The Commissioner Of Income-Tax, Madras vs Kasturi And Sons Ltd on 17 March, 1999

Equivalent citations: AIR 1999 SUPREME COURT 1275, 1999 AIR SCW 960, 1999 TAX. L. R. 425, 1999 (2) ADSC 452, 1999 (2) LRI 567, 1999 (2) SCALE 75, 1999 (3) SCC 346, (1999) 2 JT 272 (SC), 1999 ADSC 2 452, 1999 (4) SRJ 208, 1999 (2) JT 272, (1999) 103 TAXMAN 342, (1999) 237 ITR 24, (1999) 2 SCJ 441, (1999) 149 TAXATION 554, (1999) 3 SUPREME 25, (1999) 2 SCALE 75, (1999) 153 CURTAXREP 1

Bench: D.P.Wadhwa, M.Srinivasan

PETITIONER:
THE COMMISSIONER OF INCOME-TAX, MADRAS

Vs.

RESPONDENT:
KASTURI AND SONS LTD.

DATE OF JUDGMENT: 06/03/1999

BENCH:
D.P.Wadhwa, M.Srinivasan

JUDGMENT:

SRINIVASAN, J.

The respondent is a public limited company carrying on business of publishing a newspaper "The Hindu". It purchased a Dakota aircraft at a cost of Rs.3,31,455/- for the purpose of ensuring quicker and speedier transport and delivery of the newspaper. The aircraft was insured with the British Aviation Insurance Ltd., Calcutta for a sum of Rs.4,00,000/-. 2. The terms of the insurance policy enabled the insurer to opt for replacement of the aircraft in the event of loss or damage thereto in an accident. The relevant clauses in the policy are in the following terms:

> " Section 1 Loss or Damage to Aircraft Subject to the terms conditions and limits hereof the company will at their option pay or replace or make good accidental loss of or damage to the aircraft as described in the Schedule hereto (hereinafter referred to as "the aircraft") including standard component parts thereof temporarily detached in connection with overhaul or repair while in the custody or control of the Insured (unless other similar component parts have been substituted) whilst the aircraft is In

> flight Taxying On the ground Moored"

Conditions 7 and 8 of the "General Conditions" read as follows:

> "7. In the event of the Company exercising their option under Section 1 to replace the aircraft the replacement shall unless otherwise mutually agreed be by an aircraft of the same make and type and in reasonably like condition.
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> 8. The aircraft shall at all times remain the property of the Insured who shall have no right of abandonment to the Company. In the event of payment of a total loss or replacement of the aircraft by the company under the terms of the policy the Company may at their option elect to take over the remains of the aircraft as salvage."

3. The respondent's aircraft met with an accident on 25.12.67 and became a total wreck. The Insurer exercised its option in terms of the policy and purchased a similar aircraft for Rs.3,50,000/- and after incurring an additional expenditure of Rs.25,000/- made it available to the respondent in the place of the damaged one. 4. The assessment of the respondent for the year 1969-70 which was completed on 31.1.72 was reopened by the Income-tax Officer under S.147(b) of the Income-tax Act (hereinafter referred to as the `Act'). In the reassessment proceedings, the I.T.O. applied the provisions of S.41 (2) of the Act and worked out the profits at the difference between the original cost and the written down value, viz. Rs.1,58,122/-. He rejected the contention of the assessee that in view of the exercise of the option of the Insurer to replace the aircraft, no money was payable to the assessee under the policy of insurance and thus the provisions of Section 41 (2) of the Act were not attracted. Aggrieved by the order of the I.T.O., the assessee preferred an appeal before the Appellate Assistant Commissioner who took the view that Explanation to Section 41(2) read with Explanation to Section 32(1) of the Act made it clear that the expression "money payable" used in the Section included any amount received from an insurance company in any form. In that view of the matter, the Appellate Assistant Commissioner dismissed the appeal of the assessee. On further appeal to the Tribunal, the latter opined that the Insurer had an option to replace the aircraft and exercised it. Notwithstanding the same, it remained to be a contract of insurance to pay money and the exercise of the option was only to substitute the mode of discharge of the liability under the said contract. According to the Tribunal, the subject-matter of the contract remained one for payment of money which would attract the provisions of Section 41(2) of the Act. Consequently, the order of the Income-tax Officer as affirmed by the appellate authority was upheld by the Tribunal. 5. At the instance of the assessee, the matter was referred to the High Court for answering the following question:

> "Whether, on the facts and circumstances of the case, there was any profit assessable under Section 41 (2) of the Income-tax Act, 1961 by the Insurance Company exercising its option under the policy to replace the damaged aircraft with an aircraft of same make and type?"

The High Court after a detailed consideration of the matter concluded that the expression "money payable"

occurring in Section 41 (2) of the Act could not be made applicable to the present case. Holding that on the exercise of the option by the Insurer, the contract could not be considered to be one for payment of money, the High Court answered the reference in favour of the assessee and against the Revenue. It is the said judgment of the High Court which is in challenge in this appeal filed on Special Leave. 6. The learned Attorney General appearing for the appellant formulated his propositions in the following manner: " A contract of insurance is in essence a contract for money and money only. On the occurrence of the accident, money became payable under the said contract. If instead of money being paid,if the insured gets the money's worth by payment in specie it does not alter the character of the contract which continues to be one of insurance. Such payment in specie being the money's worth would only amount to a substituted mode of discharge. Once the money become payable under the contract on the occurrence of the accident, the exercise of the option by the Insurer to discharge his liability by payment in a different mode other than money will not alter the situation that money was payable under the contract. In as much as Section 41 (2) of the Act uses the expression "moneys payable" and not "moneys paid", there is no doubt as to the applicability of the Section to the case"

7. Per contra, Shri K. Parasaran, learned senior counsel appearing for the assessee has contended that when a fiscal statute uses advisedly a specific expression, it is not for the Court to substitute the same by another expression even if it may be considered to be equivalent to the expression used by the Legislature. When the contract of insurance contains a specific provision for the exercise of an option by the Insurer without any reference to the Insurer and with regard to which the Insurer had no say whatever, the moment such option is exercised, the contract should be treated only as one providing for replacement of the aircraft from the inception thereof. In that event, it cannot be considered to be a contract for payment of money at any time. Consequently, when the contract is one for replacement of aircraft from its inception, there was no money payable under the contract to the Insurer at any time because of the legal effect of the option exercised by the Insurer. Hence, Section 41 (2) of the Act has no application to the present case and the view taken by the High Court is in accordance with law and unassailable. 8. Before proceeding to consider the respective contentions, it is necessary to advert to the relevant provisions in the Act at the relevant time. Section 41 (2) in so far as it is relevant is in the following terms:

"41 (2) Where any building, machinery, plant or furniture which is owned by the assessee and which was or has been used for the purposes of business or profession is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture, as the case may be, together with the amount of scrap value, if any, exceed the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to income-tax as income of the business or profession of the previous year in which the moneys payable for the building, machinery, plant or furniture became due:

> The expression "moneys payable" found in the sub-section has been defined to have the same meaning as in sub-section (1A) of Section 32 (vide Explanation 2 to Section 41 (2A)). The Explanation to Section 32 (1A) defines "moneys payable" in the following terms:
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> (i) "moneys payable", in respect of any structure or work, includes:
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> (a) any insurance or compensation moneys payable in respect thereof;
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> (b) where the structure or work is sold, the price for which it is sold; ..."

9. The principle that a taxing statute should be strictly construed is well settled. In Principles of Statutory Interpretation by Justice G.P. Singh, Sixth edition 1966, the law is stated thus:-

> "The well-established rule in the familiar words of LORD WENSLEYDALE, reaffirmed by LORD HALSBURY and LORD SIMONDS, means: "The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words". In a classic passage LORD CAIRNS stated the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute". VISCOUNT SIMON quoted with approval a passage from ROWLATT, J. expressing the principle in the following words: "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used". Relying upon this passage LORD UPJOHN said: "Fiscal measures are not built upon any theory of taxation".

10. It is obvious that the Legislature has deliberately used the word `moneys'. Wherever the Legislature intended to refer to payment in kind other than cash or money, it has taken care to provide specifically therefor. For example in Section 41(1) itself, the Legislature has used the expression "Whether in cash or in any other manner whatsoever". There are several sections in the Act which refer to benefits other than cash though the value thereof can be ascertained in terms of cash or benefits which are convertible in cash. See Sections 17, 23(3), 28(iv), 40A(2a), 93(3)(c)(i). For example, Section 28(iv) speaks of the value of any benefit or perquisite whether convertible into money not, arising from business or profession. In Section 93(4)(c), `benefit' is defined as a payment of any kind for the purposses of the section. A converse case arose before the Calcutta High Court in Commissioner of Income-tax, West Bengal-II versus Kanan Devan Hills Produce Company Ltd. 1979 Vol.119 ITR 431 in which the words "which results directly or indirectly in the provision of

any benefit or amenity or perquisite whether convertible into money or not" in cl. (c) (iii) of Section 40 of the Act came up for interpretation and the Division Bench of the High Court held that those words excluded cash paid directly to an employee as there was no question of convertibility to money where cash was paid. When the Legislature has instead of using any word such as `benefit' used only the term `money', it can refer only to money as understood in the ordinary common parlance.

11. In Shorter Oxford English Dictionary, `money' has been defined as a "Current coin; metal stamped in pieces as a medium of exchange and measure of value. b. Hence, anything serving the same purposes as coin, late ME. c. In mod. use applied indifferently to coin and to such promissory documents representing coin (esp. bank-notes) as are currently accepted as a medium of exchange". Hence, the word `money' used in Section 41(2) of the Act has to be interpreted only as actual money or cash and not as any other thing or benefit which could be evaluated in terms of money. 12. The learned Attorney General has argued that a contract of insurance is only a contract for payment of money and money only, In support of this contention he has drawn our attention to Rayner vs. Preston 1880-81 18 Chancery Division L.R.page 1. Brett Lord Justice observed:

> "The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that under certain circumstances in a fire policy there may be an option to spend the money in rebuilding the premises, but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money and it is contract made between two persons, and two persons only, as a contract".

13. He has also referred to the judgment in Medical Defence Union versus Dept.of Trade (1979) 2 W.L.R. 686. The question in that case was whether the contract was a Contract of Insurance at all. The relevant facts in that case were as follows: The Medical Defence Union Ltd. claimed that it was not an insurance company carrying on any class of insurance business within the meaning of the Insurance Companies Act, 1974. The members were paying subscription to the company and their membership was governed by contract with each of them . Among its objects were the conduct of the legal proceedings on behalf of members, indemnifying them against claims for damages and costs and giving advice on various problems including employment, defamation and professional and technical matters. The articles gave power to the Council of Union at its discretion (1) to undertake the conduct or defence of any matter or proceedings concerning a member's professional character or interests, and (2) to grant to any member from Union funds or indemnity regarding any action, proceeding, claim or demand concerning his professional character or interest. In every case, an indemnity could be granted, restricted or declined in the Council's absolute discretion. The question was whether the contract between each member and the union was a contract of insurance for the purposes of the Act of 1974. The same was answered in the negative. The Court observed that one of the three elements of a contract of insurance was that the assured would become entitled to

something on the occurrence of some event; that that "something" must normally be of the nature of money or its equivalent and not some other benefit. It should be noticed that though the court was prepared to extend "money" to "eqivalent of money" it refused to extend the meaning of the expression `money' to `benefit'. Thus the decision can even be used against the appellant and it is not helpful to him. 14. Reliance is placed upon the judgment of this court in C.I.T. Gujarat Vs. Artex Manufacturing Co. (1997) 6 S.C.C. 437. The Bench referred to the provisions of Section 41(2) of the Act and while analysing the rationale of the section quoted the following passage found in an earlier judgment reported in 41 I.T.R. 290.

> "In CIT v. Bipinchandra Maganlal & Co. Ltd. this Court has thus explained the reason for introducing the fiction in the second proviso to Section 10(2)(vii):
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> "...The reason for introducing this fiction appears to be this. Where in the previous years, by the depreciation allowance, the taxable income is reduced for those years and ultimately the asset fetches on sale an amount exceeding the written down value, i.e., the original cost less depreciation allowance, the Revenue is justified in taking back what it had allowed in recoupment against wear and tear, because in fact the depreciation did not result. But the reason of the rule does not alter the real character of the receipt. Again, it is the accumulated depreciation over a number of years which is regarded as income of the year in which the asset is sold. The difference between the written down value of an asset and the price realized by sale thereof though not profit earned in the conduct of the business of the assessee is notionally regarded as profit in the year in which the asset is sold, for the purpose of taking back what had been allowed in the earlier years".

The Bench proceeded to refer to the position in law prior to the amendment introduced by Act 67 of 1949 and the subsequent position. Learned Attorney General has urged that when the Section intended recoupment of the benefit allowed to the assessee in the previous years by the Revenue it does not matter whether the benefit is received by the assessee in terms of money or actual cash or any kind. It is contended that if an assessee who receives the money in kind instead of actual cash, is excluded from the ambit of S.41 (2), the Section would be rendered useless as everybody would resort to such practice and deprive the Revenue of the tax payable. 15. We have already set out the relevant provisions in the policy of insurance giving an option to the insurer to replace or make good accidental loss or damage to the aircraft. The insurer exercised the option in this case. The effect of exercise of such option has been recognised to bring an end to the obligation to pay money and make the contract one to reinstate the subject-matter of insurance. It has been held that such a conversion relates back to the inception of the contract. The proposition was first laid down by Lord Campbell, C.J. in Brown versus Royal Insurance Co. (1859)1 E & E 853 in the following words:

> "The case stands as if the policy had been simply to reinstate the premises in case of fire; because, where a contract provides for an election, the party making the election is in the same position as if he had originally contracted to do the act which he has elected to do."

16. Till this date, the proposition remains undisturbed and it has been followed in several cases. Mr. K. Parasaran, learned senior counsel for the respondent has placed before us xerox copies of the relevant pages in Halsbury's Laws of England, (4th ed.) and several text books wherein Brown's case has been cited without reference to any contrary decision. In Halsbury's Laws of England, Fourth Edn. Vol.25 paras 634, 635 and 636 read as under:

> " 634. Option as to reinstatement. By the form of policy in general use, the insurers reserve to themselves the option of reinstating the property instead of making payment in money.(*) This option is reserved for the insurers' benefit, and it is for them to elect whether to reinstate; the assured is not entitled to require them to reinstate. (**) Nor may he prevent them from reinstating if they elect to do so. (***)
> (*) In a fire policy the option is embodied in the undertaking of the insurers: see 20 Forms & Precedents (5th Edn.) 29, Form 2 cl.2.
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> (**) Anderson v Commercial Union Assurance Co. (1885) 55 LjQB 146 at 149, CA per Bowen Lj.
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> (***) Bisset v Royal Exchange Assurance Co. (1821) 1 Sh.174, Ct. of Sess.
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> 635. Exercise of option to reinstate. An election for or against reinstatement is final once it is made, and cannot afterwards be withdrawn. (*) No formal election is necessary; an election by conduct is sufficient, provided that the conduct is clear and unequivocal. The insurers will be taken to have elected against reinstatement and in favour of a payment in money if the negotiations for a settlement have been conducted by the insurers throughout on the footing that the loss is to be made good by a payment in money (**), or if they have proceeded to arbitration for the purpose of ascertaining the amount to be paid under the policy. (***) On the other hand, they are not bound, in the absence of specific provision, to exercise the option immediately (****); they are entitled before exercising it to investigate the loss and to ascertain what its amount is likely to be. Therefore a merely provisional assessment of the amount, even if made in conjunction with the assured, does not debar them from electing to reinstate. (*****) * Sutherland v Sun Fire Office (1852) 14 Dunl 775, Ct. of SEss.
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> ** Scottish Amicable Heritable Securities Association v Northern Assurance Co. (1883) II R 287, Ct. of Sess.
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> *** Sutherland v Sun Fire Office (1852) 14 Dunl 775 at
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> 777. Ct. of SEss, per lord Anderson.
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> **** A time may, however, be specified within which the option is to be exercised: Bisset v Royal Exchange Assurance Co. (1821) 1 Sh 174, Ct. of Sess.

***** Sutherland v Sun Fire Office (1852) 14 Dunl 775 at 777, Ct. of Sess, per Lord Anderson.

636. Effect of election to reinstate. If the insurers do not elect to reinstate, their obligation to make good the loss by a payment in money continues; (*) but if they do elect, the obligation ceases and the contract becomes a contract to reinstate (**). In the case of a building, this contract is sufficiently performed if the building is put substantially into the same state as before the fire.

* Rayner v Preston (1881) 18 Chl 1.C.A. ** Brown v Royal Insurance Co. (1859) 1 E.E 853 at 858 per Lord Compbell CJ."

17. It is not necessary for us to quote the passages in each text book. It is sufficient to give the references as follows: (a) Chitty on Contracts 27th edn. Vol.II Paged

927. (b) Colinvaux's Law of Insurance 6th edn. pages 191 &

192. At page 192 in Para 11.3, the relevant passage reads:

"The contract of insurance becomes enforceable, in fact , as a building contract - Davies J. in Marrell vs. Irving Fire (1865) 33 N.Y. 429"

(c) General Principles of Insurance Law by E.R. Hardy Ivamy 6th edn. - page 485. (d) Mac Gillivray on Insurance Law 9th edn. Page 517 (Para 21.4.). (e) Modern Insurance Law by John Birds (4th edn.) P.277. (f) The Law of Insurance Contracts by Malcolm by A. Clarke (3rd edn.) Para 29.2. in Page 791. 18. Thus, there is no doubt that on the exercise of the option by the insurer over which the insured has no sway, the contract should be considered only as a contract for reinstatement and not as a contract for money. There is no question of any `money payable' under the contract. There is a fallacy in the contention that the money became payable on the occurrence of the accident and the exercise of the option thereafter by the insurer would not alter the nature of the contract. The contract itself gives the right to the insurer to exercise the option and the legal effect of such exercise is to make the contract one for reinstatement only from the inception. It is analogous to the `doctrine of relation back'. Such exercise of option could only be after the occurrence of the accident and not at any time earlier. Consequently, the expression `moneys payable' in S.41 (2) will not apply in this case.

19. We are unable to accept the contention that the word `money' should be interpreted as `money's worth'. The reasons given by us earlier are sufficient and we need not add to them. The reason for introducing a fiction in S.41 (2) of the Act as explained in Bipinchandra Maganlal & Co. Ltd. (41 I.T.R. 290) quoted in Artex Manufacturing Co. (1997) 6 S.C.C. 437 that it is for the purpose of recoupment by the Revenue of the benefit allowed to the assessee in the previous years does not alter the situation.

20. In the result, we do not find any error in the view expressed by the High Court in the judgment under appeal. We are in agreement with the reasoning and conclusion of the High Court in this case.
21. The appeal fails and suffers dismissal. There will be no order as to costs.