

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 123 OF 2013

The New India Assurance Co. Ltd.
A nationalized Insurance Company,
having its Registered and Head Office
at New India Assurance Building,
87 Mahatma Gandhi Road, Fort,
Mumbai 400 001 and its Divisional
Office at Velho Building, 3rd Floor,
Panaji, Goa 403 001. Appellant.

Versus.

Messrs Sesa Goa Ltd.,
a Company incorporated under the
Companies Act, and having its
registered office at Sesa Ghor,
20 EDC Complex, Patto, Panaji, Goa. Respondent.

Mr. Emerico Afonso, Advocate for the Appellant.

Mr. R.G. Ramani, with Mr. P. Kakodkar, Advocate for the
Respondent.

CROSS OBJECTION NO.20 OF 2013

IN

FIRST APPEAL NO. 123 OF 2013

Messrs Sesa Goa Ltd.,
a Company incorporated under the
Companies Act, and having its
registered office at Sesa Ghor,
20 EDC Complex, Patto, Panaji, Goa. Cross Objector/
Respondent.

Versus.

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87 Mahatma Gandhi Road, Fort,
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Office at Velho Building, 3rd Floor,
Panaji, Goa 403 001.

..... Appellant.

Mr. R.G. Ramani, with Mr. P. Kakodkar, Advocate for the Cross
Objector/Respondent.

Mr. Emerico Afonso, Advocate for the Appellant.

***Coram : M.S. Sonak &
Smt. M.S. Jawalkar, JJ.***

***Reserved on : 10th January, 2020.
Pronounced on : 16th January, 2020***

J U G M E N T : (Per M.S. SONAK, J.)

This Appeal by the Insurance Company and the Cross
Objections by the Respondents-Claimants are directed against the
Judgment and Decree dated 30th April, 2013 made by the learned
Civil Judge, Senior Division, at Panaji in Special Civil Suit
No.124/98/B, instituted by the Respondents herein, seeking to
recover an amount of Rs.4,98,70,343/- with interest at the rate of
18% per annum, as against the insurance claim arising out of Marine
Insurance Policies issued by the Appellant.

2. There is no dispute between the parties that the Vessel M.V. Orissa in which, the Respondent had insurable interest was, in fact, insured under the aforesaid policies for the period between 1st April, 1996 and 31st March, 1997. It is the case of the Respondent that the Vessel, whilst on a voyage between Marmugao – Goa and Toronto, Italy, navigated through the rough weather between 10th June, 1996 - 18th June, 1996 and suffered substantial damages. It is the case of the Respondent that the Appellant is duty bound to indemnify the Respondent against such damages. Some correspondence ensued between the Respondent and the Appellant regards the claim under the said insurance policies, which finally led to the institution of the civil suit, in which, the aforesaid impugned Judgment and Decree came to be made.

3. The Appellant had raised the issue of territorial jurisdiction of the trial Court to entertain and try the suit as instituted. This issue has been decided by the trial Court against the Appellant. Mr. Afonso, the learned Counsel for the Appellant has, however, made it clear that this objection based upon the territorial jurisdiction, was not being pursued by the Appellant in the present appeal.

4. Mr. Afonso, however, submitted that the suit as instituted, was not maintainable because the same was not validly instituted. He

submits that the plaint, in the present case, was signed and verified by the alleged officer of the Company who had no authority to do the same. He submits that in this case, neither any resolution of the Company, nor any Power of Attorney, were produced on record on behalf of the Respondent. He submits that even though such objection may not have been specifically raised in the written statement, questions were posed to PW.1 on this issue and even the learned Trial Judge has squarely addressed such issues, without any objection on the part of the Respondent. Mr. Afonso submits that this is basically a legal issue which goes to the root of the matter and, therefore, there can be no bar to raising such issue at the appellate stage. He relies upon a decision of the learned Single Judge of the Delhi High Court in *M/s. Nibro Limited vs. National Insurance Co. Ltd.*¹ and the decision of the Hon'ble Supreme Court in *State Bank of Travancore vs. Kingston Computers India Private Limited*² in support of this objection.

5. Mr. Afonso, then submits that the evidence on record very clearly makes out a case that the Respondent had breached the warranties and conditions of the insurance policies and, therefore, the Appellant stood absolved of the liability to make any payments under the insurance policies. He submits that the vessel was out of class

¹ AIR 1991 Delhi 25;

² (2011) 11 SCC 524

during the relevant period and, in any case, the vessel which was basically a trans-shipper, was not seaworthy to embark upon an adventure between Mormugao and Taranto at the onset of monsoons. He submits that the Respondent, despite being privy to the unseaworthiness of the vessel, undertook/permitted the voyage, which clearly constitutes a breach of warranties and conditions subject to which the insurance policies came to be issued. He submits that this also attracts the provisions of Section 41(5) of the Marine Insurance Act, 1963, in terms of which the Appellant-insurance company cannot be held liable for any loss attributable to any unseaworthiness.

6. Mr. Afonso submits that there was a specific condition in the class certificate issued by one of the classification societies that the vessel on full load must keep one of the 9 holds empty. He submits that there is ample evidence on record, *inter alia*, in the form of admissions on behalf of the witnesses of the Respondent that all the 9 holds were full/loaded. He submits that this also constitutes a breach of one of the conditions, subject to which the insurance policies came to be issued and therefore, no liability can be imposed upon the Appellant-insurance company.

7. Mr. Afonso, without prejudice, submits that there is no clear evidence about the vessel running into any rough weather. He

submits that necessary logbooks have been suppressed and this is a clear case which warrants drawal of adverse inference. He points out that though it is the case of the Respondent that some seamen were actually injured on account of rough weather and had to be embarked at Aden, no evidence on this aspect is produced. He points out that the logbooks are required to statutorily make entries on such aspects and the fact that no logbooks were produced, clearly warrant drawal of adverse inference against the Respondent.

8. Mr. Afonso, without prejudice, further submits that the so called damages to the vessel have absolutely no nexus with the alleged rough weather which it is said to have alleged encountered between 10th June, 1996 - 18th June, 1996. He submits that the damages, if any, are at the highest attributable to normal wear and tear, as well as the circumstance that the damaged parts were already corroded. He submits that the evidence in the form of survey report furnished by the Salvage Association is very clear on this aspect. He submits that the learned Trial Judge erred in relying upon the report furnished by J. Basheer and Associates who are neither actual surveyors, nor did they have any occasion to actually survey the vessel M.V. Orissa. He submits that in the absence of any evidence that the alleged damages had any nexus with any alleged rough weather, the learned Trial Judge, was not justified in partly decreeing the suit in

favour of the Respondents.

9. Mr. Afonso, again without prejudice, submits that the learned Trial Judge has failed to appreciate that this was a clear case of breach of clause 10 of the insurance policies, inasmuch as no intimation was ever sent to the Lloyd's Agent, by the Respondent. He submits that in these circumstances, deduction at the rate of 15% was due. He submits that in addition, deduction of Rs.20.00 lakhs was clearly due in terms of the insurance policies. He relies on a decision of the Hon'ble Apex Court in *Suraj Mal Ram Niwas Oil Mills Pvt. Ltd. vs. United India Insurance Co. Ltd. and another*³ to submit that the terms of a insurance contract have to be strictly construed and no exception can be made on the ground of equity in such matters.

10. Mr. Afonso submits that on a cumulative consideration of the aforesaid grounds, the impugned Judgment and Decree is liable to be reversed.

11. Mr. Ramani, learned Counsel for the Respondent contests the aforesaid contentions raised by Mr. Afonso. He submits that the objection with regard to any alleged incompetence of PW.1 to institute the suit on behalf of the Respondent Company was never

³ (2010) 10 SCC 567

raised in the written statement. He submits that this was a hyper-technical objection, which was rightly rejected by the learned Trial Judge. He relies on a decision of the Hon'ble Supreme Court in the case of *United Bank of India vs. Naresh Kumar and ors.*⁴ to submit that a suit cannot be dismissed on such grounds.

12. Mr. Ramani then submits that the evidence on record clearly bears out that the vessel was not only in its class during the voyage, but further the same was very much sea-worthy. He refers to the survey carried out by Palco Surveyors and Adjusters Pte Ltd., a agency chartered by the Appellant themselves. He submits that in terms of the Palco's report, the vessel was quite sea-worthy and even recommendations in the said report were complied with by the Respondent. He submits that there was no condition in the classification certificate regards keeping of one hold empty. He submits that neither the Salvage Association's report, nor the Basheer's report make any reference to either existence or breach of any such condition. He submits that there is absolutely no breach of any warranty or condition on the basis of which the Appellant can be permitted to avoid any liability under the insurance policies.

13. Mr. Ramani submits that since the vessel was absolutely sea-worthy at the time when it sailed from Mormugao and further since

⁴ AIR 1997 SC 3

there is ample evidence that the vessel ran into rough weather during the period between 10th June, 1996 to 18th June, 1996, the damages caused to the vessel can be said to be attributable only to this rough weather and not to any other cause. He submits that there is no serious challenge to the fact that the Respondent had to expend an amount of Rs.4,98,70,343/- towards setting right the damages caused to the vessel. He, therefore, submits that the impugned Judgment and Decree warrants no interference at the behest of the Appellant, but warrants interference at the behest of the Respondent to the extent that the learned Trial Judge has not decreed the entire claim of the Respondent. He submits that the cross objections, therefore, deserve to be allowed.

14. Mr. Ramani submits that there is substantial compliance with the provisions of Clause 10 of the insurance policies and, therefore, there is no question of making a 15% deduction as urged on behalf of the Appellant. However, on the aspect of deduction of Rs.20.00 lakhs, Mr. Ramani quite fairly concedes that such deduction was perhaps required to be made in terms of the insurance policies.

15. Mr. Ramani submits that Basheer's report is quite right to the extent it sees nexus between the damages to the vessel and the rough weather. But he submits that the distinction sought to be made in such report is not quite right. Mr. Ramani submits that the

material on record justifies a decree for the entire claimed amount of Rs.4,98,70,343/-. Mr. Ramani submits that the learned Trial Judge should have awarded interest @ 18% per annum, taking into consideration that this was a commercial transaction.

16. For all the aforesaid reasons, Mr. Ramani submits that the Appeal may be dismissed and the cross objection may be allowed.

17. The rival contentions now fall for our determination.

18. Having heard the learned Counsel for the parties extensively, and having regard to the contentions raised by them, according to us, the following points for determination arise in this Appeal :

(i) Whether the suit in the present matter was not properly instituted on account of failure on the part of the Respondent Company to produce on record any resolution or power of attorney to authorise Shri C.D. Chitnis to sign, verify the plaint and to institute the suit on behalf of the Respondent Company ?

(ii) Whether the Respondent can be said to have breached the warranties and conditions set out in the insurance policies, thereby absolving the Appellant of any liability to make any payments under the insurance policies ?

(iii) Whether the Respondent Company has succeeded in establishing that the vessel M.V. Orissa indeed encountered the rough weather between 10th June, 1996 and 18th June, 1996 on her voyage between Mormugao (India) and Taranto (Italy) ?

(iv) If the answer to the aforesaid point is in the affirmative, then, whether the damages suffered by the vessel M.V. Orissa have any nexus with such rough weather or whether, the damages are on account of normal wear and tear ?

(v) Whether an amount of Rs.20.00 lakhs is required to be deducted from the amount of ascertained claim in terms of the expressed stipulation in the insurance policies ?

(vi) Whether, in the facts and circumstances of the present case, there is compliance with the conditions imposed in Clause 10 of the insurance policies, and if not, whether deduction of 15 % is required to be made from the amount of ascertained claim ?

19. In so far as the first point of determination is concerned, it is an admitted position that no such objection to the institution of the suit was ever taken by the Appellant in their, otherwise detailed, written statement. Order VIII, Rule 2 of the CPC, provides that the defendant must raise by his pleading, all matters which show

the suit not to be maintainable. If objection to the non-maintainability of the suit were to be raised by the appellant their written statement in the first place or even by amending the written statement, the Respondent would have had an opportunity to meet with such objection. The mere fact that some questions were posed to Mr. C. D. Chitnis (PW.1) in the course of his cross examination, is not sufficient to conclude that the Respondent was not taken by surprise or was not likely to be taken by surprise. Order 8, Rule 2 of CPC, as noted earlier, *inter alia*, provides that the Defendant must raise by his pleading all matters which show the suit not to be maintained and all grounds of defence, if not raised, would be likely to take the opposite party by surprise, or would raise the issues of fact, not arising out of the plaint. Ordinarily, therefore, the Appellant ought not to be allowed to raise such objection at the appellate stage.

20. However, considering the position that there was some cross examination of PW.1 on the aforesaid objection and further the fact that the learned Trial Judge, in the impugned Judgment and Order has also considered and rejected such objection, we heard Mr. Afonso on the objection as raised. The material on record bears out that Shri C.D. Chitnis (PW.1) who has signed and verified the plaint, was the Company Secretary and General Manager (Corporate Affairs) of the Respondent at the relevant time. This was specifically

disclosed in the verification clause to the plaint and this position, despite the cross examination, the Appellant was not successful in proving otherwise. In this state of the evidence, coupled with the fact that no such objection was raised in the written statement, we see no error on the part of the learned Trial Judge in rejecting the objection to the maintainability of the suit.

21. According to us, the decision of the Hon'ble Supreme Court in the case of *United Bank of India vs. Naresh Kumar and ors.* (supra) affords a complete answer to the objection now raised by the Appellant. In this case, it is held that as far as possible, substantive rights should not be allowed to be defeated on account of procedural irregularities which are curable. It is further held that companies can sue and can be sued in their own name. Under Order 6, Rule 14 of the CPC, a pleading is required to be signed by the party ad its pleader, if any. As a company is a juristic entity it is obvious that some persons has to sign the pleadings on behalf of the company. Order 29, Rule 1 of CPC, therefore, provides that in a suit by or against a Corporation, the Secretary or any Director or other principal officer of the Corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6, Rule 14, together with Order 29, Rule 1 of CPC, *it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule*

1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the Corporation. In addition thereto and dehors Order 29, Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6, Rule 14 of the Code of Civil Procedure.

22. The Hon'ble Supreme Court, in the aforesaid Judgment has further proceeded to hold that *a person may be expressly authorised to sign the pleadings on behalf of the company, for example, by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can on the basis of evidence on record, and after taking all the circumstances of the case, specifically with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleadings by its officer.*

23. In the aforesaid case, a specific objection had in fact been taken to the authority of Shri L.K. Rohatgi to institute the suit on behalf of the Union Bank of India. Such objection had, in fact, been

upheld upto the stage of the High Court. Hon'ble Supreme Court, however, noted that the suit had been filed in the name of the Appellant Company (the Bank); full amount of court fee had been paid by the Appellant Company; documentary, as well as oral evidence had been led on behalf of the Appellant and trial of the suit before the trial Court had continued for about two years. The Hon'ble Supreme Court observed that *it is difficult, in these circumstances, even to presume that the suit had been filed and tried without the appellant having authorized the institution of the same.*

24. In *Nibro Limited* (supra), the learned Single Judge of the Delhi High Court has taken a view that the question of authority to institute a suit on behalf of a company is not a technical matter, but has far-reaching consequences.

25. In *State Bank of Travancore* (supra), the Hon'ble Supreme Court has taken a view that a suit filed by a person not duly authorised by the Company, is not maintainable. In latter case, the company had neither produced any evidence to prove that the signatory was appointed as the Director of the Company, nor was there any resolution of the Board of Directors, authorising the signatory to file the suit on behalf of the Company.

26. According to us, both the aforesaid decisions are quite

distinguishable. In the present case, there is evidence on record that PW.1, who actually signed, verified and instituted the suit on behalf of the Respondent, was its Company Secretary and General Manager (Corporate Affairs). Besides, the facts in the present case on the issue of institution of the suit, are substantially similar to the facts in the case of *United Bank of India vs. Naresh Kumar and ors.* (supra). Accordingly, the first point for determination will have to be answered against the Appellant and in favour of the Respondent.

27. The second point for determination relates to the breach of warranties and conditions of the policies on the part of the Respondent. The Appellant alleges the following breaches :

(A) That though the insurance policies required the vessel M.V. Orissa to maintain its class, the vessel failed to maintain its class beyond 20th February, 1996 and, consequently, was not within its class, when it undertook the voyage between Mormugao and Taranto in June, 1996.

(B) The vessel M.V. Orissa was not sea-worthy at the time of its voyage between Mormugao (India) and Taranto (Italy). Besides, the Respondent despite being privy to this position, permitted sail of the vessel. The Appellant submits that in terms of Section 41(4) of the Marine Insurance Act, 1963, the Appellant in such circumstances is not liable to any loss attributable to unseaworthiness.

(C) There was a specific condition in the class certificate issued

by the Registro Italiano Navale (RINA) that the vessel, carrying with full load conditions must keep one of the 9 holds empty. This condition was breached and, therefore, the vessel was out of class.

28. Clause 4 of the insurance policies, *inter alia*, provides that unless the underwriters agree to the contrary in writing, the insurance shall terminate automatically at the time of, *inter alia*, suspension, discontinuance, withdrawal or expiry of the class of the vessel, provided that if the vessel is at sea, such automatic termination shall be deferred until arrival at her next port. Therefore, it does appear that if there was any suspension, discontinuance, withdrawal or expiry of the class of the vessel which is insured, there shall be automatic termination of the insurance. The insurance policies also have specific classification and maintenance of class clause, which *inter alia*, provides that warranted vessel classed as below by one of the following Classification Societies and Class maintained throughout the currency of this policy or held covered at Additional Premium, if any, as may be decided by the committee, provided immediate notice as to change of Classification Society of the vessel or change, suspension, discontinuance, withdrawal or expiry of her class is given to the Insurer :

- | | |
|--------------------------------|----------------|
| 1. Lloy's Register | : 100A or B.S. |
| 2. American Bureau of Shipping | : + A 1 |
| 3. Bureau Verities (B.V.) | : 13/3 E + |

- | | |
|--|-------------------|
| 4. Germanischer Lloyd (G.L.) | : + 100A 4 |
| 5. Korean Register of Shipping | : + KRS 1 |
| 6. Nippon Kaiji Kyokai | : NS * |
| 7. Norske Varitas (NV/DNV) | : + 1A1 |
| 8. Registro Italiano | : * 100A 1.1 Nav. |
| 9. Russian Register of Shipping | : KM * |
| 10. Polish Register of Shipping | : * KM |
| 11. Indian Register of Shipping (IRS): | SU |

(NOTE : + in the above symbols denote MALTESE CROSS)

* All Classes mentioned above are subject to Class without any modification.

29. The Classification Society referred to in the class and maintenance of class, as aforesaid, included, *inter alia*, Registro Italiano (RINA) at Entry 8 and Indian Register of Shipping (IRS) at Entry 11. This means that the requirement of the insurances policies is that the vessel must be classed by any one of the Classification Societies and the class maintained throughout the currency of the insurance policy.

30. There is evidence on record which suggests that the vessel had dual class, i.e. the class issued by RINA as well as IRS. Mr. Afonso's arguments were mainly based upon the certificate of class

issued by RINA, on the basis of which he urged that at least with effect from 20/02/1996, the vessel was without any class.

31. The certificate of class at Exhibit 25, in the first place, indicates that the vessel was classed for a period of 5 years, running from September, 1992. The certificate, however, contains an endorsement that it will be invalidated whenever the requirements of the Rules are not complied with. Further, there is a note that the certificate is only valid provided it also contains the pages with the expiry date of periodical surveys and the endorsements.

32. The certificate of class, as annexed to it, shows the expiry dates of periodical surveys and the endorsements. If the details placed and the date of service as indicated in the endorsements are perused, then, it is apparent that there is a clearly discernible scheme, in which, the class of vessel is confirmed a maximum period of time and until the following survey. This scheme is discernible from the detailed endorsements from 25th November, 1992 till 16th September, 1996.

33. The endorsement dated 17th March, 1995 is of some significance and the same reads as follows :

*“SURVEYS NOW CARRIED OUT : INTERMEDIATE HULL
AND*

*MACHINERY ANNUAL SURVEYS; DRYDOCKING SURVEY;
AUX. BOILER RINA N.93; OCCASIONAL HULL SURVEY.
THE SHIP CONTINUES IN HER CLASS SUBJECT TO
SURVEY
WITHIN 31ST AUGUST 1995.”*

34. The endorsement dated 17th March, 1995 makes it clear that the vessel was in Singapore during January-March, 1995 and that the vessel continued in her class, subject to survey within 31st August, 1995. The next endorsement is dated 4th September, 1995 on the basis of survey at Kaolising.

35. This endorsement indicates the ship continued in her class till 31st October, 1995. The next endorsement is dated 16th September, 1995, which indicates that survey was carried out at Hong Kong and the class was confirmed until 31st December, 1995. The next endorsement is dated 9th November, 1995 in relation to the survey carried out at Ulsan, Korea in November, 1995 which confirms the class until 31st December, 1995.

36. The next, perhaps most significant endorsement dated 10th February, 1996 and the same reads as follows :

*“Surveys carried out : annual hull and machinery survey;
Aux. Boiler RINA N.92; Occasional hull and machinery
surveys- Class confirmed for the voyage in ballast
conditions from Singapore to Mormugao (India) -
The containerized aux. Diesel Generator on main deck and*

the conveyor belts system have to be considered temporarily out of order.”

37. The aforesaid endorsement dated 10th February, 1996 is to be read in conjunction with the endorsement dated 16th September, 1996 in order to appreciate Mr. Afonso's contention. The endorsement dated 16th September, 1996 which immediately follows the endorsement dated 10th February, 1996, reads as follows :

“Hull and machinery ordinary surveys, hull occasional survey carried out.

The containerized aux diesel generator on main deck and the conveyor belts system have to be considered temporarily out of order.

Ship continues in her class”

38. Cumulative reading of all the aforesaid endorsements, as well as conjoint reading of the endorsements dated 10th February, 1996, and 16th September, 1996, do indicate that the vessel was within the RINA class upto conclusion of its voyage in ballast condition from Singapore to Mormugao (India). There is evidence on record that this voyage commenced sometime on 12th February, 1996 in Singapore and concluded on 20th February, 1996 in Port of Mormugao (India).

39. The endorsement dated 10th February, 1996 makes it clear that at the survey carried out at Singapore between November, 1995 and February, 1996, the class was confirmed for the voyage in ballast

condition from Singapore to Mormugao (India). Unlike in the previous endorsements, there was no confirmation or continuance of class up to a particular date or upto the next survey indicated, but the class was confirmed only for the purpose of voyage and that too in ballast condition from Singapore to Mormugao (India). There is evidence forthcoming from the Respondents themselves in the form of testimony of PW.3 that this voyage was necessary in order to save time pending preparation of Trim and Stability Report by RINA. There is no endorsement that the class was either confirmed or extended beyond the date on which the voyage in ballast condition from Singapore to Mormugao (India) was concluded.

40. The next endorsement dated 16th September, 1996 refers to the survey at Taranto (Italy) between the period July – September, 1996. That is the period after the vessel sailed through the alleged rough weather between 10th June, 1996 - 18th June, 1996 and after extensive repairs were carried out at Taranto in Italy between July – September, 1996. There is a gap or break between 20th February, 1996 and July-September, 1996 during which it cannot be considered that the Vessel was in its class, in so far as RINA is concerned.

41. Mr. Ramani contends that since the endorsement dated 16th

September, 1996 refers to '*ship continues in her class*', it must be presumed that there was no gap or break, cannot be accepted in the state of the evidence on record. The expression '*continues*' has to be understood in the context that the classification was otherwise valid for a period of 5 years running from September, 1992 i.e. up to September, 1997. There are similar endorsements made earlier and on the basis of such endorsements or rather use of the expression '*continues*', it cannot be said that there was no break in the class for the period between 20th February, 1996 and July-September, 1996.

42. There is no proper explanation furnished by any of the witnesses examined on behalf of the Respondents in so far as this break or gap is concerned, though there was a specific defence raised by the Appellant on this issue. Therefore, in the present case, at least, in so far as RINA classification is concerned, there is material on record to hold that the vessel was out of its class for the relevant period when it is alleged to have sustained damages on account of the alleged rough weather. However, according to us, the aforesaid circumstance, by itself, will not constitute any breach of warranties, having regard to the specific classification and maintenance of class clause in the insurance policies.

43. As noted earlier, this clause requires the warranted vessel to be classed by one of the classification societies referred to in the

clause. In the present case, there is material on record which establishes that the vessel had a dual class, that it was classified with RINA as well as IRS. The Respondent has produced on record a certificate of class dated 15th March, 1996 issued by the Indian Register of Shipping (IRS), the validity period of which is extended upto 30th September, 1997. This certificate at Exhibit 26 speaks about the vessel having been certified on 17th March, 1995 by the Society's Surveyors in accordance with the Rules and Regulations or their equivalent for class notations. The Respondent has also produced on record a Class Maintained Certificate dated 11th December, 2007 at Exhibit 27. The latter certificate cannot be taken into consideration because the same is not really a certificate of class, but is only a certificate issued by Senior Surveyor, certifying that the vessel was classed with the IRS that her class was maintained during the period from 1st June, 1996 to 31st March, 1997. What is really relevant is actually the certificate of class dated 15th March, 1996 which is at Exhibit 26 on record.

44. Mr. Afonso did submit that the vessel was in Singapore as on 17th March 1995 and, therefore, it is not understood as to how the Surveyors of IRS could have undertaken the survey of the vessel on 17th March, 1995. There is evidence on record that the Surveyors of IRS have undertaken the survey in Singapore. Besides, PW.3 has

deposed that there was understanding between RINA and IRS to act on the basis of survey reports made by their respective Surveyors.

45. According to us, once there is a certificate of class on record, in a matter of this nature, it would not be appropriate for us to go into the issue as to whether this certificate of class was validly issued by the IRS or not. The document at Exhibit 25 came to be admitted in evidence. Its contents indicate that the vessel was within IRS class for the relevant period between 1st June, 1996 to 31st March, 1997. There is also endorsement dated 5th June, 1996 made by the Marine Mercantile Department (MMD) on record. On the basis of this documentary evidence, no interference is called for with the view taken by the learned trial Judge that the vessel was within its class during the operation of the policies and consequently, there was no breach of any conditions or warranties as to the classification.

46. On the aspect of seaworthiness of the vessel, to begin with, reference is required to be made to the report of Palco Surveyors & Adjusters Pte Ltd., which is on record at Exhibit 68. No doubt, it is correct as pointed out by Mr. Afonso that Palco Surveyors were engaged by the Appellant in order to find out whether the Appellant should reasonably accept the report and underwrite the insurance qua the vessel M.V. Orissa. However, Palco Surveyor's report gives an indication as to the state of the Vessel on 5th January, 1995. The

report, no doubt, makes certain recommendations which reads as follows :

“Recommendations

- 1. Owing to the age and type of the vessel, thickness gaugings are recommended to ascertain the extent of wastage of steel plating of the vessel.*
- 2. Owing to present change of class to ABS; class records have not been sighted and we recommend all outstanding class items to be attended to.”*

47. There is evidence on record that some measures were undertaken by the Respondent to comply with the recommendations of Palco Surveyors and it is only upon the Appellant being satisfied that such recommendations were duly complied with, that the Appellant issue the marine insurance policies on the basis of which the Respondent claims amount in the suit. Besides, it is necessary to note that even the report of the Salvage Association at Exhibit 4, upon which strong reliance is placed by the Appellant, does not indicate that the vessel was unseaworthy for undertaking the voyage between Mormugao (India) and Taranto (Italy). The report of Salvage Association, no doubt, refers to corrosion of some of the frames in holds and to the renewal of some of the frames in the holds. All these observations may be extremely relevant to determining the issue as to whether the damages which the vessel suffered, were on account of the alleged rough weather or whether the

same was on account of the state of the vessel and it is normal wear and tear. However, even the Salvage Association report, despite making specific reference to the corroded frames in the holds, does not go to the extent of observing that the vessel was unseaworthy to undertake the voyage between Mormugao (India) and Taranto (Italy).

48. The Trim and Stability report issued by RINA is also on record and on the basis of the same as well, it cannot be said that the vessel was unseaworthy to undertake the voyage between Mormugao (India) and Taranto (Italy). Then, there is a report of Basheer and Association, again commissioned by the Appellants itself which also does not say that the vessel was unseaworthy to undertake the voyage between Mormugao (India) and Taranto (Italy).

49. Further, PW.3, who was the Marine Engineer, holding Class I (Motor) Certificate of Competency issued by the Mercantile Marine Department, Mumbai has deposed to the surveys, repairs and modifications which were carried out to the vessel from time to time before it ultimately sailed from Mormugao to Taranto. Similarly, PW.2, again, Master Mariner (Foreign Going), holding Certificate of Competency issued by the Mercantile Marine Department, Mumbai has deposed that necessary Cargo Ship Safety Construction Certificate was obtained and the said Certificate contained an endorsement dated 5th June, 1996 that annual inspection of the

vessel structures had been carried out prior to sailing. He has deposed that this endorsement was made without any conditions which would affect the seaworthiness of the vessel. The witnesses on behalf of the Respondent have deposed that all statutory compliances were in place before the vessel sailed from Mormugao to Toronto. PW.4 Nitin Sahakari is B.E. (Mechanical) Marine Engineer holding Class I (Motor) Certificate of Competency issued by the Marine Mercantile Department, Mumbai. He was on board the vessel during the voyage between Mormugao and Tarato. He too has deposed to the seaworthiness of the vessel. All these witnesses were subjected to extensive cross examination. However, at least, on the aspect of seaworthiness, it cannot be said that any serious dent has been made to their depositions. Therefore, on the basis of the documentary, as well as oral evidence on record, we see no ground to differ from the findings recorded by the learned Trial Judge on the aspect of seaworthiness of the vessel.

50. The contention based upon keeping one of the holds empty, is based upon the endorsement in the certificate of class, issued by RINA against the entry “*Trade*” which reads as follows :-

“Carriage of bulk sold cargoes restricted to ore, coal, grain, unseasoned timber, non combustible goods or goods which constitute a low fire risk; specifically strengthened to carry very heavy cargoes in full load conditions which specified hold empty”.

51. According to Mr. Afonso, the aforesaid endorsement means that the vessel, when carrying very heavy cargo in full load condition, must keep one out of nine holds empty. DW1 or DW2 examined on behalf of the Appellant has really not thrown sufficient light as to the meaning of the aforesaid endorsement. In contrast, PW.2 has explained that the aforesaid endorsement only means that the vessel has been specifically strengthened to carry very heavy cargo in full load condition even with a specified hold being kept empty.

52. Neither Salvage Association, nor Basheer Associates, the agency engaged by the Appellant, have really commented upon this aspect. In this state of evidence, it is really not possible to hold, one way or the other as to whether the aforesaid endorsement is to be interpreted in the manner suggested by the Appellant, or in the manner suggested by the Respondent. However, it is necessary to note that the aforesaid endorsement is not some warranty or condition specified in the insurance policy. The aforesaid endorsement is a condition imposed by RINA for vessel to continue in its class. As noted earlier, we have, in fact, agreed with the contention of Mr. Afonso that the vessel was not in RINA class post the conclusion of its voyage for ballast condition from Singapore to Mormugao *i.e.* from 20th February, 1996. Therefore, even if Mr.

Afonso's contention regards the interpretation of the aforesaid endorsement is to be accepted, the same might afford yet another ground to hold that the vessel was not within RINA class at the time of voyage between Mormugao and Taranto. However, again, as noted earlier, that would make no difference because the vessel which had a dual class, continued to have IRS class, which is evident from the document at Exhibit 25 and the findings thereon recorded earlier in this judgment and order.

53. For all the aforesaid reasons, we are unable to interfere with the findings recorded by the learned Trial Judge that there was any breach of warranty or condition on the part of the Respondent, so as to absolve the Appellant of the liability under the insurance policies. The second point for determination is accordingly required to be answered against the Appellant and in favour of the Respondent.

54. The third point for determination is whether the Respondent company has succeeded in establishing that the vessel indeed encountered the rough weather between 10th June, 1996 and 18th June, 1996 on her voyage between Mormugao and Taranto.

55. The documentary evidence produced on record by the

Respondent are two Notes of protest at Exhibit 30 issued by Master of Vessel and Accord Ship Management (Pvt.) Ltd., Bombay. To the Notes of protest issued by Accord Ship Management (Pvt.) Ltd., there are annexed certain copies of log extracts. Then there is a document at Exhibit 32 issued by the India Meteorological Department. These documents do indicate that the vessel encountered the severe weather condition between 10th June, 1996 and 18th June, 1996 at the Arabian Sea.

56. Although, there is some merit in the contention of Mr. Afonso that all the logbooks or entries therein have not been produced by the Respondent, we do not think that non-production of such logbooks, in the facts and circumstances of the present case, calls for a drawal of any adverse inference to the extent of disbelieving the documentary evidence already produced on record. Besides, in this case, the Respondent has examined Nitin Vinayak Sahakari (PW4), second Engineer, who was on board the vessel at the time when it took voyage from Mormugao to Taranto in Arabian Sea. PW.4 has deposed, in detail, as to the weather conditions during the period from 10th June, 1996 and 18th June, 1996. Though, PW4 was extensively cross examined, it cannot be said that any serious dent was made to his deposition. The learned Trial Judge has accepted the documentary as well as oral evidence produced on behalf of the

Respondent and we do not think that there is any serious error in appreciation or evaluation of such evidence.

57. Mr. Afonso may be right in his submission that if some of the crew members were injured and vessel had to be diverted to the port of Aden to drop them, all these matters would have certainly been reflected in the logbooks. However, as noted earlier, non-production of the logbooks cannot result in virtually discarding all other documentary and oral evidence on record. Accordingly, even the third point for determination is required to be answered against the Appellant and in favour of the Respondent.

58. The fourth and perhaps most important point for determination is, whether the damages suffered by the vessel have nexus with rough weather or whether the damages are on account of normal wear and tear.

59. In the plaint at paragraph 9, the Respondent has pleaded that as a consequence of the severe weather, the vessel sustained damages to its frame and brackets in various holds, suffered burn out to the electric cables in junction box of Crane 3, sustained damage to her hydraulic pipelines, as well as damage to an accommodation ladder and platform. The evidence produced on record substantially

bears out that the vessel did suffer the damages as indicated in the pleadings. The evidence on record also substantially establishes that the Respondent spent an amount of Rs.4,98,70,343/- towards repairs or setting right for the aforesaid damages caused to the vessel. However, the moot question is whether all these damages are attributable to the rough weather which the vessel encountered between 10th June, 1996 and 18th June, 1996 or, whether these damages are attributable to the normal wear and tear arising out of condition of the vessel when it sailed from Mormugao to Taranto.

60. The entire case of the Respondent is that once it is established that the vessel was seaworthy at the time when it set sailed from Mormugao to Taranto and once it is established that it encountered rough weather on her voyage, it must be presumed that the damages caused to the vessel are solely on account of such rough weather alone. According to us, even if it is established that the vessel was seaworthy at the time when it sailed from Mormugao to Taranto and even if it is established that the vessel did encounter some rough weather between 10th June, 1996 and 18th June, 1996 still it does not follow that the damages can invariably to be attributed to such rough weather.

61. Merely because the vessel may be seaworthy, does not mean

that the damages caused to it in the course of voyage are only attributable to the perils of sea like rough weather. In this case, there is evidence to indicate that the frames were already corroded. Despite the corroded frames, it is possible that the vessel could qualify to be declared as seaworthy. However, the damages caused to such corroded frames can hardly be regarded as damages on account of any peril of sea like rough weather.

62. The Respondent, has hardly led any independent evidence in order to establish nexus between damages and rough weather. The Respondent instead has relied almost entirely upon the report of Basheer and Associates, an agency engaged by the Appellant themselves. Basheer and Associates admittedly, did not themselves carry out any survey of the vessel, but have only offered their opinion on the report of Salvage Association, who actually carried out the survey on the vessel on behalf of the Appellant. Basheer and Associates, after considering the report of Salvage Association, have opined that only the damages to the extent of Rs.1,12,46,999/- can be reasonably attributed to the rough weather and rest of the damages, in monetary terms, are attributable to the condition of the vessel at the time it set to sail from Mormugao to Taranto and consequently, two factors like normal wear and tear. J. Basheer and Associates have, therefore, only partially agreed or rather disagreed

with the report of the Salvage Association who are the actual surveyors of the vessel on behalf of the Appellant.

63. The survey report of the Salvage Association at Exhibit 40 was in fact produced on record by the Respondents themselves. This report is totally against the case of the Respondent. This report refers to the survey of each of nine holds of the vessel and points out that in so far as the first hold is concerned, a total of 19 frames were found to be corroded and 19 frames were found to be recently renewed; in so far as the second hold is concerned, about 22 frames were found to be distorted, holed, buckled and heavily wasted. However, all the remaining frames, although undamaged, were found only to be heavily wasted; In so far as the third hold is concerned, the position was similar to the second hold; In so far as the fourth hold is concerned, no severe wastage of the structure was evident; In so far as the fifth hold is concerned, nine frames were found to be distorted, buckled and wasted and all remaining frames, though undamaged, were found to be heavily visited; In so far as the sixth hold is concerned, 23 frames were found to be distorted, buckled and corroded. Thus, all the remaining frames, with the exception of eight, were heavily corroded; In so far as the seventh hold is concerned, again, 19 frames were found to be heavily corroded and holed and all other frames, though undamaged, were found to be

heavily corroded; In so far as the eighth hold is concerned, 14 frames were found to be buckled, distorted and wasted and remaining frames, which were undamaged, were found to be heavily corroded; In so far as the ninth hold is concerned, no frames were found to be damaged, however all the frames port and starboard were found to be heavily corroded.

64. The Salvage Association, in its report, has made a detailed assessment and thereafter opined that the damage found and the permanent repairs detailed in this report are what can reasonably be attributed to normal wear and tear. The report opines that the evidence available at survey indicates that the wastage of the side shell frames and brackets was beyond classification limits and as a result, were unfit to cope with the weather the vessel was built to withstand. The report also comments upon ultrasonic readings taken by yet another agency SANKI at Singapore by surmising that the thickness gauge readings were taken by inexperienced operators and the results were not representative of the true state of the side frames. The report also refers to extensive photographs having taken and records kept of the condition of the frames. Mr. Afonso submits that no such photographs were produced on record by the Respondent.

65. J. Basheer and Associates analysed the report of the

Salvage Association as also the other material on record produced on behalf of the Respondent and finally opined that they were only to agree in entirety with the observations in the report of the Salvage Association, but felt that damages to the extent of Rs.1,12,46,999/- could be attributed to rough weather, though rest of the damages can be attributed to the condition of the vessel and normal wear and tear. Again even the report of J. Basheer and Associates was relied upon and produced by the Respondents themselves. Thereafter, the matter was once again referred to the Salvage Association and the Salvage Association, by its communication dated 18th August, 1998 at Exhibit 95, reiterated its opinion by disagreeing entirely with the opinion expressed by J. Basheer and Associates. The Salvage Association reasoned that despite so called rough weather, the frames and plates which have been renewed and strengthened, did not suffer any damage and therefore, the damage suffered by the remaining frames is attributable to normal wear and tear and has no nexus with the weather condition.

66. Now it is necessary to note that the reports of Salvage Association and J. Basheer and Associates were commissioned by none other than the Appellant itself. The Respondent had also commissioned a report, however, the same was never produced on record by the Respondent. Nevertheless, what is important is the two

reports produced on record by the Respondent, were the reports which were commissioned by the Appellant itself. The first report of the Salvage Association attributes the entire damage to normal wear and tear. The second report analyses the first report, as also the other material placed on record by the Respondent and thereafter concludes that the damages ,at least to the extent of Rs.1,12,46,999/-, cannot be said to be attributable to the normal wear and tear, but can be said to be attributable to the weather condition. It is true that J. Basheer and Associates were not actually involved in the survey. However, J. Basheer and Associates had the benefit of survey undertaken by the Salvage Association, as also the other material placed on record on behalf of the Respondent. J. Basheer and Associates have analysed this material, in substantial detail, and thereafter given their opinion.

67. The learned Trial Judge has accepted the opinion of expert J. Basheer and Associates. The material produced on record by the parties indicate that though the vessel was seaworthy nevertheless, number of plates were indeed corroded and it is these corroded plates which have suffered the maximum damage during the voyage. No doubt, there are also some other plates which had suffered damage. There are some other parts of the vessel which had suffered damage as pointed out in the report of J. Basheer and Associates. Upon cumulative consideration of all this material on record, as also the

analysis offered by J. Basheer and Associates, we find that no serious error can be said to have been committed by the learned Trial Judge in accepting the report of the J. Basheer and Associates.

68. As noted earlier, J. Basheer and Associates has, in fact, agreed with the report of the Salvage Association, the actual surveyor of the vessel and on the said basis, held that the claims of the Respondent to the extent of almost 75% do not deserve to be accepted, since, damages on the basis of such claims which have been raised, have no nexus with rough weather or peril of the sea, but these damages are basically on account of condition of the vessel at the time of its sail and normal wear and tear. The evidence on record indicates that in fact the vessel was due for its annual survey and it cannot be ruled out the reason as to why the vessel was proceeding to Taranto, eventually the annual survey was carried out. The report of J. Basheer and Associates disagrees with the opinion of the Salvage Association only to the extent of 25% of the total claim. It is on this basis, the learned Trial Judge has awarded the Respondent an amount of Rs.1,12,46,999/- as against the claimed amount of Rs.4,98,70,343/-.

69. At this stage, it is necessary to consider the evidence on behalf of the Appellant. The Appellant has examined Alope N. Jha,

the Deputy General Manager as DW.1. The learned Trial Judge in paragraphs 96 to 111 of the impugned Judgment and Decree has discussed the deposition of DW.1 in the context of the issues in the suit. On most of the aspects, DW.1 has disclaimed any knowledge. DW.1 has, however, admitted that the representatives of Palco Surveyors attended the vessel on behalf of the underwriters and on completion of the repairs, they even confirmed that all the repairs were satisfactorily completed. DW.1 has admitted that the classification notations are indicatives of the specific rule requirements which have been met and the classification notations assigned to a ship are indicated on the certificate of classification, as well as the register of ship published by the Society. DW.1 even admitted that the total loss recorded in the Basheer's report comes to Rs.1,12,46,999/-. As noted earlier, all this evidence has been discussed in substantial details by the learned Trial Judge and there is really no reason to differ from the findings recorded by the learned Trial Judge. The fourth point for determination will have to be answered by endorsing the findings recorded by the learned Trial Judge that the damages to the extent of Rs.1,12,46,999/-, are only the damages which can be said to be relatable to the perils of the sea, like rough weather and not the entire damages of Rs.4,98,70,343/- as urged by the Respondent in its cross objection. The fourth point for determination is answered accordingly.

70. The fifth point for determination relates to deduction of amount of Rs.20.00 lakhs in terms of the insurance policy. On this aspect, there was really no serious dispute and such deduction is required to be done in terms of the insurance policies. Accordingly, from the amount of Rs.1,12,46,999/-, the learned Trial Judge, ought to have deducted the amount of Rs.20.00 lakhs and to this extent, interference is warranted with the impugned judgment and decree. The sixth point for determination is accordingly required to be answered in favour of the Appellant and against the Respondent.

71. The sixth point for determination is whether there was any breach of clause 10 of the insurance policy. Clause 10 of the insurance policy reads as follows :-

“10. NOTICE OF CLAIM AND TENDERS

10.1 In the event of accident whereby loss or damage may result in a claim under this insurance, notice shall be given to the Underwriters prior to survey and also, if the vessel is abroad, to the nearest Lloyd's Agent so that a surveyor may be appointed to represent the Underwriters should they so desire.

10.2 The Underwriters shall be entitled to decide the port to which the Vessel shall proceed for docking or repair (the actual additional expense of the voyage arising from compliance with the Underwriters' requirements being refunded to the Assured) and shall have a right of veto concerning a place of repair or a

repairing firm.

10.3 The Underwriters may also take tenders or may require further tenders to be taken for the repair of the Vessel. Where such a tender has been taken and a tender is accepted with the approval of the Underwriters, an allowance shall be made at the rate of 30% per annum on the insured value for time lost between the despatch of the invitations to tender required by Underwriters and the acceptance of a tender to the extent that such time is lost solely as the result of tenders having been taken and provided that the tender is accepted without delay after receipt of the Underwriters' approval.

Due credit shall be given against the allowance as above for any amounts recovered in respect of fuel and stores and wages and maintenance of the Master Officers and Crew or any member thereof, including amounts allowed in general average, and for any amounts recovered from third parties in respect of damages for detention and/or loss of profit and/or running expenses, for the period covered by the tender allowance or any part thereof.

Where a part of the cost of the repair of damage other than a fixed deductible is not recoverable from the Underwriters the allowance shall be reduced by a similar proportion.

10.4 In the event of failure to comply with the conditions of this Clause 10 a deduction of 15% shall be made from the amount of the ascertained claim.”

72. In this case, admittedly, the accident whereby the loss or damage is said to have taken place when the vessel was abroad. Therefore, in terms of Clause 10.1, the Respondent was duty bound

to give notice not only to the Respondent, but also to the Lloyd's Agent, so that the surveyor could be appointed to represent the underwriters and should they so desire. Admittedly, no such notice was given by the Respondent to Lloyd's Agent.

73. Mr. Ramani, however, tried to contend that there was substantial compliance with this clause, inasmuch as the notice was given to the Appellant. He also pointed out that eventually the Appellant did appoint the surveyors. According to us, the fact that after some time the surveyors were indeed appointed by the Appellant, is not a good ground to hold that there was compliance with the conditions prescribed in clause 10.1 of the insurance policies. The purpose for which the notice is required to be given to the Lloyd's Agent, is so that the Lloyd's Agent can immediately survey the vessel and give a report to the insurance company as to whether the vessel was involved in any accident and whether loss or damage has no nexus with such accident. In the present case, if the Respondents were to comply with the requirements of giving notice to the Lloyd's Agent, then, as pointed out by Mr. Afonso in all probabilities the Lloyd's Agent who have surveys practically in every port, would have surveyed the vessel at the port of Aden itself, where the vessel is alleged to have called.

74. In any case, when it comes to interpretation of insurance contract and its terms, the words used therein must be given paramount importance and interpreted as expression without any addition, deletion or substitution. Besides, in a contract of insurance, the rights and obligations are governed by the terms of the said contract. Since, upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of liability of the insurer and no exception can be made on the ground of equity. Thus construed, we find merit in the contention of Mr. Afonso that this is a case where the Respondent has breached the provisions of clause 10 of the insurance policy.

75. In *Suraj Mal Ram Niwas Oil Mills Private Limited* (supra) there was a condition in the insurance policy that each and every consignment must be declared. The claimant failed to disclose the number of consignments during the relevant period when its goods suffered damages. The claimant, however, took up a defence that there was substantial compliance, because the claimant had declared the goods having insurable interest and non-declaration of goods, which, in any case had no insurable interest, did not constitute any breach of the conditions of the insurance policy. However, the

Hon'ble Supreme Court held that there was a breach of this condition and the appellant's claim must fail on this short ground. It was held that as per the policy, the appellant could not have picked and chosen dispatches to be declared and that too at the instance of the third party consignee who was otherwise a stranger to the contract. It is in this case that the Hon'ble Supreme Court has held that in a contract of insurance, the rights and obligations are governed by the terms of the said contract. Since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of liability of the insurer and no exception can be made on the ground of equity. The Hon'ble Supreme Court further held that the Courts should always try to interpret the words in the insurance contract as they have been expressed by the parties. It is not open for the Court to add, delete or substitute any words. The words used in the insurance contract must be given paramount importance.

76. In the present case, although the breach of Clause 10 of the insurance policy is established, that, by itself, does not entitle the Appellant to repudiate the policy or reject the Respondent's claim. In fact, that was not even the case of the Respondent. Mr. Afonso's contention was only that in the event of failure to comply with the

conditions of clause 10, a deduction of 15% to be made from the amount of ascertained claim.

77. Clause 10.4 of the insurance policy, in terms provide that in the event of failure to comply with the conditions of this clause 10, a deduction of 15% shall be made from the amount of the ascertained claim. Accordingly, the contention of Mr. Afonso in this regard is quite well founded and will have to be upheld. Therefore, from the ascertained claim of Rs.92,46,999/-, a further deduction of 15% is due. This means that the Respondent's suit can be decreed to the extent of Rs.78,59,949.15. The impugned judgment and decree therefore warrants further modification. The fifth point for determination will also have to be decided in favour of the Appellant and against the Respondent.

78. There is absolutely no case made out by the Respondent in their cross objections. As noted earlier, the report of J. Basheer and Associates deserves to be accepted in its entirety, as has been done by the learned Trial Judge. Reasoning for this has been set out not only in the impugned judgment and decree, which we have endorsed, but further we too have set out our own reasons for upholding the view taken by the learned Trial Judge. Accordingly, we find that there is absolutely no merit in the cross objections, which deserve to be

dismissed. Even on the aspect of rate of interest, we are of the opinion that the interest at the rate of 6% per annum awarded by the learned Trial Court is fair and reasonable, having regard to all circumstances in which the claim arose.

79. For all the aforesaid reasons, we dispose of this appeal and cross objections by making the following order :-

(a) The appeal is partly allowed and the cross objections are dismissed;

(b) The impugned judgment and decree is modified by substituting the amount of Rs.1,12,46,999/- with Rs.78,59,949.15. This means that there shall now be a decree directing the Appellant to pay to the Respondent a sum of Rs.78,59,949.15, together with interest at the rate of 6% per annum from the date of institution of suit, till its actual payment.

(c) From out of the amount deposited by the Appellant in this Court, the Respondent is entitled to withdraw the amount to the aforesaid extent along with accrued interest, if any, thereon and the Registry is directed to refund the balance amount to the Appellant again, along with accrued interest thereon, if any;

(d) In the facts of the present case, there shall be no order as to costs.

Smt. M.S. Jawalkar, J.

M.S. Sonak, J.