
(2026) 03 KL CK 0725

In the High Court Of Kerala

Case No : Regular First Appeal No. 202 Of 2017

New India Assurance Co. Ltd

APPELLANT

Vs

The Federal Bank Ltd

RESPONDENT

Date of Decision : 02-03-2026

Acts Referred:

Citation : (2026) 03 KL CK 0725

Hon'ble Judges : Sathish Ninan, J;P. Krishna Kumar, J

Bench : Division Bench

Advocate : George Cherian, Latha Susan Cherian, K.S.Santhi, Madhu Radhakrishnan

Final Decision : Allowed

Judgement

Sathish Ninan, J

1. The suit for money by a Bank, under a Banker's Indemnity Policy of the defendant Insurance Company, was decreed by the trial court. The Insurance Company is in appeal.

2. Ext.A2 is the base insurance policy with its addition/extension, availed by the plaintiff from the defendant insurance company. It relates to the period 01.04.2012 to 31.03.2013. The plaintiff alleges that, during the period from 11.04.2012 to 20.05.2012 there were various fraudulent transactions in the plaintiff's ATMs across the country, by fraudsters, by utilising ATM cards of other banks. The plaintiff describes the modus operandi of the transactions thus;

"The modus operandi of such transactions is for the fraudster who may be the customer of other banks request for a cash withdrawal for an amount of Rs.10,000/- or less from the ATM centre of the plaintiff bank using the ATM cards of the banks mentioned above. When the ATM dispenses the requested amount, the fraudster will keep one or two currency notes in the presenter intentionally and take the rest of the amount. For the purpose of illustration, in the case of a withdrawal of Rs.10,000/-, the fraudster may take only Rs.9,900/- allowing

Rs.100/- note to be remained in the presenter. The fraudster will intentionally allow the ATM to recapture the note which will happen automatically after 42 seconds. After the above mentioned predetermined time of 42 seconds, the remaining currency note/s will be pulled back by the machine. But the notes so pulled back or retracted will not be counted by the ATM and will be moved to the divert tray.”

On such reversal, the entire amount will stand reversed in the customers account. The plaintiff claims to have suffered a total loss of Rs.83,34,600/- under such transactions. The plaintiff seeks to be indemnified by the defendant insurance company under Ext.A2 policy.

3. The defendant insurance company contended that the alleged fraudulent transactions are not covered under Ext.A2 policy. It was contended that the 'add-on cover' styled as 'fraud protection cover' is available only for the plaintiff's debit card holders. Relying upon various clauses in Ext.A2 policy, it is contended that no amount is payable for the alleged incidents.

4. The trial court decreed the suit holding that the transactions in question are fraudulent transactions which are covered under Ext.A2 policy.

5. We have heard Sri.George Cherian, the learned Senior Counsel for the appellant and Sri.Madhu Radhakrishnan, the learned counsel for the respondent.

6. The points for determination in the appeal are:-

“(i) Is the plaint claim excluded under Ext.A2 policy?

(ii) Is the insurance company entitled to rely on the 'excess' clause in Ext.A2 policy?

(iii) Does the decree and judgment of the trial court warrant any interference?”

7. The claim was repudiated by the Insurance Company relying upon two exclusion clauses in the policy. The clauses in Ext.A2 policy which are relevant for the case at hand, are as under: -

“A. ON PREMISES

By reason of any money and/or securities for which the insured are responsible or interested in or the custody of which they have undertaken and which now are, or are by them supposed or believed to be or at any time during the period of insurance may be in or upon their own premises (including Mobile Offices) or upon the premises of the Bankers in any recognised place of safe deposit or lodged or deposited in the ordinary course of business for exchange, conversion with the issues thereof, or with any agents of such issuers or with any person employed to procure or manage the exchange, conversion registration thereof being (while so in or on such premises or so placed, lodged or deposited as aforesaid) lost, destroyed or otherwise made away by Fire, Riot and Strike, malicious damage & Terrorist risks, Burglary or Housebreaking, Theft, Robbery or

hold up, whether within or without and whether by the employees of the insured or any other person or persons whomsoever.”

.....

EXCEPTIONS

The Company shall not be liable in respect of :

.....

(g) Losses attributable directly or indirectly to a manipulation or faulty computer or other EDP system and/or any fraudulent use of the computer or other EDP system by the employee or outsiders, irrespective of whether the computer or EDP system belongs to the insured or it is shared by the insured with others on service contract basis or otherwise.

(i) Losses arising directly or indirectly out of any use of automated teller machines”

The clauses in the Additional Cover Policy which are part of

Ext.A2:

“2. Additional limit for item A: Additional cover on money and/or securities held on premises including ATMs & Coin vending machines, authorized agents and employees. Money includes gold bullions held on consignment basis.”

3. Additional limit for item B: Additional sum insured in transit includes money and/or securities as described above.

ADD ON COVER

“C. Fraud protection cover to Federal Bank Debit card holders:

Notwithstanding anything herein contained to the contrary, we the underwriters undertake and agree, subject to the following items, exclusions, limitations and conditions, to indemnify the assured in excess of the amounts of the deductible stated to be applicable, and subject always to the Limit of indemnity stated in the schedule, against such loss as herein provided.

Maximum Sum insured of Rs.1,00,000/- per Federal bank debit card for the financial loss sustained due to fraudulent transactions on the lost or stolen Federal Bank Debit Card within 24 hours prior and post of the reporting of loss/ theft of Debit card to M/s Federal Bank. Fraudulent transactions means phishing, cloning of card, and wrong/unauthorized or unknown use of pin code, usage of card after pilferage, stealing, snatching, burglary and assault. Snatching away of money, drawn from the Bank's ATM, from within its immediate vicinity and fraud by Bank's ATM attendant also would be covered. The annual limit of indemnity for this extension would be Rs.2,00,00,000/- and excess per claim is Rs.2500/-”

8. Clause A above deals with the place of occurrence and the nature of the

occurrences that are covered under the policy. That ATMs are covered under the policy, even under the base policy and also the additional/extended policy, is not in dispute. The question is whether fraudulent transactions at the ATMs are covered under the policy. Referring to clause (A), which relates to 'on-premises' damage/loss, the learned counsel for the plaintiff argued that the incidents in question, namely, fraudulent use of ATMs falls within "theft" and "malicious damage" included therein. He further referred to clause (2) of the additional policy and contended that, money in ATMs are specifically covered thereunder, irrespective of the nature of the incident which caused the loss, be it by fraudulent use of ATM or other means.

9. The learned Senior Counsel appearing for the defendants, on the other hand, contended that, the loss resulting out of fraudulent use of ATMs are not included under clause (A) and that, exceptions (g) and (i) specifically excluded loss arising out of the use of ATMs, including a fraudulent use. He also argued that the additional/extended policy only enhanced the limits under clause (A) ('on-premises' loss) and clause (B) (relating to 'in transit' loss), and that no additional item was brought under the policy coverage except the Federal Bank(plaintiff's) debit card holders. It was further argued that, even if the claim is considered as one falling within the policy coverage, still, the 'PROVISO clause' which stipulates that the insured has to bear the first 25% of each loss or 2% of the basic sum insured, whichever is higher, applies. None of the fraudulent transactions exceed Rs.10,000/-. The excess applicable is Rs.25,000/-. Hence the insurance company is not liable to pay any amount, it is argued.

10. In reply, the learned counsel for the plaintiff argued that, under the additional policy, money in ATMs were specifically secured and if the exception clauses relied on by the defendants are held to apply, it will defeat the very purpose/object of the additional policy; such clauses are to be read down. It was also argued that, when the terms or clauses of the policy are ambiguous, they are to be interpreted in favour of the insured by applying the doctrine of contra proferentem. Further, referring to the PROVISO relied on by the defendants, the learned counsel contended that, the modus operandi of all the incidents was one and the same and it has to be treated as a single act. He also argued that, at the relevant time the maximum withdrawal limit from an ATM was Rs.10,000/- and the excess being Rs.25,000/- every transaction would be within the excess. Therefore, in no case would the insurance company be liable to indemnify. Such clauses are to be treated as void and non-existent, and are to be eschewed from consideration. He also relied on 'blue pencil rule' to contend that it is possible that such offending clause in a contract is to be treated as non-existent. It was further urged that, in the letter of repudiation issued by the defendants, the excess clause was not set up as a reason, and therefore they are precluded from relying upon the same in the suit.

11. Since a determination of the questions involved relate to a proper understanding of the terms of the policy, we consider it appropriate to first refer

to the principles laid down by the Apex Court in that regard. Both the learned counsel referred to a host of decisions; we proceed to refer to the same:

In *Haris Marine Products v. Export Credit Guarantee Corporation (ECGC) Limited* [AIR 2022 SC 3036], it was held:

"It is entrenched in our jurisprudence that an ambiguous term in an insurance contract is to be construed harmoniously by reading the contract in its entirety. If after that, no clarity emerges, then the term must be interpreted in favour of the insured, i.e., against the drafter of the policy."

Therein the Apex Court had also referred to its earlier judgments in:- *General Assurance Society Ltd. v. Chandumull Jain* [(1966) 3 SCR 500] :-

"In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of *uberrima fides* i.e., good faith on the part of the assured and the contract is likely to be construed *contra proferentem* that is against the company in case of ambiguity or doubt... (I)n interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves."

United India Insurance Co.Ltd. v. Pushpalaya Printers [(2004) 3 SCC 694]:-

".....(I)t is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations, one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event... Where the words of a document are ambiguous, they shall be construed against the party who prepared the document."

In *Sushilaben Indravadan Gandhi v. New India Assurance Co.Ltd* [(2021) 7 SCC 151], wherein the explanation to the rule of *contra proferentem* as provided under Halsbury's Laws of England were referred to;

"*Contra proferentem* rule.--Where there is ambiguity in the policy the court will apply the *contra proferentem* rule. Where a policy is produced by the insurers, it is their business to see that precision and clarity are attained and, if they fail to do so, the ambiguity will be resolved by adopting the construction favourable to the insured. Similarly, as regards language which emanates from the insured, such as the language used in answer to questions in the proposal or in a slip, a construction favourable to the insurers will prevail if the insured has created any ambiguity. This rule, however, only becomes operative where the words are truly ambiguous; it is a Rule for resolving ambiguity and it cannot be invoked with a view to creating a doubt. Therefore, where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the Rule has no application."

In *Haris Marine Products*, the Apex Court after referring to the above held:-

"The Rule of contra proferentem thus protects the insured from the vagaries of an unfavourable interpretation of an ambiguous term to which it did not agree. The Rule assumes special significance in standard form insurance policies, called contract d' adhesion or boilerplate contracts, in which the insured has little to no countervailing bargaining power."

In *Export Credit Guarantee Corporation of India Ltd., v. Garg Sons International* [(2014) 1 SCC 686]; the Apex Court held,

"Thus, it is not permissible for the court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance. No exceptions can be made on the ground of equity. The liberal attitude adopted by the court, by way of which it interferes in the terms of an insurance agreement, is not permitted. The same must certainly not be extended to the extent of substituting words that were never intended to form a part of the agreement."

Therein the Apex Court referred to the judgments in, *Oriental Insurance Co. Ltd. v. Sony Cheriyan* [(1999) 6 SCC 451]; *Polymat India (P) Ltd. v. National Insurance Co.Ltd.* [(2005) 9 SCC 174]; *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* [(2010) 11 SCC 296]; and *Rashtriya Ispat Nigam Ltd. v. M/s. Dewan Chand Ram Saran* [(2012) 5 SCC 306], which held:-

"The insured cannot claim anything more than what is covered by the insurance policy. "...the terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely." The clauses of an insurance policy have to be read as they are... Consequently, the terms of the insurance policy, that fix the responsibility of the Insurance Company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonise the terms thereof, keeping in mind that the Rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon.

The Court also referred to the judgment in *Vikram Greentech (I) Ltd. & Anr. v. New India Assurance CO.Ltd.* AIR 2009 SC 2493, wherein it was observed,

"The court while construing the terms of policy is not expected to venture into extra liberalism that may result in rewriting the contract or substituting the terms which were not intended by the parties."

In *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal* [(2004) 8 SCC 644], the Apex Court held thus;

"Therefore, it is settled law that the terms of the contract have to be strictly read and natural meaning be given to it. No outside aid should be sought unless the meaning is ambiguous."

In Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Company Ltd. And Ors. [AIR 2016 SC 3908], the Apex Court observed thus;

"..... The Common Law Rule of construction "Verba chartarum forties accipiuntur contra proferentem" means that ambiguity in the wording of the policy is to be resolved against the party who prepared it."

The Apex Court referred to the following passage in MacGillivray on Insurance Law,

"The contra proferentem Rule of construction arises only where there is a wording employed by those drafting the Clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. "One must not use the Rule to create the ambiguity-one must find the ambiguity first." The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances."

The Court also referred to Colinviaux's Law of Insurance, wherein the Rule of contra proferentem was explained thus;

"But a Clause is only to be contra proferentem in cases of real ambiguity. One must not use the Rule to create an ambiguity. One must find the ambiguity first. Even where a Clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine. So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly."

In Canara Bank v. United India Insurance Co. Ltd. And Ors. [(2020) 3 SCC 455], the Apex Court held thus;

"The principles relating to interpretation of insurance policies are well settled and not in dispute. At the same time, the provisions of the policy must be read and interpreted in such a manner so as to give effect to the reasonable expectations of all the parties including the insured and the beneficiaries. It is also well settled that coverage provisions should be interpreted broadly and if there is any ambiguity, the same should be resolved in favour of the insured. On the other hand, the exclusion clauses must be read narrowly. The policy and its components must be read as a whole and given a meaning which furthers the expectations of the parties and also the business realities. According to us, the entire policy should be understood and examined in such a manner and when that is done, the interpretation becomes a commercially sensible interpretation."

In Shivram Chandra Jagarnath Cold Storage and Ors. v. New India Assurance Company Limited and Ors. [(2022) 4 SCC 539], the Apex Court, referring to its earlier judgment in New India Assurance Co. Ltd. v. Rajeshwar Sharma and Anr. [(2019) 2 SCC 671], held thus:

"The object of exceptions is to define with greater precision the scope of the policy by making clear what is intended to be excluded and contrasting with what is intended to be included.

Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with utmost strictness and it is the duty of the insurers to except their liability in clean and unambiguous terms. The onus of proving that the loss falls within the exception lies upon the insurers, unless by proving the language of the exception, the assured is expressly required to prove that, in the circumstances, the exception does not apply."

The Apex Court further observed,

"In *New India Assurance (supra)*, it was held that if there is no ambiguity in the Clause exempting the insurer from a liability arising from an excepted cause, the insurance claim can be rejected by the insurer."

In *Oriental Insurance Co. Ltd. v. Sony Cheriyan* [(1999) 6 SCC 451], the Apex Court held thus;

"The insurance policy between the insurer and the insured represents a contract between the parties. Since the insurer undertakes to compensate the loss suffered by the insured on account of risks covered by the insurance policy, the terms of the agreement have to be strictly construed to determine the liability of the insurer. The insured cannot claim anything more than what is covered by the insurance policy. That being so, the insured has also to act strictly in accordance with the statutory limitations or terms of the policy expressly set out therein."

In *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan and Ors.* [(1987) 2 SCC 654], the Apex Court held thus;

".....When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependents on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obedience to, the doctrine of 'reading down' the exclusion clause in the light of the 'main purpose' of the provision so that the 'exclusion clause' does not cross swords with the 'main purpose' highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose."

In *Cement Corporation of India v. ICICI Lombard General Insurance Company Limited* [2025 INSC 1444], the Apex Court held thus;

"Additionally, in case of insurance contracts, the exclusion Clause must be construed strictly and wherever there is any ambiguity between two or more clauses in the contract, it must be interpreted in favour of the insured."

Therein it was also held thus;

"19. Another instance where exception clauses may be interpreted to the benefit of the insured is when the exception clauses are too wide and not consistent with the main purpose or object of the insurance policy.

xxxx xxxx xxxx

28. It is a trite law that the exclusions in the contract for insurance must be read strictly...."

In *Shivram Chandra Jagarnath Cold Storage and Anr. v. New India Assurance Company Limited and Ors.* [(2022) 4 SCC 539] relying on *Sangrur Sales Corporation v. United India Insurance Co. Ltd.*, [2020 SCC ONLINE SC 63] it was held that in the event two constructions are possible or if there is any ambiguity, a construction that is beneficial to the insured should be adopted consistent with the purpose of the policy.

In *United India Insurance Co. Ltd. v. Great Eastern Shipping Co. Ltd.* [AIR 2007 SC 2556], the Apex Court after referring to the case in *Shashi Gupta (Smt.) v. Life Insurance Corporation of India and Anr.* [(1990) 18 ITR 481 (SC)] held thus;

"As both the aforesaid interpretations are reasonably possible, we would accept the one which favours the policy-holder, as the same advances the purpose for which a policy is taken and would be in consonance with the object to be achieved for getting lives assured."

In *Texco Marketing Pvt. Ltd. v. Tata AIG General Insurance Co.Ltd. and Ors* [(2023) 1 SCC 428], the Apex Court held thus;

"9 . Adhesion contracts are otherwise called Standard-Form Contracts. Contracts of Insurance are one such category of contracts. These contracts are prepared by the insurer having a standard format upon which a consumer is made to sign. He has very little option or choice to negotiate the terms of the contract, except to sign on the dotted lines. The insurer who, being the dominant party dictates its own terms, leaving it upon the consumer, either to take it or leave it. Such contracts are obviously one sided, grossly in favour of the insurer due to the weak bargaining power of the consumer.

10. The concept of freedom of contract loses some significance in a contract of insurance. Such contracts demand a very high degree of prudence, good faith, disclosure and notice on the part of the insurer, being different facets of the doctrine of fairness. Though, a contract of insurance is a voluntary act on the part of the consumer, the obvious intendment is to cover any contingency that might happen in future. A premium is paid obviously for that purpose, as there is a legitimate expectation of reimbursement when an Act of God happens.

Therefore, an insurer is expected to keep that objective in mind, and that too from the point of view of the consumer, to cover the risk, as against a plausible repudiation.

Exclusion Clause

11. An exclusion Clause in a contract of insurance has to be interpreted differently. Not only the onus but also the burden lies with the insurer when reliance is made on such a clause. This is for the reason that insurance contracts are special contracts premised on the notion of good faith. It is not a leverage or a safeguard for the insurer, but is meant to be pressed into service on a contingency, being a contract of speculation. An insurance contract by its very nature mandates disclosure of all material facts by both parties.

12. An exclusion Clause has to be understood on the touch-stone of the doctrine of reading down in the light of the underlining object and intendment of the contract. It can never be understood to mean to be in conflict with the main purpose for which the contract is entered. A party, who relies upon it, shall not be the one who committed an act of fraud, coercion or mis-representation, particularly when the contract along with the exclusion Clause is introduced by it. Such a Clause has to be understood on the prism of the main contract. The main contract once signed would eclipse the offending exclusion Clause when it would otherwise be impossible to execute it. A Clause or a term is a limb, which has got no existence outside, as such, it exists and vanishes along with the contract, having no independent life of its own. It has got no ability to destroy its own creator, i.e. the main contract. When it is destructive to the main contract, right at its inception, it has to be severed, being a conscious exclusion, though brought either inadvertently or consciously by the party who introduced it. The doctrine of waiver, acquiescence, approbate and reprobate, and estoppel would certainly come into operation as considered by this Court in *N. Murugesan v. Union of India* [(2022) 2 SCC 25].”

In *Texco Marketing Pvt. Ltd.*, the Apex Court after referring to the case in *Shivram Chandra Jagarnath Cold Storage v. New India Assurance Co. Ltd.* [(2022) 4 SCC 539], held thus;

“Another instance where exception clauses may be interpreted to the benefit of the insured is when the exception clauses are too wide and not consistent with the main purpose or object of the insurance policy. In *B.V. Nagaraju v. Oriental Insurance Co. Ltd.* [(1996) 4 SCC 647], a two-Judge Bench of this Court read down an exception Clause to serve the main purpose of the policy.”

12. From the above precedents, the following principles emerge:-

(a) Ambiguous terms in policy are to be construed harmoniously, by reading the contract in full. If harmonious construction is not possible, then construe in favour of the insured.

(b) Construe the terms strictly. Court is not to make out a new contract.

- (c) In case of ambiguity, interpretation in favour of the purpose for which the policy is taken is to be adopted.
- (d) Contra proferentem is to be applied only in case of ambiguity. First, find the ambiguity. It cannot be invoked to create an ambiguity.
- (e) If on a fair and reasonable construction, the words admit of only one meaning, the Rule of Contra proferentem does not apply.
- (f) The rule has significance in standard form contracts where the insured have no bargaining power.
- (g) In construing the terms, equity or liberal attitude is not permitted.
- (h) Only what is covered under the policy can be claimed.
- (i) Clauses to be strictly read and natural meaning to be given. Words used to be given importance.
- (j) Coverage provisions to be interpreted broadly and exclusion clauses to be read narrowly.
- (k) Exceptions define with precision, what is excluded and included.
- (l) The onus of proving an exception lies on the insurer.
- (m) Read down the exclusion clause when it cross swords with the main purpose. Effort must be to harmonise the two. Exclusion clause to be understood on the prism of the main contract.
- (n) Even where a clause is ambiguous, when on reading the whole contract it becomes clear, the rule of contra proferentem is not to be applied.
- (o) In purely commercial, negotiated contracts between parties of equal bargaining power, contra proferentem may have limited or no application.

Bearing the above principles in mind, we proceed to consider the clauses of the policy, which are relevant and have been extracted supra.

13. On a first blush it would appear that the instances in question are a form of 'theft' or 'malicious damage' under clause 'A' of the policy. But, the exception clause (i) quoted above, specifically excludes losses arising out of the use of ATMs. It mentions, "any direct or indirect use". Therefore, losses occurring due to any direct or indirect use of ATMs are excluded under the clause. The incidents in question, upon which damage resulted to the plaintiff, have arisen out of the fraudulent use of the ATMs. Plainly read, the exclusion clause covers the same. The fact that fraudulent use of the plaintiff Bank's debit cards are specifically included in the Add-on cover taken under the additional/extended policy, implies that, there is no coverage with regard to fraudulent use of other debit cards.

14. So also, exclusion clause (g) in clause A, specifically mentions about losses due to faulty or fraudulent use of EDP (Electronic Data Processing) system. It

could not be contended that ATMs are not EDP systems.

15. Therefore, it is evident that what is covered under the policy is, a theft occurring in the premises of the ATM counter and malicious damage of the ATM; it does not extend to a fraudulent use of the ATM. This also appears to be in consonance with the other incidents mentioned in clause A which reads, "lost, destroyed or otherwise made away by Fire, Riot and Strike, malicious damage & Terrorist risks, Burglary or Housebreaking, Theft, Robbery or hold up." The word 'theft' is used along with, "Fire, Riot and Strike, malicious damage & Terrorist risks, Burglary or Housebreaking, Theft, Robbery or hold up", indicating that, it is not a loss caused due to use of the ATM that is intended. Anyhow, in the light of the exclusion clauses above, the instances in question, which have arisen out of the use of ATM, are excluded from the policy cover.

16. The learned counsel for the respondent would refer to Clause 2 of the Additional Cover Policy (which has been extracted above) and contend that the Additional Policy covers the money in the ATMs and hence the incidents in question which resulted in loss of money, is covered under the Additional Cover Policy.

17. The Additional or Extension Policy begins like this:

"CONDITIONS ATTACHED TO AND FORMING PART OF POLICY NO.760702/46/12/04/00000002 PERIOD COVER : FROM 1.4.2012 TO 31.3.2013"

At the foot of the Additional Policy it is written thus:

"This Policy is subject to Bankers Indemnity policy clauses as attached."

The above admits of no doubt, and it is not in dispute, that the clauses in the base policy applies for the Additional Policy also.

18. Clauses 1, 2 and 3 of the additional cover policy indicate that the additional policy relates only to additional limit for certain items covered under the original Bankers Indemnity Policy. Clause-2 relates to additional limit of Rs.50 crores for item-A and clause-3 relates to additional limit of Rs.10 crores for item-B. The said items 'A' and 'B' are those mentioned as items 'A' and 'B' in the base Banker's Indemnity Policy viz. "ON PREMISES" and "IN TRANSIT". Though the principal policy contains further items 'C' to 'H' which are forgery or alteration, dishonesty, hypothecated goods, registered postal sendings, appraisers, and Janata Agents/Chhoti Bachat Yojna agents, Pygmy collectors, the additional limit is not extended to such items. Therefore, it is evident that the additional policy only adds an additional limit to the original policy. Though money in premises including ATMs is specifically mentioned in the additional policy, admittedly ATMs were included even in the base policy. In other words, the additional policy does not relate to any item which is not included in the principal policy but only provides additional limit.

19. The "policy schedule to Ext.A2", which is the facing sheet of the policy, reads:

Section-1 (Max. limit Sum Insured for Section I in aggregate)

Basic cover

Sum insured (Rs.) Rs.2500000/-

Premium (Rs.) Rs.150000/-

Additional cover for Money in premises

Rs.500000000/-

Rs.1500000/-

Additional cover for Money in transit

Rs.100000000/-

Rs.500000/-

Staff loading

8745 nos.

Rs.188236/-

Infidelity of caretaker

100 nos.

Rs.16000/-

From the above also it is evident that under the additional policy there has only been an enhancement or addition in the limit and that too for losses arising "in premises" and "in transit". Hence the argument that under the additional policy even a fraudulent transaction in an ATM was brought in as an additional item, cannot stand.

20. The conclusion as above is supported by yet another factor. Under the original policy, as was already noted, losses arising out of any use of ATMs, whether direct or indirect have been excluded. However, in the additional policy, protection is given to the debit card holders of the plaintiff Bank alone, against fraudulent transactions. This is specifically included as an add-on cover under the head "ADD ON COVERS". The add on covers under the additional policy are only Caretaker Cover, Spurious Gold Cover and Fraud Protection cover to Federal Bank Debit Card holders. At the last page of the Additional Policy, the add-ons under the policy are shown thus:

Special conditions As per annexure.

:

ADDITIONAL COVER:

1 INFEDILITY OF THE OUTSOURCED CARETAKERS

2 COVER FOR SPURIOUS GOLD ANY ONE ACCIDENT : Rs.20 lacs PER BRANCH
Rs.50 lacs ANY ONE YEAR LIMIT : Rs.2 crores Excess Rs.15000/- each and every claim

3 COVER FOR DEBIT CARD Sum insured : Rs.1 lac per card Annual limit : Rs.2 crores Excess per claim : Rs.2500/-

Excess

:

Rs.25,000.00

This policy is subject to Bankers indemnity policy clauses as attached.

Therefore it is evident that the additional policy was only for an additional limit for "in premises" and "in transit" losses and for add-on cover for the three specific heads indicated above.

21. On the above discussions we find that, the policy excludes losses arising directly or indirectly out of the use of ATMs including the transactions in question.

22. Now, we come to the contention of the learned Senior Counsel with regard to the excess clause. The relevant clause in the policy reads thus,

"(a) EXCESS: Insured shall bear the first 25% of each loss under items 'A' to 'E' or 2% of the basic Sum Insured whichever is higher, but not exceeding the amount specified in the Schedule. Each loss in respect of each dishonest or criminal act shall be treated as a separate loss.

This excess will however not apply to loss or damage arising out of Fire, Riot & Strike. In respect of item F, G, H of the policy (i.e. Registered Postal sendings, Appraisers & Janata Agent etc.) the excess applicable will be 25% of the claim amount"

There is a similar clause in the additional policy, and it reads thus;

"Insured shall bear the first 25% of each loss under item A to E or 2% of the basic sum insured whichever is higher but not exceeding the maximum of Rs.25,0000/-. Each loss in respect of each dishonest or criminal act shall be treated as a separate loss."

As per the said clause, the loss suffered up to 2% of the basic sum insured is to be borne by the insured. So also, each loss in respect of each act is to be treated as a separate loss. Going by the basic sum assured, such amount is Rs.25,000/-. Ext.A3 statement with regard to the incidents and the losses, reveals that none of the transactions are above Rs.10,000/-. Therefore, if the excess clause is applied, the insured is to bear the entire loss and no amount is recoverable from the insurance company.

23. One of the contentions of the learned counsel for the plaintiff is that, though

the incidents have occurred at different places in the country, it has to be taken as a single act resulting in loss to the plaintiff. The learned counsel relied on the "Unities Doctrine" propounded in the famous Dawson's Field Arbitration, by its Arbitrator Mr. Michael Kerr QC (Queen's Counsel), and applied and developed by Rix J. in *Kuwait Airways Corporation v. Kuwait Insurance Co.* [SAK (1996) 1 Lloyd's Rep. 664]. In Dawson's Field Arbitration case, four planes were hijacked as part of a planned and co-ordinated operation with the objective to bargain the demand for release of prisoners. Since the negotiations did not progress, three aircraft were blown up together as one operation. Therein, it was observed thus;

"Whether or not something which produces a plurality of loss or damage can properly be described as one occurrence therefore depends on the position and viewpoint of the observer and involves the question of degree of unity in relation to cause, locality, time, and, if initiated by human action, the circumstances and purposes of the persons responsible.....The answer must be subjective. No one contended that each explosion was a separate occurrence. In my view there was one occurrence, one event, one happening; the blowing up of three aircraft in close proximity more or less simultaneously, within the time span of a few minutes, and as a result of a single decision to do so without any one being able to approach the aircraft between the first explosion and their destruction."

24. In *Kuwait Airways Corporation* it was held that, to apply the 'unities doctrine', it has to be satisfied that; (i) there was unity of time; (ii) there was unity of location; (iii) there was unity of cause; and (iv) there was unity of intent. The above was relied on by the High Court of Justice, Queen's Bench Division, Commercial Court in an arbitration claim between *Aioi Nissay Dowa Insurance Company Limited* (formerly *The Chiyoda Fire and marine Insurance Company Limited*) v. *Heraldglenn Limited* and another, reported in (Neutral Citation Number) [2013] EWHC 154 (Comm) [England and Wales High Court Commercial Court]. There, the claim related to loss sustained out of the attack on the Twin Towers of the World Trade Center on September 11, 2001. There the question was whether the loss was caused by series of occurrences "arising out of one event" for the purpose of applying the policy. The arbitration tribunal held it to be separate events. The Court, after elaborately considering the 'unities doctrine', held that there were separate causes for the losses, because there were two hijacking of two air-crafts, causing separate loss. It was also found that there was no unity of time and location, to hold that the losses arose out of one event.

25. The occurrences in the present case have happened at various parts of the country, in different ATMs, and spread over a span of one month, the 'unities doctrine' does not apply to the facts at hand. So also there is no case of unity of intent. Therefore, it cannot be held that the losses arose out of one event.

26. In *Amravati District Central Cooperative Bank Limited v. United India Fire and General Insurance Company Limited* [(2010) 5 SCC 294], there were series of embezzlement by an employee of a bank, which were connected together by a common *modus operandi*, the Apex Court, considering a similar excess clause,

held that the loss on account of each embezzlement forms a separate claim. Therein the Apex Court, explaining the meaning of excess clauses in insurance contracts, held thus;

"Excess" clauses are commonly used in insurance contracts. In insurance parlance, the term "excess" in the excess clause in the policy refers to "that part of the amount of loss, under each claim, which is not covered by the policy" or the "amount that the policy-holder has, by agreement, to bear or contribute to each insurance claim". In other words it limits the liability of the insurer in regard to each claim, only to the amount of loss, in excess of the sum specified in the excess clause, which the insured has agreed to bear (either himself or by securing other insurance coverage)."

Therefore, we negate the contention of the learned counsel relying on the 'unities doctrine'.

27. Now, coming to the argument regarding the "excess clause", if the clause is applied, no amounts are payable by the insurance company to the plaintiff since "each loss" is not more than Rs.10,000/- and the excess being Rs.25,000/-. Relying on the judgment of the Apex Court in *Texco Marketing Pvt. Ltd. v. Tata AIG General Insurance Co. Ltd. And Ors.* [(2023) 1 SCC 428], the learned counsel for the plaintiff argued that, by applying the 'blue pencil rule', the excess clause is to be eschewed from consideration since, otherwise it renders the very indemnity under the policy nugatory and otiose. In *Texco Marketing Pvt. Ltd.*, the Apex Court held that the "doctrine of blue pencil" strikes off the offending clause in a contract, it being void ab initio. It was observed,

"The said clause being repugnant to the main contract, and thus destroying it without even a need for adjudication, certainly has to be eschewed by the Court. The very existence of such a clause having found to be totally illegal and detrimental to the execution of the main contract along with its objective, requires an effacement in the form of declaration of its non-existence, warranting a decision by the Court accordingly."

The Apex Court relied on its earlier judgment in *Beed District Central Coop. Bank Ltd. v. State of Maharashtra* [(2006) 8 SCC 514], which referred to the evolution of the doctrine by the English and American Courts, thus;

"10 . The "doctrine of blue pencil" was evolved by the English and American courts. In *Halsbury's Laws of England*, (4th Edn., Vol. 9), p. 297, para 430, it is stated:

430. Severance of illegal and void provisions.--A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or 'severed' from the contract and the rest of the contract enforced without them. Nearly all the cases arise in the context of restraint of trade, but the following principles are applicable to contracts in general.

11. In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn. 2005, Vol. 1, pp. 553-54, it is stated:

Blue pencil doctrine (test).--A judicial standard for deciding whether to invalidate the whole contract or only the offending words. Under this standard, only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words. (Black, 7th Edn., 1999)

This doctrine holds that if courts can render an unreasonable restraint reasonable by scratching out the offensive portions of the covenant, they should do so and then enforce the remainder. Traditionally, the doctrine is applicable only if the covenant in question is applicable, so that the unreasonable portions may be separated. E.P.I. of Cleveland, Inc. v. Basler [12 Ohio App 2d 16 : 230 NE 2d 552, 556].

Blue pencil rule/test.--Legal theory that permits a judge to limit unreasonable aspects of a covenant not to compete.

Severance of contract; 'severance can be effected when the part severed can be removed by running a blue pencil through it without affording the remaining part'. Attwood v. Lamont [(1920) 3 KB 571 : 1920 All ER Rep 55 (CA)]. (Banking)

A Rule in contracts a court may strike parts of a covenant not to compete in order to make the covenant reasonable. (Merriam Webster)

Phrase referring to severance (q.v.) of contract. 'Severance can be effected when the part severed can be removed by running a blue pencil through it' without affording the remaining part. Attwood v. Lamont [(1920) 3 KB 571 : 1920 All ER Rep 55 (CA)]. (Banking)"

This Court has, in Ismail Hajee Essa Trust and Ors. v. Muslim Educational Society and Ors. [2017 (1) KHC 916], referred to the rule and it was held thus;

"The 'doctrine of blue pencil' can be called in aid to sever the illegal and void provisions from the contract in order to enforce the rest of it. The offending parts are invalidated (if it would be possible to delete them) by running a blue pencil through them as opposed to changing or rearranging words."

28. The very basis upon which the plaintiff seeks invocation of the 'blue pencil rule' is that, at the relevant time, the maximum limit of withdrawal from an ATM is Rs.10,000/- and hence, an excess clause of Rs.25,000/-would render the very policy nugatory. The learned Senior Counsel appearing for the defendants would refute such claim. The plaintiff failed to adduce any evidence to substantiate the factual basis regarding the same. Therefore, though the argument of the learned counsel for the plaintiff would appear attractive, it could not be established that the rule applies to the facts of the case.

29. Relying on the judgments of the Apex Court in New India Assurance Co. Ltd. and Ors. v. Mudit Roadways [(2024) (3) SCC 193] and Galada Power and

Telecommunication Ltd. v. United India Insurance Company Ltd. and Anr. [(2016) 14 SCC 161], the learned counsel for the plaintiff argued that the excess clause was not urged by the insurance company in their letter of repudiation, and having not chosen to urge the same in their repudiation letter, it is not open for the insurance company to rely upon the same in the suit. In Mudit Roadways (supra) referring to Galada Power (supra) , it was held thus;

“Notably, in earlier cases like Galada Power and Telecommunication Ltd. v. United India Insurance Co. Ltd. And Anr. [(2016) 14 SCC 161] and Saurashtra Chemicals Ltd. v. National Insurance Co. Ltd. [(2019) 19 SCC 70], it was declared that new grounds for repudiation cannot be introduced during the hearing if they were not included in the repudiation letter. This legal principle was reiterated in JSK Industries Pvt. Ltd. v. Oriental Insurance Co. Ltd. [2022: INSC: 1106].

xxxx xxxx xxxx

Canvassing supplementary arguments during the hearing, (beyond those in the insurer's reputation letter), is explicitly prohibited. Consequently, it is held that the insurer cannot introduce additional reasoning beyond those detailed in their letter, to justify the repudiation.”

30. The learned Senior Counsel appearing for the insurance company argued that such restriction applies only in invoking the repudiation clauses and not to the excess clause in the agreement. Under the excess clause there is no repudiation, and it has significance only in relation to quantification of the liability, it is argued.

31. Under insurance law, repudiation of a claim is the rejection of claim by the insurer. It could be on various grounds including, lack of coverage under the policy, breach of policy conditions, exclusion clauses. An “excess”, which is the proportion of the loss that the insured has to bear, could not be strictly said to be a repudiation, under which, the very liability is disputed. It is essentially a limitation on the quantum payable and not a denial of the very liability. In a case where the excess clause is applicable, there is no repudiation of the liability as such. It only deals with the mode of computation of the quantum payable by the insurance company. Such a question would arise only when the insurance company is found liable. Therefore, generally, it may not be possible to say that the excess clause operates as repudiation of liability and hence, such ground ought to have been taken in the repudiation letter issued by the insurance company.

32. However, in the case at hand, the insurance company relies upon the excess clause to contend that no amounts are payable to the plaintiff under the policy, the loss being within the limit of excess. Such a contention essentially amounts to denial of the claim in its entirety and practically amounts to repudiation. Such contention was available to the insurance company even at the time when they issued the repudiation letter, however, not taken. Therefore, on the facts of the present case, the reliance on the excess clause essentially amounts to

repudiation. The defendants having not relied upon the same in their letter of repudiation, cannot be permitted to fall back upon it to deny the claim in its entirety. However, in the light of the findings on the other points, the non applicability of the excess clause is of no avail to the plaintiff.

33. Therefore, though Sri. Madhu Radhakrishnan, the learned counsel for the plaintiff, has not left any stone unturned, the plaint claim is bound to fail.

In the result, the appeal is allowed. The decree and judgment of the trial court are set aside and the suit will stand dismissed. Parties to bear their respective costs.