

(1980) 02 BOM CK 0026

In the Bombay High Court

Case No : O.S. Suit No. 122 of 1976 & Suit No. 122 of 1976

Central Bank of India

APPELLANT

Vs

New India Assurance Co. Ltd.

RESPONDENT

Date of Decision : 14-02-1980

Acts Referred:

Penal Code, 1860 (IPC) — Section 23

Citation : (1983) 53 CompCas 522

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

Pendse, J.—An interesting question which lies in a very narrow compass, but is not easy of solution falls for determination in this originating summons. Before advertng to the questions which require answer, it would be appropriate to set out a few facts which have given rise to the filing of the present proceedings.

2. The plaintiffs, Central Bank of India, are a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act V of 1970, while the defendants are the insurance company incorporated under the Companies Act. The defendants, New India Assurance Co. Ltd., do general insurance business and, inter alia, issue policies of insurance to banks, including "bankers" indemnity policies", indemnifying the banks in respect of losses suffered by them in the course of their banking business. The plaintiffs obtained a bankers" indemnity policy dated February 2, 1972, for the period commencing from January 3, 1972, to January 3, 1973, in respect of total insurance cover of Rs. 20,00,000. The insurance premium paid by the bank was to the tune of Rs. 4,51,045.80. By the insurance policy, the defendants, inter alia, agreed to pay and make good to the plaintiffs all such direct losses as the plaintiffs might during the said period discover, that they have sustained in the manner mentioned in the policy. Clause 4 of this policy, which is relevant for the present proceedings, provided that the defendants shall pay and make good all direct losses as the bank may discover by reason of the dishonest or criminal act of any

officer, clerk or servant of the bank with respect to the loss of its money and securities wherever committed and whether committed directly or in connivance with others. The policy was issued subject to the endorsement Nos. (a) to (f) attached to and forming part of the policy. Endorsement No. (c) was to the effect that the bank shall be considered a co-insurer to the extent of 25% subject to the minimum excess of Rs. 25,000 for each and every claim under cl. 4 of the policy and shall repay to the company any such or less amount if paid by the company in the first instance.

3. The bank had employed one Homi Pestonji Wadia during the subsistence of the insurance policy in the "inward clearing department" at the Bombay office. Wadia had opened two home savings accounts with the Bombay office of the Central Bank in addition to a home savings account with the National and Grindlays Bank Ltd., Bombay. Between December 21, 1971, and September 28, 1972, Wadia had committed diverse fraudulent acts in respect of moneys belonging to the bank aggregating in all Rs. 13,00,381.40. The modus operandi of Wadia in defrauding the bank was as follows :

Wadia used to draw cheques for various amounts on his home savings accounts with the Central Bank and used to lodge the same for collection with the National & Grindlays Bank. In the ordinary course of business, the National & Grindlays Bank would present the cheques for clearance through the clearing house, Reserve Bank of India. All the cheques drawn on the Central Bank used to be deposited with the clearing house for the purpose of clearance and the representatives of the Central Bank would attend the clearing house and would collect the cheques and hand over to the inward clearing department of the Central Bank.

4. On receipt of those cheques in the inward clearing department, Wadia used to get hold of the cheques drawn by him and used to destroy the same before a debit entry is made in his home savings accounts. As the cheques were destroyed before making a debit entry and as the cheques were not returned to the National & Grindlays Bank, the account of Wadia in that bank, used to be credited with the amounts covered by the cheques. The employee of the Central Bank, by adopting this modus operandi has defrauded the Central Bank to the tune of Rs. 13 lakhs, and odd between the period, December 21, 1971, and September 28, 1972. The employee has in all drawn 23 cheques and the amounts covered under those cheques vary from Rs. 25,000 to Rs. 77,000. All cheques, except one, were for an amount in excess of Rs. 25,000.

5. The fraudulent acts committed by Wadia were discovered by the Central Bank on October 18, 1972, and, on interrogation, Wadia made a clear confession of his guilt and accepted that he had committed a fraud in the aggregate sum of Rs. 13,00,381.40. The bank lodged a first information report with the Bombay Police on October 23, 1972, and also gave a notice to the insurance company about the loss sustained in consequence of the fraudulent acts committed by Wadia. The Central Bank also submitted the statement of claim in the requisite form to the

insurance company for an indemnification of the amount on December 14, 1972. The police launched a prosecution against Wadia and that prosecution ultimately resulted in conviction. The police, during the investigation, recovered an amount of Rs. 6,49,157.26 from the accused and that amount was credited with the Central Bank. The Central Bank filed Suit No. 168 of 1975 in this court against Wadia for the recovery of the balance amount of Rs. 6,51,224.14 and secured an ex parte decree on October 22, 1975. The bank in execution of the decree was unable to recover any amount from Wadia.

6. The Central Bank lodged its claim on December 14, 1972, with the insurance company and also complied with the other requirements under the policy of insurance. The Central Bank made a claim on the basis of the financial loss sustained in consequence of the fraudulent acts of its employee and demanded total indemnification less 25% as mentioned in endorsement (c) of the policy. The endorsement (c) attached to the policy, which is described as "an excess clause", claims the bank, envisages the totality of the loss suffered in consequence of several cheques drawn by the employee. The bank accordingly claimed that they were entitled to treat the entire loss as one claim less 25% subject to the minimum excess of Rs. 25,000 under the excess clause. The insurance company disputed the accuracy of the claim and contended that as the employee of the bank has drawn several cheques and the several amounts mentioned in the said cheques became the subject-matter of separate and independent claims, the company was entitled to deduct the sum of Rs. 25,000, from each of the amounts of the cheques, under the excess clause.

7. It was further claimed that payment made by the plaintiffs to the employee on each and every cheque was a separate and distinct transaction and the result of a separate dishonest or criminal act and, therefore, the plaintiffs were bound to make separate claim in respect of each transaction. The company further claimed that it was not open for the bank to make one claim in respect of several losses and then demand indemnification by the deduction of 25% of the claim subject to a minimum of Rs. 25,000.

8. Differences having arisen with regard to the interpretation of the excess clause, i.e., endorsement No. (c) attached to the policy, between the plaintiffs and the defendants, the present originating summons is taken out to declare and determine the rights of the parties under the said policy. The three questions, which are submitted for determination are as follows :

(a) Whether the excess clause envisages a claim for the payment under the said policy of the totality of the losses suffered by the plaintiffs in consequence of the dishonest and/or criminal acts of the said employee less 25% subject to a minimum of Rs. 25,000 ?

(b) Whether the said excess clause envisages the deduction of 25% subject to a minimum of Rs. 25,000 from each of the amounts of the said cheques which were drawn on the plaintiffs by the said employee and credited to the said

employee and credited to the said employee's home savings accounts with the said National & Grindlays Bank Ltd. and withdrawn by the said employee ?

(c) Whether the plaintiffs are entitled to claim from the defendants the said sum of Rs. 4,88,418.11 as claimed by the plaintiffs, or the sum of Rs. 1,16,972.14 as claimed by the defendants or any other amount and if so what ?

9. Mr. Thakkar, the learned counsel appearing on behalf of the bank, submitted that the expression "each and every claim" in endorsement No. (c) would apply to the total loss suffered as the result of a series of losses and is not limited to "each and every loss". The learned counsel submitted that the claim contemplated by the excess clause arises when the loss is discovered and if the discovery is in respect of several losses then it is permissible to make one claim in respect of those losses. The learned counsel submitted that in normal insurance terminology, the expression "each and every claim" should be considered as the claim arising out of various losses and the expression "claim" should not be equated with "loss". It was urged that the expression "claim" is distinct and different from expression "loss" and the claim means a demand for something done or an assertion of a right. Mr. Thakkar placed strong reliance upon the fact that in the subsequent policy issued by the defendants, the expression "each and every claim" is substituted by the expression "each and every loss" in the excess clause and submitted that this alteration unmistakably indicated that the insurance company realised the difference between the two expressions.

10. The learned counsel submitted that while construing the terms of an insurance policy the interpretation should be strict against the one who prepares the policy and the policy in this case is prepared by the company. It was urged that in case there is some ambiguity in the phraseology of the insurance policy, then the same should be interpreted in favour of the insured. Mr. Thakkar finally submitted that the entire amount recovered by the bank from its employee would first go for the benefit of the bank and if any amount is left over after meeting the liability of 25% to be borne by the bank, the same should be given credit for reducing the liability of the insurance company.

11. In answer to these submissions, Mr. Joshi, the learned counsel appearing on behalf of the insurance company, submitted that the true construction of the excess clause should be that the bank would be the co-insurer to the extent of 25% subject to the minimum excess of Rs. 25,000 for each and every loss under cl. 4 of the policy. The learned counsel submitted that though the expression in the excess clause is for "each and every claim" it in fact means "each and every loss" covered by cl. 4 of the policy. It was urged that every loss gives rise to a separate and distinct claim and it is not permissible for the bank to club together various losses and make one claim, thereby defeating the purpose and the intent of the policy. Mr. Joshi submits that a plain reading of the policy would indicate that the petty losses below Rs. 25,000 suffered by the bank are not covered by the insurance policy and the excess clause should be construed in that light. Mr.

Joshi further submitted that the liability of the insurance company should be determined with reference to each and every loss after taking into account the amount recovered by the bank from the employee and reducing the liability of both the bank and the insurance company proportionately.

12. The insurance policy dated December 31, 1971, is annexed as Ex. A to the plaint. The relevant clauses of the policy are as under :

"Now the company hereby agrees, subject to the terms, conditions and provisos contained herein or endorsed hereon to pay and make good to the insured all such direct losses as the insured may during the said period discover that they have sustained in the manner hereinafter mentioned."

13. Clause 4 refers to the loss suffered by reason of dishonest or criminal act of the employees of the bank. The next relevant portion of the policy is as follows :

"The total liability of the company in respect of any loss or losses caused by, (a) acts of or omission of any one person (whether one of the officers, clerks or servants of the insured or not) or acts or omissions in which such person is concerned or implicated or, (b) in respect of any one casualty or event is limited to the amount of rupees twenty lakhs only (Rs. 20,00,000), irrespective of the total amount of such loss. Upon the discovery of any loss under this insurance (and subject to the due payment of the further premium hereinafter mentioned) a further premium calculated prorata upon the annual premium for the unexpired time and the amount of such loss shall be payable by the insured to the company, and subject as aforesaid, as from the time the discovery of such loss, and even though the further premium may not meanwhile have been actually paid, this insurance shall be treated as renewed so as, at all times during the said period of twelve calendar months, to continue as an insurance to the full extent of rupees twenty lakhs only (Rs. 20,00,000) notwithstanding any previous loss for which the company may have paid or be liable to pay hereunder; the true intent and meaning of these presents being that while the total liability of the company is to be limited as aforesaid any number of separate claims for losses incurred in any otherwise way either on the same or different days arise against the company hereunder, subject only to its right on the discovery of any loss to the payment of the further premium hereinbefore mentioned provided always that the liability of the company in respect of losses discovered during the period of this policy is in no case to exceed Rs. 40 lakhs (Rs. 40,00,000)."

14. The other relevant part of the policy is endorsement (c) which reads as under :

"That the insured shall be considered co-insurer to the extent of 25% subject to the minimum excess of Rs. 25,000 for each and every claim under clause 4 of this policy and shall repay to the company any such or less amount if paid by the company in the first instance."

15. The principal question which falls for determination is whether the expression

"each and every claim" under cl. 4 of the policy in endorsement (c) or the excess clause is equivalent to "each and every loss" under cl. 4 of the policy. The rules governing the interpretation of insurance policies are well settled. An insurance policy is a contractual and commercial document in writing, designed to fulfil well recognised commercial purposes and made with due regard to commercial habits and practices. When presented with a conflict between the parties, as to what the policy means, it is necessary to consider the language used in the policy. The meaning of a word or clause in the policy is often controlled by its content. The policy records a contract reflecting the intention of the parties and the clauses will have to be construed in such a way as to give efficacy to the transaction in accordance with the maxim *ut reimages valeat quam pereat* (It is better for a thing to have effect than to be made void). Though attention is required to be concentrated on the language, where two constructions are possible, the one which tends to defeat the intention or to make it practically illusory will have to be rejected.

16. If there is any ambiguity in the language used in the policy, it is to be construed more strongly against the party who prepared it, which in the majority of cases is the insurance company. The contra preferences rule providing for resolving the ambiguity by a construction favourable to the assured has application only if the words are truly ambiguous, i.e., speak with two voices and not otherwise.

17. The company has agreed to pay and make good all losses that have been sustained by the insured by a dishonest and criminal act of its employee, and discovered during the period covered by the policy. The policy is issued on condition that the insured shall give immediate written notice to the company of any loss together with all particulars for purpose of indemnification. The excess clause treats the insured as co-insurer in respect of each and every claim to the extent of 25% subject to the minimum excess of Rs. 25,000. In other words, the insured has agreed to make no claim in respect of a loss below Rs. 25,000. The policy further provides that the total liability of the company in respect of any one casualty or event is limited to rupees twenty lakhs only and the liability in no case to exceed rupees forty lakhs for losses discovered during the entire period covered by the policy. The excess clause or endorsement (c) refers to each and every claim under cl. 4, and cl. 4 relates to loss of money due to the dishonest or criminal act of an employee and, therefore, it is necessary to find out when the loss is sustained by the bank. Under s. 23 of the IPC, a person is said to lose wrongfully when such person is wrongfully kept out of property or deprived of property, and wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled. In the present case, on each occasion the employee of the bank has drawn a cheque on the home savings account, a distinct and separate act of fraud was committed. Each act of fraud caused a wrongful loss to the bank and in respect of each of such loss the bank was entitled to make a claim against the company. The loss is sustained or suffered by the bank as soon as the fraudulent act is over, and the fact of the loss

forthwith gives rise to a claim.

18. The policy enables the insured to make a claim on a discovery of the loss, but that only means that making or lodging of the claim is postponed till the date of discovery. A right to make the claim accrues as soon as the loss is suffered but its enforcement is available only on the discovery. The employee committed several acts of fraud and defalcation and each such separate act caused a loss and gave a distinct and separate cause of action to the bank. It is true that all these acts of defalcation were discovered only on October 18, 1972, but the fact of discovery on one day would not enable the bank to claim that several acts of defalcation constituted one single or composite loss. It would be worthwhile in this connection to make a reference to the decision of the Court of Appeal reported in [1920] 2 KB 537 in the case of *Pennsylvania Company for Insurances on Lives and Granting Annuities v. Mumford*. The plaintiffs in that case carried on the business of acting as custodians of securities deposited with them by customers for safe keeping. They were insured under a policy underwritten by the defendant for a total liability of Dollar 20,000 against all losses which they might discover during the currency of the policy and sustained since September, 1909, by reason of any securities being stolen, misappropriated or made away with by fraud of its officers.

19. The plaintiffs discovered in May, 1917, that one of their employees had fraudulently made away with large securities between September, 1909, and September 23, 1916. There were in all forty-one separate cases against the employee. The plaintiffs having made good the losses to their customers claimed against the underwriters against the policy. The underwriters paid Pounds 20,000 but resisted the suit filed by the plaintiffs for a balance amount of Pounds 140,000. The trial judge dismissed the suit and the Court of Appeal confirmed that decree on the ground that the loss suffered was not covered by the terms of the policy. One of the contentions raised by the underwriters was that as all the thefts were discovered at the same time, there could be only one claim for Dollar 20,000 and it was not permissible to make a separate claim for each loss. The contention was negated by Lord Justice Scrutton observing (pp. 551, 552) :

"A third point arises in a curious way. My previous views render it unnecessary to decide it, but as the underwriters argued it strenuously, and obviously attached great importance to it, I express my opinion on it. For, with great respect to the eminent authorities at Loyds" who are responsible for this common form policy, if it means what their counsel contend it means, the sooner it is put into language intelligible to ordinary assured the better, and the occasion of this revision might be made the opportunity for recasting it so as to cover the losses which occurred in this case, which clearly should be within the scope of such a common form policy. The policy is on all such direct losses as the assured may discover during the currency of the policy, and which have happened since the first policy was taken out seven years before. It is for Dollar 20,000; and there is a provision that on the occurrence of a loss and payment, the amount insured may be again

raised to the original figure by payment of a fresh premium; "the true intent and meaning of these presents being that while the total liability of each of the undersigned in respect of any single loss is to be limited to the amount underwritten by him any number of separate claims to that amount may either on the same or on different days arise against him hereunder subject only to his right on the happening of any loss to payment of the further premium hereinbefore mentioned and provided for". That is to say, supposing a theft of Dollar 20,000 has taken place on January 1, in each of the seven years commencing January 1, 1910, and these seven thefts are discovered on seven consecutive days in October, 1916, there will be a claim for seven times Dollar 20,000, on the appropriate premiums being paid. I understand the counsel for the underwriters to admit this, but to contend that if the seven thefts were all discovered at the same time, there would only be a claim for one loss of Dollar 20,000. Their reason for this was that it was the discovery, not the theft, that made the loss, and there was only one discovery. This, in my view, is quite erroneous. The policy is against direct losses discovered during the year; "any one loss" refers to the loss, not to the discovery. "Separate claims for any single loss" may arise on the same day, and by the same discovery of the various single losses. I was quite unable to understand, or see any ground for the argument of the underwriters to the contrary, or any difficulty in calculation of the premiums to be paid for several losses above the Dollar 20,000 limit, all discovered at the same time."

20. The passage clearly brings out the distinction between the fact of loss and its discovery. The mere fact that several acts of defalcation were discovered on one day would not lead to the conclusion that several losses under different acts could be treated as one composite loss.

21. Once it is found that each act of defalcation gives rise to a distinct and separate cause of action and the loss is caused by each of the acts, then, the next question is whether a single or one claim can be made in respect of such several losses. The question assumes importance because of the excess clause incorporated in the policy. The insured is considered a co-insurer to the extent of a minimum of Rs. 25,000 for each and every claim and Mr. Thakkar submits that due weight should be given to the word "claim". The submission is that the word "claim" is used in contra distinction to the word "loss" and, therefore, it is not open for the insurance company to contend that the bank is a co-insurer in respect of each loss. Mr. Joshi, on the other hand, submits that the bank is a co-insurer in connection with every item of loss and the excess clause is inserted with an intent that the bank should not make a claim in respect of the loss of a petty amount. The expression "claim" is defined in the Random House Dictionary of English Language, on p. 271, as : "to demand by or as by virtue of a right; demand for something as due; as assertion of a right or an alleged right." The Webster's Third New International Dictionary defines the word "claim" on p. 414 as : "a demand of right or supposed right; an assertion of title made." Mr. Thakkar relied upon a passage in the judgment of Mr. Justice Devlin reported in

[1956] 3 All ER 821; [1957] 27 Comp Cas 31 (QB) in the case of *West Wake Price & Co. v. Ching*, and submitted that the primary meaning of the word "claim", whether used in a popular sense or in a strict legal sense, is such as to attach it to the object that is claimed. Relying upon the judgment, it is submitted that the dictionary meaning should be employed while construing the excess clause and it should be held that the bank's liability as co-insurer is not in respect of each and every loss but in regard to each claim only.

22. The question involves the construction of the word "claim" in endorsement (c) or the excess clause. The word is of common occurrence in the field of insurance and may mean either the right to make a claim or an assertion of a right. The plain object of the clause, as stated earlier, is to exempt the insurance company from the liability to pay small claims which the bank has to bear itself. The word "claim" in this clause means the occurrence of a state of facts which justifies a claim on the insurer and does not mean the assertion of a claim on the company. In other words, in my judgment, the operation of the excess clause is determined by the facts which give rise to the claim and not by the form in which the claim is asserted. The view I am taking finds support in the judgment of Mr. Justice McNair reported in [1960] 2 L R. 241 (Aus) in the case of *Australia and New Zealand Bank Ltd. v. Colonial and Eagle Wharves Ltd.*

23. In this connection, it would be useful to make a reference to the decision of the Court of Appeal reported in [1938] 2 All ER 199 in the case of *Philadelphia National Bank v. Price*. In this case, by a policy of insurance, under which the plaintiff-bank was to be indemnified against all losses to which it might be put by reason of its having made loans against documents which might prove to have been invalid, it was provided that the insurers were to pay claims only for the excess of Pounds 25,000 ultimate net loss "by each and every loss or occurrence". The plaintiff bank agreed in March, 1924, to make advances to one B, upon the security of B, promissory notes and invoices in respect of goods sold by B, in the course of his business. Almost daily from April, 1924, to Nov., 1930, B sent to the plaintiff-bank a number of invoices together with a promissory note for the total amount of the notes and invoices was debited to B's loan account and credited to his current account, upon which B was able to draw. From time to time payments of the invoices were received from B and these were credited to the loan account. The total amount of the invoices on any one day never exceeded Pounds 25,000.

24. By sending fictitious invoices, B obtained from the bank, on loan, Pounds 400,000 more than was owed to him by his customers. In November, 1930, B was insolvent and in April, 1931, he was adjudicated bankrupt. The bank sought to recover the amount of its loss under its policy of insurance. The question which arose was whether the aggregate loss which the bank has suffered is to be treated as one loss, in which case the franchise clause will operate only with regard to the first portion of that loss or as merely an addition of a number of losses with regard to each of which the excess clause will apply. The excess

clause read as follows (p. 200) :

"Notwithstanding anything to the contrary herein contained, this insurance is only to pay claims for the excess of Pounds 200,000, ultimate net loss, by each and every loss or occurrence."

25. The Master of the Rolls held that the loss cannot be treated as one loss as each production of document of invoice led to a fresh loss and must be treated as a number of losses occasioned by a number of advances. The claim made by the bank was dismissed as the loss in each case was below the excess limit. This decision clearly assists the stand taken by the insurance company. An identical view was also taken in a decision reported in [1923] 17 L. R. 153 in the case of *Equitable Trust Co. of New York v. Whittaker*. Mr. Thakkar attempted to distinguish these authorities by submitting that in the excess clause in both the cases the expression used is "each and every loss", and not each and every claim. In view of my finding that the word "claim" is used in the policy merely to connote an occurrence of the fact giving rise to the claim, the submission of Mr. Thakkar deserves to be repelled. In accordance with the objects and interpretation of the terms and conditions of the policy, in my judgment, the bank is liable to be considered as co-insurer to the extent of 25%, subject to the minimum excess of Rs. 25,000, in respect of each loss sustained by each set of defalcation by its employee, and it is not permissible to aggregate the total loss for a working out of the excess clause.

26. There is one more contention advanced on behalf of the bank which required reference. It is urged that the object of paying a premium of about rupees four and a half lakhs was to secure indemnity against losses and that fact should be taken into consideration while construing the word "claim" in the excess clause. The insurance company has subsequently altered the excess clause by substituting the expression "each and every loss" for each and every claim, making it abundantly clear that for the purposes of this clause each loss in respect of each dishonest or criminal act shall be treated as a separate loss. The alteration, submits Mr. Thakkar, would indicate that the earlier expression was construed in the manner suggested by the bank, even by the insurance company. Mr. Joshi countered the submission by pointing out that the alteration was effected only to make the position crystal clear and the payment of premium could have no bearing, as, even subsequent to the alteration, the bank is paying the same premium amount. The object of the policy is to secure losses to the extent of 25% subject to a minimum excess of Rs. 25,000 and the construction suggested by the bank would defeat the same and lead to anomalous results.

27. That brings me to another question as to what amount the bank is entitled to claim from the insurance company. The chart annexed to the written statement filed by the company indicated that Wadia committed acts of defalcation on twenty-three different occasions and on each occasion, save and except one, the amount lifted was more than Rs. 25,000. The bank is the co-insurer in terms of the excess clause to the extent of Rs. 25,000 and the company is bound to make

good the excess amount. The chart shows that the total amount of defalcation was Rs. 13,00,381.40 and out of that the bank was co-insurer for Rs. 5,75,000 while the liability of the insurer was for the balance amount of Rs. 7,25,381.40 only. The police authorities had recovered an amount of Rs. 6,49,157.26 from Wadia during the investigation of the case and the dispute is centered round on whether the insurance company or the bank is entitled to credit it.

28. Mr. Thakkar submits that the bank is entitled to credit the entire amount towards its liability as co-insurer, and the amount which will be left over after meeting the liability of the bank can be credited to the company for reducing its liability. Mr. Joshi, on the other hand, submits that the insurance company is entitled to claim the entire amount recovered and the insurer's liability accordingly stands reduced. In my judgment, the claims of both the bank and the company are erroneous, and the amount of recovery has to be shared proportionately in the ratio of the loss to be borne by them.

29. The insurance law recognises the doctrine of subrogation. Subrogation is primarily concerned with the legal rights of the assured against third parties, but, by virtue of the doctrine of subrogation, the insurer can also recover from the assured the value of any benefits received by him incidental to the loss. Any sums received by the assured and which diminishes his loss must be held by him on trust for his insurer, who has an equitable proprietary interest in such sums. The doctrine of subrogation is applied to all the insurers including the assured himself if he is his own insurer for a part of the loss. In other words, the doctrine is attracted and applicable to the co-insurers. In cases where the insured's interest is fully covered, the insured cannot be compelled to hand over anything he may recover to the insurer, until he has been fully indemnified for his loss, but in cases of partial insurance, however, the rule has no application. In contracts of marine insurance and in respect of policies which contain an average or excess clause, the assured is always deemed to be his own insurer. In such cases, the insured is not entitled to keep whatever he recovers from third parties until he has received a full indemnity and the insurer is not prevented from claiming the share of the proceeds. That being so, it seemed logical that the amount recovered from Wadia ought to be divided in proportion to the respective interests.

30. The bank is a co-insurer to the extent of Rs. 5,75,000 out of the total loss and that share works out at 44.23% while the insurer's share comes to 55.77% of the total loss. The amount recovered has to be split up between the parties in that proportion and accordingly out of the total amount of Rs. 6,49,157.26 the bank would be entitled to retain Rs. 2,87,043.02 while the company's share would be Rs. 3,62,114.24 only. The insurer's share of the net loss is, therefore, Rs. 3,63,267.16 and that is the amount the plaintiffs are entitled to claim.

31. It would be appropriate in this connection to make a reference to a decision of the Court of Appeal reported in [1907] PD 216 (The Common wealth). The owners of a steamship, which had run down a schooner, paid into court Dollar

1,000, the value of the schooner as assessed in the registry. The underwriters who had paid the owners of the schooner Dollar 1,000, being the amount for which she was insured under a policy stating the value to be Dollar 1,350, claimed the Dollar 1,000. Bargrave Deane J. held that the owners of the schooner were entitled to be treated as their own insurers for Dollar 350, and, therefore, Dollar 1,000 must be divided between them and the underwriters in the proportion of their respective interest, viz., 350/1,350ths and 1,000/1,350ths. The Court of Appeal confirmed the decision and Sir Gorell Barnes, President, held that the decision of the trial court was reasonable in principle and although there was no authority, the division in proportion to respective interests seemed analogous to the case of salvage. Reliance on this decision Mr. Joshi is very appropriate.

32. Accordingly, in my judgment, the excess clause in the policy does not envisage a claim for the payment of the totality of the losses sustained by the criminal acts of Wadia but envisages the deduction of 25% subject to a minimum of Rs. 25,000 from each of the amounts defalcated by Wadia. The plaintiff-bank, in my judgment, in the circumstances of the case, is entitled to claim from the defendants, insurance company, a sum of Rs. 3,63,267.16 only. My answers to the questions raised in the originations summons are :

(A) No.

(B) Yes.

(C) The plaintiffs are entitled to claim Rs. 3,63,267.16 only.

In the circumstances of the case, there will be no order as to costs.

33. Order accordingly.