mortgagee will have to be agitated in a separate suit. The High Court did not agree with this view. It was held that a mortgager is not bound to file separate suits against persons in possession and then obliged to have recourse to the mortgagee for damages if the mortgagor failed to get possession and that the liability to account for the value of the properties, if the mortgagee failed to give possession of the lands should and ought to be deckled in the same suit. It was pointed out that it would be in the interest of the mortgagee to arrange with the third parties who are in possession to restore possession to the Plaintiffs and if that was not done the mortgagee should be liable - vide statement of the law in Mulla''s Transfer of Property Act, fifth edition at pages 429 and 430.

6. I will first consider the question whether the subsequent sale by Kesarimull to

the third Defendant are fraudulent and collusive and that Kesarimull and the third Defendant are merely dummies and name lenders of the first Defendant. It is impossible to accept the findings of the Courts below as their entire perspective of approach is wrong. From my discussion above, I have no hesitation in holding that (independently of the additional evidence, i.e. even if it is not received), there is ample evidence to prove that Kesarimull and the third Defendant were mere benamidars for the first Defendant.

7. An argument was advanced that even if the third Defendant is a benamidar and an alias for the first Defendant, the Plaintiffs will not be entitled to recover possession of the property if it should be held that Kesarimull was a bona fide purchaser. The contention is that before the property ultimately gets into the hands of the mortgagee there has been a valid revenue sale in favour of Kesarimull extinguishing the title of the mortgagor and his right of redemption. The fact that later on, the property (which was freed from the claim of redemption) was purchased by the mortgagee himself would not revive the mortgagor''s right of redemption. I have already held on facts that Kesarimull is an alias and a dummy for the first Defendant. Even assuming that he is a bona fide purchaser and had an independent title that would not affect the rights of the Plaintiffs and I see no substance is the contention urged by the first Defendant.

8. It is settled law (and does not require an elaborate citation) that if the mortgagee commits default in the payment of the revenue and he himself purchased the land, the right of redemption is not extinguished. Reference may be made to the latest decision of the Supreme Court in Basmati Devi Vs. Chamroo Sao and Others, is all the cases Section 90 of the Trust Act and the principle underlying therein has been applied and it was held that the mortgagee, the wrong-doer, cannot take advantage of his own wrong and despite the revenue sale the mortgage would still be regarded as subsisting. The question is whether it makes any difference when at the revenue sale which no doubt was due to the default and culpable negligence of the mortgagee the property was purchased by a stranger and from that stranger the mortgagee later on purchased this property. That would not make any difference at all. This question came up for direct decision in the case of a mortgagor in Sanagapally Lakshmayya v. Intoory Bolla Reddy I.L.R.(1902) Mad. 385. u/s 65(c) of the Transfer of Property Act, it was the duty of the mortgagor to pay public revenue accruing due on mortgaged land when it continues in his possession. He failed to perform that duty and the land was sold for arrears of revenue and the purchaser at the revenue sale sold the land to the original mortgager. It was held that the mortgagee will be entitled to enforce rights against the property subsequently purchased by the mortgager. It is sufficient to set out the following portion of the head note:

A man cannot be allowed to take advantage of his own wrong, and notwithstanding that the land might have vested in the purchaser at the revenue sale free of the mortgage, the original mortgager (or his son), on his purchase from the auction purchaser, cannot plead, for his own benefit, that by reason of such wrong there has been a statutory extinction of the original mortgage.

The principle of this decision has been applied to cases in which the mortgagee by his own default first allowed the property to be sold for arrears of revenue and later on bought that property himself. I may refer to the decision of Viswanatha Sastri, J. in A. Thulasi Bai Ammal Vs. Punapakk in Ramakrishnappa Nattan and Others , in which the learned Judge had rejected the argument that on account of the revenue sale the title of the mortgager was extinguished and that when the property was purchased by the mortgagee it was under a different root of title i.e. the revenue sale and that the property was free from the obligation for redemption - vide observations at page 433. The same principle has been applied in cases in which the property was sold on account of the mortgagee fraudulently defaulting to pay the rent due to the landlord and later on acquiring a fresh grant from the lessor. I may refer to the decision of the Patna High Court in Subedar Rai Vs. Bachai Pandey, in which this principle was applied. Reference may be made to the following observations:

His possession during this period was undoubtedly that of the mortgagee and immediate settlement before the next harvest season taken by him from the landlord is an indication of his complicity with the rent sale. Another significant fact to be borne in mind is that he took the settlement of 1 bigha 15 kathas exactly representing the same land which he had taken as mortgage security, although the land sold in rent sale was more than that. These facts, in my view, which have been lost sight of by the Courts below, go a long way to show that not only the Defendant mortgagee defaulted in discharging his obligation to pay the rent but he did so in order to bring about the sale, so that he may gain advantage for himself.

To the similar effect is the latest decision of the Kerala High Court reported in (Ittiyil Valia Veettil Puthen, Vettil) Parukutty Amma and Others Vs. (Perumangat Kunhi Othru Amma Son) Govinda Kurup and Others, . In that case the mortgagee committed default in payment of michavaram and renewal fee to jenmi. Jenmi recovered possession of property by obtaining a decree and the mortgagee got possession under a fresh kanam document from jenmi. It was held that the mortgagor was entitled to redeem. The learned Judge has observed as follows (at page 51)

The Plaintiff was wronged by the mistake of the first Defendant. Exhibit B-5 could have been averted by the first Defendant paying the arrears of michavaram and renewal fee and taking a renewal of the kanam when the jenmi made demand. That was not done. It is not now open to the first Defendant to turn round and say that the Plaintiff has lost his right to redeem. The fact that the first Defendant was dispossessed in execution of exhibit B-5 fad subsequent thereto he took exhibit B-1 kanam from - the jenmi cannot in my view alter the position. In Kamala Kanta and Others Vs. Ananda Chandra Chakraburty and Others, , a

Bench of the Calcutta High Court held that the mortgagees cannot by suffering dispossession and having taken new title from the landlord affect the mortgagors in the property of which they were put into possession under the mortgage. In Tali Mahton and Others Vs. Lekhraj Mahton and Others, it was observed:

The mortgagee being In possession had a certain duty towards the mortgager and it was his clear duty to maintain his possession as against the landlord. He could not by suffering dispossession put an end to the tenancy and then proceed to take a settlement of the land from the landlord.

The above two decisions established the proposition that when once the land comes back to the mortgagee it is immaterial by what process of law the landlord obtained possession.

I may also refer to the following observations of Scott C.J., in a similar situation in Chhita Bhula v. Bai Jamni I.L.R.(1916) 40 Bom. 483 :

The argument also appears to us to be slightly circuitous, because ex-hypothesi it is by reason of his default as mortgagee, and by his improperly availing himself of his position as mortgagee that the sale has taken place. How then can it be said that he is to obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee through his fraudulent action as mortgagee?

Reference may also be made to the following statement of law in Lewin on Trusts, sixteenth edition, at page 657:

But if the trustee sells land to bona fide purchaser without notice and, subsequently, himself becomes the owner of the land, though for a good and valuable consideration, the trust revives again as to him and he is bound to restore the land to the trust, the only exception to the rule which protects a purchaser with notice taking from a purchaser without notice, is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a bona fide purchaser without notice, and has got it back again.

9. For all these reasons, i.e., (a) first Defendant is guilty of wilful default and fraudulent conduct and the revenue sale will not affect the right of redemption of the Plaintiffs; (b) Kesarimull and the third Defendant are merely dummies and benamidars for the first Defendant and (c) even if Kesarimull is an innocent bona fide purchaser, the third Defendant being a dummy and name lender for the first Defendant, the Plaintiffs will be entitled to redeem and recover possession of the property.

10. I shall next consider the question of the measure and quantum of damages to which the Plaintiffs would be entitled if for any reason they should be denied the relief of possession of item 1. Mr. M.S. Venkatararaa Iyer, learned Counsel for the Appellants drew my attention to some decisions in which the measure of damages in the case of breach of covenant of title on the part of the vendor

came up for decision and was held that the vendee will be entitled to the value of the property as on the date when he was dispossessed by a paramount title. The argument that the damages would only be the price paid by the purchaser of the value of property on the date of the sale or that the purchaser is not entitled to the value of improvements he had effected was not accepted in all these cases and it was held that the purchaser will be entitled to be but in the same position, in terms of money, which he would have occupied but for the eviction by title paramount. The principle of Section 73 of the Contract Act was applied and damages were awarded on the basis of the hands of the purchaser at the time of eviction. In other words, the amount which the purchaser would require to purchase similar property in the market, was regarded as the proper measure of damages. So far as this position is concerned, the law is well settled.

11. In Dhadha Sahib v. Muhammad Sultan Sahib I.L.R.(1920) Mad. 167, the Bench held that in assessing the damages the vendee would be entitled to ask that damages should be assessed at the enhanced value of the lands. I may also refer to the Full Bench decision of this Court in Adikesavan Naidu v. Gurunatha Chetti I.L.R(1916) Mad. 338 (F.B.), in which, in relation to the contracts concerning immovable properties, the principle underlying Section 73 of the Contract Act was applied on the question of the measure of damages. All these cases are considered in a decision in (Yella) Ramayya and Others Vs. (Chukkapalli) Kotayya and Others, where it was held that the principle of Section 73 of the Contract Act would apply to the measure of damages and the vendee would be entitled to full market value of the property on the date of the eviction with all the accretions and improvements. There is no need to refer to further cases and it is sufficient to refer to the latest decision of Natesan, J. In Kalyani v. Ezumalai ILR [1968] Mad. 548 in which the learned Judge has discussed the entire case law and has held that when the purchaser is evicted, the measure of damages is the market value of the land at the time of eviction. The principle of the above decisions has to be applied with a slight modification based upon the obligation of the mortgagee bearing in mind that the right of the mortgager is essentially a claim for restitution. u/s 60 of the Transfer of Property Act, at the time of the redemption, it is the duty of the mortgagee in possession to deliver possession of property to the mortgager, and necessarily restitution in terms of money will have to be ascertained with reference to the date of default, i.e., the date of the judgment which directs the mortgagee to deliver possession and which direction the mortgagee is unable to comply with whatever may be the reasons. The mortgager has his own time to redeem and he cannot be compelled to redeem earlier. He is entitled to recover possession of the property at the time of redemption whenever he exercises that right and the loss to him is the value of the property as on the date when the Court holds the mortgager is entitled to possession. In the instant case, the value of property will have to be determined as on the date of the judgment of this Court because till now the mortgager has been making every effort to recover possession of the property by trying to establish that the third Defendant is a benamidar. The mortgagee is a wrongdoer

and he has no right to compel the mortgager to elect his remedies earlier. It is only on the date when the mortgager ultimately fails to recover possession that he can claim the alternate relief of damages or restitution. The question of the right of the mortgager for damages, in the alternative was not considered by the Courts below because the mortgager has been trying to establish his right to the possession of the property. If this Court ultimately denies him that relief, it is then that he becomes entitled to the relief of damages, and for that purpose, this Court will have to send the case back to the trial Court for ascertaining the value of the property as on this date because it is a suit for redemption.

12. I may refer to the decision in Rosenthal v. Alderton & Sons Ltd. [1946] 1 K.B. 374, which deals with the question of the date on which the value of the goods should be ascertained in an action for detinue, and it is sufficient to set out the following head note:

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.

The argument that the value of the goods as on the date of demand by the Plaintiff for delivery of the goods and refusal by the Defendant would be the relevant date for assessing the damages was rejected in the following terms at pages 378 and 379:

In our judgment an assessment of the value of the goods detained (and not subsequently returned) at the date of the accrual of the cause of action (i.e., of the refusal of the Plaintiff''s demand) must presuppose that on that date the Plaintiff abandoned his property in the goods; and such a premise is inconsistent with the pursuit by the Plaintiff of his action of detinue. The significance of the date of the refusal of the Plaintiff''s demand is that the Defendant''s failure to return the goods after that date becomes and continues to be, wrongful. Moreover the Plaintiff may recover damages in respect of the wrongful detention after that date, e.g., where the Plaintiff has suffered loss from a fall in value of the goods between the date of the Defendant''s refusal and the date of actual return see William v. Archer 136 E.R. 899 and such damages must equally continue to run until the return of the goods or (in default of return) until payment of their value. There is (as appears from the forms of judgment already mentioned) a clear distinction between the value of the goods claimed in default of their return and damages for their detention, whether returning or not. The date of the refusal of the Plaintiff''s demand is the date from which the latter commence to run, but appears to be irrelevant to the former and cannot convert a claim for the return of the goods into a claim for payment of their value on that date.

The Defendants finally submitted that in any event the value, of certain of the goods which they had in fact sold could not be assessed at any higher value than at the date of sale. In other words they say "We have proved that we converted some of your goods and therefore we can have the benefit of any lower value prevailing at the date of conversion. It is, however, dear that it is no answer for a bailee, when sued in detinue, to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor of. Wilkinson v. Verity (1871) L.R. 6 C.P. 206. It seems to us that the Defendants are, in effect, saying Your real remedy is in conversion. But the bailor can, in such circumstances, elect to sue in detinue (at any rate where he was not aware of the conversion at the time), and there is no reason why the value of the goods in fact converted should be assessed on a different basis from the value of the goods which the bailee has not converted but which for some other reason he fails to re-deliver.

I may next refer to the decision in Sachs v. Miklos [1948] 2 K.B. 23. In that case a gratuitous bailee who was keeping certain furniture sold the furniture, as the bailee required space taken up by the furniture, after sending two letters to the bailor, the Plaintiff in the action. The letters did not reach the Plaintiff but the Defendant, the gratuitous bailee under the impression that the letters reached the Plaintiff but the Plaintiff did not evince any interest in the matter, sold the goods through a firm of auctioneers, after making some unsuccessful attempts to inform the Plaintiff through phone. Long afterwards when the Plaintiff came to know of the sale he brought the action for the value of the furniture. It was held that the Plaintiff would be entitled to the increased value of the furniture between the date of sale and the Plaintiff''s discovery of the same. Lord Goddard C.J., has stated the law thus:

If a man does not know that his property is being sold, so that he cannot intervene and stop the sale, he may, when he does find out, be able to maintain that his property has been disposed of without any authority from or notice to him, and claim damages on the basis of its increase in value. That, in my opinion, is how the measure of damage works out.

The observation extracted above will have to be applied with a further qualification-in the instant case. The Plaintiffs were not aware of the revenue sale till they impleaded the third Defendant. Further in the instant case it cannot be said, against the Plaintiffs that their title to the property should be deemed to have once for all been lost when they were informed of the purchase by the third Defendant. In the above case the auction of the furniture put an end to the right Of the Plaintiff to recover the furniture in specie and his only remedy was to sue for damages. In the instant case, the situation is totally different. The Plaintiffs could be said to have lost title to the property only when this Court finally holds that the third Defendant has acquired indefeasible title and it is only on that date the Plaintiff becomes entitled to the value of the property.

13. I may next refer to the decision in Munro v. Willmott [1949] 1 K.B. 295. In

that case the Defendant acted as a gratuitous bailee for keeping the motor car of the Plaintiff. As the Defendant required the space for some other purpose, the motor car was an obstacle to him and so after some unsuccessful efforts to inform the Plaintiff, he, made certain repairs to the car to make it saleable and ultimately sold the car. The Plaintiff sued the Defendant for damages for detinue and conversion and it was held that the Plaintiff will be entitled to damages on the basis of the value of the car on the day of tile judgment, of course, subject to an obligation to reimburse the Defendant in respect of monies spent by him for repair and improvement of the car. All the earlier decisions were discussed and it was held that the damages should be assessed as those which the Plaintiff had suffered by reason of the fact that the Plaintiff had been deprived of the property or by its detention up to the date of the judgment.

14. I may next refer to the decision of the Supreme Court in Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI), in which all these English decisions were considered and it was held that the Plaintiff would be entitled to elect his remedy and that the keeping of the Plaintiff''s property by the Defendant would amount to a tort which continues all the time until redelivery and that the measure of damages will be the value of the goods, as on the date of the verdict or judgment by the Court. The action of detinue is based upon wrong detention of the Plaintiff''s property by the Defendant, evidenced by a refusal to deliver upon demand. It was observed that if a bailee unlawfully or negligently loses or parts with possession, he the bailee cannot get rid of his contractual liability to restore the bailor''s property on the determination of the bailment and if he fails to do so, he may be sued in detinue and the Plaintiff will be entitled to either delivery of the property or payment of value as on the date of judgment. That case dealt with a case of bailment of motor trucks. The principle of that decision will apply in the case of a mortgagee with possession. In the case of bailment it is the entrustment of movables like trucks, goods, etc. A pledge, where possession of the property is given to the pledgee, is in one sense a bailment and when the pledgee allows the property to be sold or lost through his negligence and when the pledger seeks to recover possession of the pledged goods, the principle laid down by the Supreme Court would apply, i.e., the pledger will be entitled to enhanced value of the goods as on the date of the judgment, the Defendant being guilty of a tort and the Plaintiffs right being an action for detinue. The Supreme Court has pointed out that even though the Plaintiff the pledger may have come to know that the goods were lost or were converted, the right to elect whether to sue the Defendant for damages for conversion or to sue for damages for the wrongful detention, as an action of detinue, is that of the Plaintiff and it is not open to the Defendant a wrong doer to compel the Plaintiff to elect to sue for damages on the basis of conversion. If this is the liability with reference to bailment, of movables, I do not see any reason why the same principle should not be applied in the case of a mortgage with possession, the object being the same, to secure the loan advanced to the mortgager or bailor as the case may be. I may refer to the following observations

at page 280:

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 own wrong and cannot ask the Plaintiff to choose a remedy which may be Jess beneficial to him.

After an elaborate review of the cases, the position, was summed up by the Supreme Court as follows at pages 286 and 287:

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 value of 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 redeliver 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 volition 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 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 thus being a tort which continues all the time until the redelivery 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 wrongfully 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.

The above observations apply a fortiori to an action for redemption of immovable property when it is only by reason of the decision of this Court the Plaintiffs title to recover the property could be said to be lost and it is only on that date the Plaintiffs should be given restitution.

15. The litigation is about twelve years old now and any remand to the trial Court for ascertaining the value of the land would only protract proceedings. Further, the property is very near Kodambakkam, Madras city limits though within the jurisdiction of the District Munsif, Poonamallee. The best course under the circumstances to avoid delay and unnecessary expenses is to appoint a Commissioner to inspect the property and submit his report as to the value of the property after giving an opportunity to both sides to adduce oral and documentary evidence. The Commissioner will record the evidence and submit his report in the light of the evidence adduced before him and based on his inspection. The appeal would be finally disposed of after the receipt of the report of the Commissioner and hearing both sides. Parties will have fifteen days time to file their objections after the Commissioner submits his report.

