1945 *Present:* **Keuneman and Jayetileke JJ.**

PUNCHIAPPUHAMY, Appellant, *and* FERNANDO, Respondent.

290—D. C., Avissawella 3,350.

Decree—Action for recovery of lorry and damages—Failure of delivery—Form of decree—Execution—Civil Procedure Code, ss. 191 and 321.

Where in an action for the recovery of a lorry and damages till the lorry is returned, the decree declared the plaintiff entitled to the lorry and to restoration of possession and damages at Rs. 50 per month till possession is restored, and continued: It is further ordered and decreed that, if the defendant fails to restore the lorry, the plaintiff will be entitled to recover its value, which is fixed at Rs. 750; in that event there will be no damages subsequent to date hereof.

Held, that the decree had been correctly entered in terms of section 191 of the Civil Procedure Code and that in default of delivery, the procedure laid down by section 321 should be followed.

APPEAL from an order of the District Judge of Avissawella.

H. V. Perera, K.C. (with *Nihal Gunesekere* and *S. E. J. Fernando*), for defendant, appellant.

C. S. Barr Kumarakulasingham for plaintiff, respondent.

Cur. adv. vult.

March 7, 1945. KEUNEMAN J.—

In this case judgment was entered for plaintiff declaring him entitled to the lorry claimed by him and damages at Rs. 50 a month from June 1, 1942, till the lorry is returned to him. The judgment continued—

If the defendant fails to restore the said lorry to plaintiff, plaintiff will be entitled to its value which I fix at Rs. 750, but in that event there will be no damages subsequent to the date hereof ". The judgment was delivered on July 9, 1943.

The decree in the case declared the plaintiff entitled to the lorry in question and to restoration of possession of the same and damages at Rs. 50 a month from June, 1942, till restoration of possession of the lorry, and continued—" It is further ordered and decreed that if the defendant fails to restore the lorry the plaintiff will be entitled to recover its value which is fixed at Rs. 750; in that event there will be no damages subsequent to date hereof ".

The defendant thereafter on July 14, 1943, deposited in court the damages awarded up to date of decree and a further Rs. 750 representing the value fixed for the lorry in the decree. On July 16, 1943, the plaintiff tendered application for execution of decree by issue of writ of possession, and this was allowed on July 20, 1943. On August 6, 1043, the Deputy Fiscal of Avissawella returned the writ of possession unexecuted in the following circumstances.

The Deputy Fiscal made his demand and proceeded to seize the lorry in question, which at the time had neither engine nor wheels. The report says " The plaintiff was not agreeable to receive possession as some of the parts including the entirety of the wheels and the entirety

of the engine have been removed and it was not in a condition to be put on the road. It was found that some of the parts had been recently removed. The defendant on being questioned admitted that he removed the parts and sold them ".

Thereafter the plaintiff declined to withdraw the sum of Rs. 750 and claimed damages for non-delivery. The District Judge held that " the plaintiff has the option to proceed on the first part of the decree, *i.e.*, for the delivery of the lorry and for damages till such delivery without accepting the Rs. 750 deposited in Court as the value of the lorry ". The District Judge realized that this was equivalent to an order that the defendant would have to pay the damages indefinitely, but considered that the defendant had brought this trouble on himself.

From this order the defendant appeals.

It appears to me that the decree in this case correctly followed section 191 of the Civil Procedure Code which is as follows: " 191. When the action is far movable property, if the decree be fore the delivery of such property, it shall also state the amount of money to be paid as an alternative, if delivery cannot be had."

I do not think we can regard ourselves as bound by *Sitthambarapillai v. Vinasithamby* [1] that in an action for recovery of specific movables an alternative decree for payment of its value is bad, and that this section is inconsistent with sections 320-322. Subsequent decisions have disagreed with this finding: see *Sellamba v. Cathamuttu Pillai* [2] and *Appuhamy v. Appuhamy* [3]. In the latter case it was held that " A judgment in the form contemplated in section 191 may be executed according to the procedure laid down in section 320-322. A writ would issue for delivery of possession in terms of No. 62 in the Second Schedule. In default of delivery the procedure laid down in section 321 would be adopted, and the court having already estimated the judgment creditor's loss by not receiving the goods in the decree, it will not be necessary to do so again unless any further loss has occurred by non-delivery ".

I do not think it is necessary to argue the matter further, for the decree entered in this case has not been altered or amended in any way and is binding on the parties, and it is necessary for us to interpret and apply the decree.

I may say that the defendant misconceived his rights in thinking that he could compel the plaintiff to accept the value of the lorry instead of recovering the lorry in terms of the decree. The payment into court of Rs. 750 could not prevent the plaintiff from claiming a writ of possession under section 320, or from getting the Fiscal to seize the property under section 321 if the property was still available for seizure. So far the plaintiff acted correctly, but I am not able to agree with his claim that the defendant is bound to pay him Rs. 50 a month indefinitely. He could only resort to his remedies under section 321 and claim (*a*) writ of execution by seizure and sale of the defendant's property, or (*b*) a warrant for the arrest of the judgment-debtor, or (*c*) both these remedies. There was no necessity in this case to resort to section 322, because the decree

[1] *1 N. L. R. 114.*

[2] *2 Cur. L. R. 72.*

[3] *14 N. L. R. 8.*

had already assessed the value of the lorry and dealt with the question of damages. On these matters the decree itself is very definite. The value of the lorry is fixed at Rs. 750, and if the defendant fails to restore the lorry there were to be no damages after the date of the decree.

I think there can be no question in this case that the defendant has failed to restore the lorry, and the fact that by his own act he has put it out of his power to do so cannot, in my opinion, alter that. I do not think in the circumstances we can give to the plaintiff what is in effect a perpetual decree for Rs. 50 a month against the defendant, and indeed the decree in the case does not permit us to do so. It may be that if the decree had been fully considered in the first instance the District Judge may in the decree have ordered that the damages should continue up to some date even after the decree, but unfortunately for the plaintiff the terms of this decree are too rigid.

The order of the District Judge must be set aside. Plaintiff will be entitled to withdraw the sum of Rs. 750 deposited in court by the defendant. As the defendant has by his own act put it out of the power of the plaintiff to recover possession, and as he has materially contributed to the confusion existing in this case, I do not make any order of costs in his favour.

JAYATILEKE J.—I agree. *Appeal allowed.*