

*Privy Council Appeal No. 26 of 1934*

The Central Bank of India, Limited - - - - *Appellants*

*v.*

The Guardian Assurance Company, Limited, and another *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 20TH MARCH, 1936.

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*Present at the Hearing:*

LORD ATKIN.

LORD ALNESS.

LORD MAUGHAM.

[*Delivered by* LORD MAUGHAM.]

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This is an appeal from a decree of the High Court of Judicature at Lahore dated the 20th May, 1932, which reversed a decree of the Subordinate Judge of Lahore dated the 16th July, 1929, and dismissed the plaintiffs' suit with costs. The decree was made in an action commenced by plaint dated the 21st December, 1927, brought by the appellants, the Central Bank of India, Limited, and Mr. J. Rustomji (called in what follows Seth Rustomji), a nominal respondent to this appeal against the Guardian Assurance Company, Limited, on certain policies of insurance whereby the plaintiffs (or one of them) were insured against loss by fire. The insurance related to a stock of wheat, wheat products and gunny bags stored in certain godowns of mills which belonged to Seth Rustomji. The buildings and the stock were charged or hypothecated to the present appellants called hereafter the Central Bank. Seth Rustomji was not represented on the appeal before their Lordships. As will appear from the facts to be stated there emerged at the trial two questions: first, whether the plaintiffs had proved (the onus being on them) that the large amount of stock alleged to have been destroyed by fire had in fact been so destroyed, secondly, whether under a clause in the policies (clause 13) the claim, if it was proved to be of a fraudulent character, had the effect in the circumstances of effecting a forfeiture of all the rights of the plaintiffs (or either of them) to recover under the policies. The onus

of proving a fraud was on the insurance company, and, as will appear, the position of the Central Bank and Seth Rustomji in relation to the charge of fraud was by no means identical. The Subordinate Judge of Lahore held that the plaintiffs had proved a loss as claimed in respect of the wheat, wheat products and gunny bags destroyed by the fire, and he accordingly decided that the plaintiffs were not guilty of the fraud alleged against them, namely, that of grossly exaggerating the claim. He therefore made a decree by which the insurance company was ordered to pay to the plaintiffs the sum of Rs.3,98,200 with certain costs, and there was a direction that out of the decretal amount the Central Bank would have prior claims on account of mortgage money and interest. There was an appeal from this decree to the High Court of Judicature at Lahore. The appeal was heard by Dalip Singh and Agha Haidar JJ. Judgment was delivered on the 20th May, 1932, by Dalip Singh J. with which judgment Agha Haidar J. agreed. The learned Judges came to a conclusion different from that of the trial Judge. They considered it to be proved that the amount of the stock destroyed was grossly exaggerated to the knowledge of Seth Rustomji and that the claim was therefore fraudulent so far as he was concerned. In the reasons given for the judgment it is stated that counsel for the respondents on that appeal, namely, for the Central Bank and Seth Rustomji, had conceded that "as the insurance was a joint insurance, fraud on the part of either of the plaintiffs would equally affect the claim of the other plaintiff though the insurable interests of the two were different". The Court in these circumstances thought it unnecessary to decide whether the Central Bank also were concerned in the making of a fraudulent claim. In the result the action was dismissed with costs. From this decision the Central Bank has appealed.

It is plain from this bare outline of the facts that the main questions that arise are pure questions of fact on which the trial Judge, who heard the greater number of the witnesses, and the High Court have taken opposite views. In considering these questions their Lordships have throughout borne in mind the importance of attaching weight to the views of the trial Judge and also to the circumstance that so far as the issue of fraud is involved in the case those who allege fraud ought to establish it by something more than grave suspicion, or in other words that the charge ought to be clearly established. With these preliminary observations it now becomes necessary to state the more important facts of the case, omitting however reference to a number of matters which seem to their Lordships inconclusive or of relatively little moment.

Seth Rustomji was from 1918 until the date of the fire on the 25th December, 1926, the owner of some large flour mills situate at Badami Bagh, Lahore. He happened to be a member of the Local Advisory Committee of the Central

Bank, and in the year 1921 that Committee reported that he was very respectable and worth 20 lakhs. In the year 1918 he borrowed from the Central Bank one lakh which loan was never secured (Account No. 1). In November, 1920, he was granted by the Central Bank a credit of a further two lakhs which purported to be secured by a mortgage of the stock at his mill (Account No. 2). In December, 1921, he was granted by the Central Bank a further credit of three lakhs on the same security (Account No. 3). The stock at his mills was in the ordinary course insured against fire. This was effected by a number of different policies granted by the Guardian Assurance Company, Limited, the defendants in the action (called below "the insurance company"). The stock of wheat, wheat products and gunny bags with which this action is concerned was that situate for the time being in certain godowns marked or described in a plan used at the trial as godowns I, J, T, and X. There were four policies for Rs.3,25,000 in all relating to the wheat and wheat products situate in those godowns. There was another policy by which "new gunny bags in bales" situate in such godowns were insured for Rs.55,000. All the policies were assigned absolutely to the Central Bank as part of the bank's security. Each of them contained a condition (condition 13 in the original policy) providing that "if the claim made should be in any respect fraudulent or if any false declaration should be made or used in support thereof or if any fraudulent means or devices should be used by the insured or anyone acting on his behalf to obtain any benefit under the policy, all benefit under the policy should be forfeited."

Their Lordships note that the form of charge or hypothecation given when the loans were granted provided for possession of the stock being given to the Central Bank and for delivery to them of the keys of the godowns; and it seems that it was the usual practice on granting such loans to place a godown keeper in charge of the hypothecated stock. Seth Rustomji, however, was unwilling to allow a godown keeper on behalf of the Central Bank, and the loan was apparently sanctioned on these terms without, however, any alteration of the form of mortgage. It was stipulated that Seth Rustomji should maintain a margin of stock of a value of 25 per cent. above his loan. He sent to the Central Bank at first fortnightly and afterwards weekly statements of his stock. These weekly statements continued to be rendered and the claim made by the Central Bank and Seth Rustomji was admittedly based on the last weekly statement sent to the Central Bank before the fire, namely, that dated 20th December, 1926, which purported to show a total amount of stock and gunny bags in the godowns I, J, T, and X, and also in three other godowns which were not injured in the fire amounting in value to Rs.511,680. It should be mentioned here that the person who prepared the statement was not produced as a witness, nor was his absence accounted

for. After the fire notice was given to the insurance company of a loss amounting to Rs.4,00,946-13-0 made up as follows:—Wheat and its products amounting to Rs.3,50,282-14-0, empty gunny bags Rs.50,663-15-0. The total sum insured on wheat and its products at the date of the fire was only Rs.3,50,000; and the claim of the plaintiffs was therefore for Rs.4,00,663-15-0. They also claimed at the trial interest at the rate of 6 per cent. per annum from the date of the fire.

There had been certain inspections of the godowns on behalf of the Central Bank; and certain inspection reports made by Mr. J. F. Kalianiwala, an inspector of godowns in the employ of the Central Bank, were put in evidence. There was no evidence of any reports made after the 15th October, 1925. In the report of the 19th December, 1924, it was stated that Seth Rustomji was not maintaining a stock register similar to that kept at other factories and that the basis of checking the approximation of stock was from statements made by employees at the mill. The report also said that no regular inspection had been made for quite a long period "as the party," meaning Seth Rustomji, "was known to be sensitive to such inspections". Further, Seth Rustomji had already written to the Central Bank that he would shortly be selling the mill and adjusting his account. It was in these circumstances that a somewhat remarkable incident occurred. On the 22nd April, 1926, Mr. R. Jariwala, the manager of the Lahore branch of the Central Bank, wrote to Seth Rustomji as follows:—"Mr. Thakur has been asked by Head Office to minutely go through all the finances of this branch, and as a part of his duty he has to check the stock at your mills minutely. I shall therefore thank you to please let him know the time suitable to you on Sunday at which he could carry on the work of inspection at the mills." At this date the weekly stock statement sent by Seth Rustomji to the Central Bank purported to show that at that date he had stocks worth Rs.6,98,760 including more than 2,000 tons of coal. His unsecured loan of one lakh was still owing; his credit of two lakhs on Account No. 2 had been exhausted, and no drawings had recently been made against that account; the credit of three lakhs (Account No. 3) showed a debit balance of over three lakhs. He no doubt had other property besides his mill and the stock therein, but it was for the most part heavily encumbered, and about this time a cotton mill of which he was the owner at Amritsar was sold by the Punjab National Bank as mortgagee. In answer to the request of the Central Bank, Seth Rustomji wrote a letter in which he stated that he had never been asked to have his stocks minutely examined before. He added that if the bank should insist it would be better that he should "dispose of his property at any price and at any sacrifice immediately and liquidate his debt" to the bank. But, he said, negotiations were being carried on and

he had every hope that his properties would be sold within the next six months. He trusted that the bank would not insist that his stocks should be examined in detail thus putting him unnecessarily into an awkward and perhaps disgraceful position before the public eye, for, he said, such matters spread rapidly and got known to the public very soon. He then offered to send title deeds of property worth about two lakhs of rupees as further security if these properties were not immediately sold, and if they were, to reduce his indebtedness to the bank substantially. The managing director of the Central Bank was not satisfied with this explanation and he pointed out that the checking of stock by a bank officer on a special date was in the ordinary course of business. On the 8th May, Seth Rustomji wrote saying that he was turning his mill into a joint stock company, that a minute examination of the stock would create a very bad impression on the public, and that he would send the title deeds of two properties of his as further security. On the 13th May, this proposal was accepted by the Central Bank, but the directors added that they desired that Seth Rustomji should make all possible arrangements to see that "his accounts were adjusted within the course of three months". They also said that they were asking Mr. Thakur to make a cursory examination of the stocks and that they hoped that Seth Rustomji would not object to this. In his answer Seth Rustomji said nothing about consenting to such a cursory inspection, and it was never made by Mr. Thakur. Title deeds of the two properties referred to were promptly sent to the local agent of the Central Bank. One of these properties was Seth Rustomji's share of some property known as the Punjab Ice House. The other deeds related to certain trust property of which Seth Rustomji was a trustee. The trust he stated at the trial was a family trust, and no details of it were given in evidence by him or on his behalf, though of course he knew all the facts and the defendants did not. Seth Rustomji on the 12th June, 1926, declared that "no adverse claim of any kind existed against the properties in question"; but the Central Bank was compelled at some later date to return the title deeds after ascertaining that it was a trust property. Whatever excuse might be put forward in an endeavour to palliate the conduct of the trustee of a family trust in charging the trust property to secure his own debt, it seems to their Lordships beyond dispute that his conduct in this matter is very strong evidence of the desperate straits to which he was put for money at that time; and it is certainly extraordinary that he should have preferred to embark on so dubious and improper a transaction rather than to allow the agent of the Central Bank, who might well have been thought to be acting on behalf of an intending purchaser, to make a detailed examination of the stock of wheat and wheat products in the godowns or a Sunday while the mill was not working.

There is other cogent evidence tending to show that all was not well with the mill and with the financial position of Seth Rustomji in the year 1926. Their Lordships, with the assistance of counsel, have carefully examined the overdrafts on the accounts of Seth Rustomji with the Central Bank and with the Punjab National Bank, Limited, and from these it appears that the total bank overdrafts of Seth Rustomji had grown more or less steadily from the year 1921 from the sum of say, two lakhs, to a sum exceeding ten lakhs in the year 1926. The total overdrafts on the 30th June, 1926, amounted to Rs.10,40,312, and although there was a slight reduction during the latter part of the year, this was due to sales of property by the banks as mortgagees or by Seth Rustomji himself. It may here be mentioned that in September, 1926, Seth Rustomji sold a large house in Ferozepore Road, Lahore, in which he had lived and went to live in a smaller house. The house he sold appears also to have belonged to a family trust of which Seth Rustomji was one of the trustees. Nevertheless he paid out of the proceeds of sale Rs.60,000 to the Punjab National Bank and Rs.79,000 to the Central Bank, personal debts of his own. The books and other documents showing the accounts of the mill had been kept in an office in the private house in Ferozepore Road, but after the sale all such books and papers are stated by Seth Rustomji to have been kept at the mill.

In order to appreciate the evidence in relation to the fire it is necessary to give some account of the mill premises so far as they were destroyed and of the stocks which according to the plaintiffs were in them. The mill premises occupied a substantial amount of ground, but the portions of the premises with which we are mainly concerned are the godowns I, J, T, and X situate to the south of the mill and certain offices marked H on the plan. The area so occupied is a rectangle roughly 150 ft. from east to west and 73 ft. from north to south. The internal dimensions of the godown J which occupied the eastern part of the rectangle were 70 ft. by 39 ft. 6 ins. Those of godown T to the west of J were 47 ft. by 29 ft.; those of godown X (further to the west) were 74 ft. by 45 ft. The height of godowns T and J. was 16 ft. 3 ins. Godown X had a roof sloping up to an apex. The lower parts were 10 ft. to 11 ft. high, the central height was 17 ft. There were two godowns called I to the south of godown T which were 22 ft. by 14 ft. 6 ins. and 9 ft. in height. To the southward of the godown X there were a number of smaller rooms called H at the trial. Three of these rooms were 12 ft. by 12 ft. They were separated from the westerly godown I by two quite small rooms or lavatories also marked I. The rooms marked H on the plan used at the trial and the two small rooms marked I were of the nature of office premises and did not contain wheat or wheat products. One of the rooms marked H contained an iron safe and in one or other of the rooms marked H there were kept after the month of September, 1926, the



numerous books and papers which according to Seth Rustomji were in use at the mill. The walls of the godowns were of brick. The roof of X was of corrugated iron lying on timber rafters supported on wooden pillars. The roofs of I, J, and T were of wood and mud on timber rafters supported in J and T, on brick pillars.

According to the evidence given on behalf of the plaintiffs the total capacity of the godowns I, J, T and X, assuming they were full from the floor to the roofs, was 122,382 cubic feet, and after deducting spaces for the pillars it would amount to 121,017 cubic feet; but this allows neither for passages between the bags nor for the space above the bags piled in the godowns along which it was said there was room for a man to crawl, nor for the fact that according to the evidence for the plaintiffs the bags were piled in all the godowns some 6 ins. away from the walls in order to avoid damp. The claim was based as already mentioned on the statement sent to the Central Bank on the 20th December according to which there were then 18,580 bags of wheat products, 11,850 bags of wheat, 680 bags of bran and 90,890 gunny bags, and also some refractions (in effect waste products). It was not in dispute at the trial that bags to that extent could not be accommodated in the five godowns unless they were piled up to the roof and evidence to show that they were so piled was given by Seth Rustomji, his sons, and other witnesses for the plaintiffs. Bags would be piled according to the evidence on their sides and would occupy about one foot of vertical space. It may be mentioned here that the bags are roughly 44 ins. by 26 ins. before they are filled, that the bags of maida held  $2\frac{1}{2}$  maunds, of sooji rawa 2 to  $2\frac{1}{2}$ , of atta 2 maunds, of wheat  $2\frac{1}{2}$  and of refractions 2 maunds. A maund weighs 80 lbs. It is evident that the bags of wheat and the wheat products lying near the floor of the godowns would necessarily be subject to great pressure, especially in the godowns J and T which were some 16 ft. high. At the date of the fire according to the plaintiffs' evidence we must visualise these godowns full almost to bursting point with wheat and wheat products tightly packed in bags and also with bales or parcels of empty gunny bags.

The mill was closed down for the Christmas Holiday on the 24th December at 4.30 p.m. The head clerk, one Ram Labhaya, had gone away for a holiday five or six days before the fire, and one Ganda Singh was working as head clerk in his place. Three chaukidars or watchmen were constantly at the mill. The fire broke out or at any rate was first noticed by a chaukidar at 8.30 p.m. on Christmas Day. There were three chaukidars at the mill; none of them were called as witnesses, and it may be noted that the plaintiffs made no effort to prove an earlier hour for the fire or how it originated. Seth Rustomji and his son H. Rustomji were at dinner but they at once went to the mill. According to Seth Rustomji and other witnesses for the plaintiffs all the

godowns were then in flames. The roof of godown X was coming down and the godowns J and T were mostly destroyed by the fire when Seth Rustomji reached the mill and so also were the two godowns I. The staff of the fire brigade was there and the assistant superintendent of the brigade (Gian Chand) but they were not working as there was no water. They were all standing according to Seth Rustomji with their arms folded to the west of the godown X. He added that the fire brigade people brought out only the tops of the tables and chairs from the office and he alleged that he asked them not to do that and to save the goods, but he also said they were helpless to save the goods as there was no water. He went into room H which was his sitting room, the second room from the west, but he could not go, he said, into the two H rooms towards the east as they were on fire. He said that he asked Gian Chand and other people of the staff to save the records, but he also said, almost in his next sentence, that the books and registers had already been burnt before he made that suggestion. He asserted that he saw the books "burnt in flames" in the two rooms H towards the east. His evidence in these respects was supported by that of various employees and by that of his son H. Rustomji. The evidence of the two members of the fire brigade who were called on behalf of the defendants by no means accords with these statements on behalf of the plaintiffs. Gian Chand was the assistant superintendent of the fire brigade. The fire station is near the town hall of Lahore. He swore that the fire brigade received notice of the fire at 8.25 p.m. on the 25th December, 1926, and that within three minutes after receiving the message the fire engine left. The mill is only half a mile away, and they were there in five minutes. The gate in the mill compound was closed, but when they got in they found there was no available water. There was indeed a tank containing a mixture of oil and water, but the well close to the tank was too deep for the engine suction hose to reach the water. Part of the roof of godown X which was made of corrugated sheets of iron had come down when they arrived and the fire was burning inside. The roofs of godowns J and T had completely fallen down when they arrived. The roofs of the two godowns I were burning but they had not come down. The fire was spreading to the adjoining rooms marked H. Seth Rustomji and his son arrived some 15 minutes later. In godown X Gian Chand saw some loose grain in the western part and some gunny bags filled with grain in the eastern part. They were heaped to a height of about 3 ft. He went inside godown J soon after he arrived, by the door which is on the north side. He saw there bags of flour and maida. The rafters were smouldering on the bags of maida and flour. The height of the bags over the whole of the godown J was 3 ft., including the debris, that is including the roof that had fallen. A little later he went into godown T. There he saw some gunny bags rolled in bundles. The roofs and rafters had fallen in. The height



of the gunny bags and debris was about 5 ft. from the ground. He did not go into godowns marked I to the south of T. They were burning. He suggested to Mr. Rustomji that the papers ought to be removed from his office (one of the rooms H), but Seth Rustomji replied, "What is the use of saving the papers while the stock is burnt?" The witness went into all the rooms marked H on the plan. The easternmost H was burning and in it he saw some loose papers lying on the floor and some locked almirahs (or cupboards) and shelves. There were also almirahs and tables in the office H; and in the H further to the west there was a telephone and a table. There was nothing in the fourth room H. He swore that it was possible to take out the almirahs and tables if he had wished to do so. He saw no books of account or registers but only loose papers. The superintendent of the fire brigade was Mr. Sheringham. When the news of the fire was received at headquarters he was at a Christmas dance in Lahore, having been on leave on that day from 7 p.m. He reached the scene of the fire at 10.45 and there he met Gian Chand and the staff (who had been there a little over two hours), and he also saw Seth Rustomji and his son. There being no water he telephoned for the water to the municipal engineer who however could not supply any. At that stage the iron roof of X was partly down but the roofs of J, T, and the two I's south of T had fallen in. The bottoms of the roofs and the bags of grain of godown X were smouldering. The contents of the godowns were partly covered by the rafters that had fallen down off godown X but there was some amount of loose grain in the western part of that godown. There were bags under the sheeting of the roof that had come down. The height of the bags under the sheeting was 5 or 6 ft. He walked over the debris in godowns T, J, and the two godowns I south of T. The debris, which included the remains of the roofs, was 3 ft. to 3½ ft., and he walked over the debris. It was practically all over the godowns. In the eastern H and one H adjoining it he saw tables on which papers were lying loose and there were papers also on the floor. Some of the papers were burnt round the edges and some were unburnt: and this it will be borne in mind was over two hours from the time of Seth Rustomji's arrival. He saw no books at all. He said what was perhaps obvious that the fire was not too bad otherwise they could not have gone into the rooms and godowns. He left about midnight with his engine. There was then no danger of the fire spreading. The next morning he went with his motor engine and steam engine and four water lorries. He doused the debris with water on that day. He made a report to the Municipal Committee in which he said that the stock of wheat was small, and he also entered there the amount of loss as alleged by Seth Rustomji. In his final answer on cross-examination he said that the whole

office H was covered with papers and so he could not see if there were books below them or not. It will be apparent that if the evidence of these two fire brigade witnesses is accepted, the evidence given on behalf of the plaintiffs as regards the books and papers must be untrue and as regards the extent to which the godowns were filled immediately prior to the fire must be open to the gravest suspicion.

The insurance company employed a firm of Landale and Clarke who are salvage contractors and assessors to make enquiries as to the losses caused by the fire and they sent a Mr. Haultain who had been in their service for 19 years to investigate the matter. He arrived at Lahore on the afternoon of the 31st December, 1926, and he went at once to the mill and there he saw Seth Rustomji and his son, H. Rustomji, and he also saw Mr. Ladli Dass, the mill manager, and Ganda Singh, the acting head clerk. He made a number of enquiries and it may be noted that in godowns J, T and X the stock was still smouldering in places alongside the walls. He examined and measured the stock in the godowns to the north which were not injured by the fire and he also turned over the heaps of debris in the burnt godowns and took samples. Further he took statements from nearly all the persons who afterwards gave evidence. At his instance a certain Mr. L. V. Skill, a representative of Messrs. Ricketts Turner and Company was called in to make an estimate of the loss as regards the stock. He first attended the mill on 20th January, 1927, and a number of photographs were taken on that day of the damaged godowns as they stood. These photographs and the negatives—very poor examples of the art—were produced at the trial. He measured the godowns and took samples of the burnt and damaged stock from the godowns, but these samples do not appear to have been of any use. He gave evidence at the trial of the depth of the debris in the godowns and as to the probable height of the burnt stock in the various godowns judging from the smoke marks on the walls. Their Lordships have derived little assistance from the photographs which were said to support his conclusions. It may be mentioned here that the plaintiffs caused photographs to be taken at a later date which show certain plume-like marks on the walls above the positions indicated by Mr. Skill as being the height to which in his view the stock reached, but Mr. Skill and other witnesses declared that these plume-like marks were not in existence when the photographs were taken under the instructions of Mr. Skill on the 20th January and they do not appear on those photographs; and it may be observed on the one hand that the plume-like marks might well have been produced artificially, and on the other hand even if they existed their curious nature does not suggest that the godowns were ever full to the roofs as the plaintiffs contend.

The plaintiffs put in a claim as already stated for Rs.4,00,663-15-0. The insurance company called for statements and affidavits in proof of this claim. On the 28th April, 1927, the insurance company stated that they had received the report of the assessors who had estimated the contents of the various godowns in question on the day of the fire as amounting to 4,335 bags of wheat and wheat products and 2,100 gunny bags in bales. The assessors valued the above stocks of wheat and products at Rs.43,521 and of the gunnies at Rs.1,050. The insurance company, after observing that the stocks and values as claimed were very much in excess of those ascertained by the surveyors, begged to be furnished with copies of all documentary evidence in the possession of the claimants, i.e., documents, correspondence, returns, entries in books, ledger accounts, etc., which supported the stocks and values claimed. Some affidavits were filed and a good deal of correspondence followed. The insurance company was not satisfied and rejected the claim of the Central Bank and Seth Rustomji. The plaint was filed on the 21st December, 1927.

Their Lordships have already observed that Seth Rustomji and a number of witnesses who had been employed by him at the mill, including three of his sons, gave positive evidence at the trial that the godowns in question were or had been full to their roofs as above stated and the direct evidence of a number of witnesses of this kind cannot of course be rejected lightly or without very good grounds for its rejection. On the other hand, claims for loss by fire, like certain other claims against insurance companies, cannot in general be tested and disproved otherwise than by circumstantial evidence. There are in the present case special circumstances which, in their Lordships' view, agreeing with that of the two High Court Judges, make it impossible to have any doubt that the statements made by and on behalf of Seth Rustomji were untrue and untrue to his knowledge. In the first place not a single book, register, ledger, invoice or other document of any sort, kind or description has been produced from the custody of Seth Rustomji to support the claim, and it is alleged that every one of these papers and documents were destroyed in the fire. Their Lordships see the gravest difficulty in giving credence to the view that there was any attempt or desire on the part of Seth Rustomji to preserve some at any rate of these documents and papers. The cupboards were locked when Seth Rustomji arrived on the scene of the fire, but there could have been no difficulty in ordering those of them which contained books and papers to be broken open. At the time when Seth Rustomji arrived upon the scene it is clear from the evidence of both the fire brigade officials that some of the papers were untouched by the fire and lay on the tables and on the floor of the office. The books of record and ledgers which should have been in the almira's during the Christmas holiday could have been recovered. If Seth Rustomji had really desired to have them

saved he could have called upon members of the fire brigade staff, who according to him were standing by with folded arms, to assist him in the matter assuming that his own coolies were unwilling to help. Nor does it seem very probable that Seth Rustomji did not keep at his own private residence some records of his earnings over a series of years and some materials from which his income tax returns must have been made. If it is necessary to choose between the evidence of Gian Chand and Mr. Sheringham, completely independent witnesses as they were, as to the conversation with Seth Rustomji in reference to the books, their Lordships are of opinion that the evidence of the independent witnesses in view of all the circumstances of the case must be accepted. This matter of records or written evidence, however, does not rest there. The plaintiffs had called on commission on the 16th May, 1929, a witness, one, Ram Labhaya, who had been the head clerk at the mills during all relevant periods but who had left in June, 1927. He observed in cross-examination that the products of the mill were mostly sold to the city merchants, especially the atta, and he added that the local merchants could say the amounts of products purchased by them from the mills. It is indeed apparent that Seth Rustomji could have got for use at the trial an almost complete set of duplicate invoices or duplicate receipts showing the amounts of his purchases and of his sales during at any rate some months prior to the fire. Not a single duplicate invoice or receipt for the relevant period was produced on behalf of the plaintiffs.

There were however in addition to these documents two sources of enquiry open to either party from which valuable information might be obtained. The passbooks of Seth Rustomji showing details of his accounts both with the Central Bank and with the Punjab National Bank could of course be examined. Further the books kept by the railway company could be examined and proved with the object of ascertaining the amounts of wheat from time to time arriving at the mill siding and the amount of products leaving the mill by rail. There were also bags of wheat which arrived by cart and products which left by cart and which therefore would not be shown in these records, but it was stated in evidence by Seth Rustomji that about half the stock arrived by rail and half the products left by rail so that the railway records would form at least a very good test of the operations of the mill in the months preceding the fire as compared with its previous operation.

The examination of the banking accounts led to a significant result. The three accounts of Seth Rustomji with the Central Bank and the fourth account with the Punjab National Bank have been examined and summarised. Taking the whole of these accounts together and examining those debit items which must include purchases on account of the mill and which may include certain other payments, it is found that in the year 1925 the total purchases and other

payments amounted to Rs.19,02,211. During the same year the credit items which must include the results of sales of any magnitude and it may be of cash paid in by Seth Rustomji amounted to Rs.19,75,212. If we now take the similar summarised results for the year 1926 we find that the total of purchases and other payments amounted to Rs.6,24,973 and the total of sales and cash paid in, which it will be remembered included the proceeds of sale of some immoveables realised by Seth Rustomji, amounted to Rs.7,18,765. No explanation was given of this extraordinary reduction in what may be shortly described as the banking turnover. Further examination only tends to strengthen the point that the business had suffered a remarkable reduction in volume. The totals of sales and cash paid in during the year 1926 at the end of each quarter, deducting the proceeds of sale of outside properties which Seth Rustomji had been compelled to realise, are as follows :—

	Rs.
For the quarter ending 31st March ...	2,94,162
For the next quarter ... ..	1,15,890
For the third quarter ... ..	1,00,168
and for the last quarter ... ..	64,545

These figures are less than half the figures obtained on the same basis for the years 1922 to 1925 inclusive. The admitted fact that for some time before the fire the mills were working only six hours a day for a five-day week tends plainly to support the view that business had fallen off to a large extent, and adds weight to the suggestion that there was no reason why a mill proprietor in financial difficulty should keep so large an amount of capital locked up in godowns filled to the roofs so as to make convenient handling of the goods very difficult if not impossible.

The examination of the railway records proved on behalf of the defendants by Abdul Hamid and Sher Ali the goods clerks of the railway company pointed in the same direction as the pass books of Seth Rustomji. Their Lordships do not think it necessary to repeat the comments of Dalip Singh J. on the figures extracted from the railway records. They will add that it is significant that the plaintiffs with this easy method of testing the annual production of the mills from, say, the year 1923, preferred to rely on the fortnightly or weekly statements sent by Seth Rustomji to the Central Bank without giving any real proof of their accuracy.

The insurance company endeavoured in both Courts to establish the proposition that the maximum capacity of the godowns X. T. J. and I. was not great enough to accommodate the 29,265 bags of wheat and wheat products for which the claim was made, to say nothing of the 73,690 gunny bags, even if the bags were stacked up to the roof of the various godowns. The difficulty in establishing this proposition was due to the inconclusive nature of the evidence as to the space occupied by the bags of the different products and the bags of wheat, for it appears that the space so occupied varies

very considerably with the way in which the bags are stacked and the pressure to which they are subjected. Moreover their Lordships think that it is difficult to believe that the statements furnished to the Central Bank for a number of years were wholly untrue. The question at the trial was whether the alleged stock was in the godowns at the date of the fire. There had been other godowns at an earlier date, but the evidence as to this was incomplete. The evidence as to the capacity of the godowns X, T. J. and I. was regarded in the High Court as being insufficient to justify a conclusion and their Lordships take the same view on this matter. The real question is whether the wheat and the products were not only stacked up to the top of the godowns, but were so stacked as to allow no passages through the godowns of such width as to facilitate the removal of bags or columns of bags from all parts of them. It is important to note in this connection that Seth Rustomji stated that the stock in the godowns was fresh and that the products were not more than a month or two old, and that Mr. Kalianiwala stated in his report of the 13th July, 1925, that the stock is almost invariably fresh. It is therefore apparent that a method of stacking which would make it practically impossible to remove the older products from the back of the godown without a very large removal of all the new stock nearer to the entrance would be, though perhaps not impossible, exceedingly inconvenient. The evidence on behalf of the plaintiffs was that there were some narrow passages extending only to one quarter of the depth of each godown and in one case to one half the depth, and Seth Rustomji alleged that the passage was not so much as to enable a man to carry a bag on his back. The insurance company called as an expert Mr. A. G. Watts, the manager of the Pioneer Mills of Shahdara, Lahore. This gentleman had had 31 years' milling experience, at first in a Battersea flour mill and since 1914 in various mills in India. He gave evidence that in his godowns wheat is stacked to a height of six bags, atta, rawa and sooji to a height of seven bags and bran up to a height of ten to twelve bags, but that wheat could be stored up to the ceiling as it could last longer. He had seen nearly all the mills in the neighbourhood of Lahore, but had never seen a godown packed with stock without spaces between the stacks. He himself kept a passage six foot wide between the stacks and he would describe the method of storage without a passage as a silly one. One difficulty would be that the old stock would be at the back and the new would be in front. It may be added that he stated that all his wheat was imported by rail and one could not buy wheat in Lahore. "It has all", he said, "to come from outside". Having regard to this evidence their Lordships think the High Court were justified in their view that the method of stacking alleged by Seth Rustomji and the other witnesses for the plaintiffs to have existed in the Badami Bagh mills was of a very exceptional character. The matter however did not rest simply on considerations of this kind. There



was one completely independent witness who had been into the godowns two or three days before the fire. This was Abdul Hamid, the goods clerk at the N.W. Railway Station. It was his duty to visit the siding daily and he had in fact visited the siding two or three days before the fire. He was accustomed to go inside the godowns partly for the sake of amusement and partly to purchase bags of atta for himself and other clerks of the railway. Further he sometimes had to see the head clerk to obtain information from him as to the release of the wagons. He had never been inside godown J. but he had been into godown X. two or three days before the fire. The contents were of wheat and bran. The height of the stock was from four to five bags. He had also been into godown T. a month before the fire. He there saw bags of flour but he could not state the nature of the products. The stock was stacked in layers and the height of the layer was not more than five bags. There were passages between the stacks. The passage was wide enough to enable a man to walk through it easily. In cross-examination this witness was asked to give the dimensions of godowns X. and T., and he gave them in yards not very accurately. Except for that there seems to have been no effort to cross-examine the witness as to what he saw inside godowns X. and T. and certainly no ground whatever was suggested for thinking that he was not telling the truth to the best of his recollection. It has been already noted that this witness had not been into godown J. There is however a curious item of evidence coming from the plaintiffs' side as regards the contents of this godown. Ram Labhaya as has been observed was the head clerk in the mills at and previously to the date of the fire and his evidence as to the contents of godown J. is in these words :—

“ I cannot say how many pillars there were in godown J. The bales were stacked between the eastern row of pillars and the western wall. They were extended from north to south. Some pillars in the southern corners were loose. The stack of bales was not so high as that of the wheat. There were two lines of bales and the height of the stack was three or four bales. Between the stacks of wheat bags there was a space left through which a man could pass. I cannot give approximately even the width of the space mentioned above. There was a space left through which a man could pass and there was no necessity for a man going up and crawling. The space was between the north and south walls. If a man entered godown J. from the north door, the gunny bags were on the left and the wheat bags were on the right.”

It will be apparent that this evidence is wholly inconsistent with the view that in godown J. which was about 70 feet long and  $39\frac{1}{2}$  feet broad and some 16 feet high, the contents were piled up to the roof and that there was a passage only for a quarter of its length. It is true that the witness stated that there was no passage through which a man could go in godown T. and that the checking could be done there only by crawling like a snake on the top of the bags. It may be observed however that as regards godown X. he stated that

he was unable to give the amount of bags stored and could not say whether there were a thousand or two thousand bags. It seems to their Lordships quite impossible to reject his evidence as to the contents of godown J. The facts must have been known not only to Seth Rustomji and his sons and the other witnesses and there is an obvious comment as to the truth of their testimony.

The indisputable facts as to the height of the debris in the godowns within a very short time of the discovery of the fire together with the evidence already mentioned seem to their Lordships to establish the untruth of the statements as to the contents of the godowns given by the witnesses on behalf of the plaintiffs, including Seth Rustomji himself. No evidence was called on behalf of the plaintiffs to suggest that wheat and wheat products packed in bags and stored in roofed godowns to their utmost capacity, with the result that the lower rows of bags would be very tightly compressed, would burn like tinder. The fire, assuming as their Lordships do an accidental cause, could not have broken out in all the godowns at the same time. It would spread no doubt from the roofs which included timbers of an inflammable character. The burning timbers would fall, as we know they did fall, upon stacks of wheat or wheat products. The sacks themselves would it seems burn fairly readily but that tightly packed bags of wheat and wheat products 12, 13 or 14 feet high would be burnt or be turned into smouldering material only 3 to 4 feet high in the space of an hour or two seems to their Lordships to be an almost impossible proposition. Moreover, all the independent evidence on the matter is in favour of the defendants' view. Mr. A. G. Watts already referred to had had some experience of the burning of bags of wheat in stacks, and he stated that when burning debris falls on a stack of wheat the upper portion of the bags burns and the grain is turned to a black colour and makes a solid mass. A little later he said, "Bags of grain do not burn in flames. They only smoulder", and as regards the bags in a stack, the bags at the bottom in the case he had personal knowledge of, remained absolutely undamaged and only some of the bags at or near the top were damaged by the fire. Mr. Haultain had also had experience of burning grain and he stated that the bags themselves burn away very quickly but that the grain burns very slowly as the air could not get into the centre of the grain. The tighter the bags were packed the slower, he said, was the combustion which was by smouldering and not by flames. In particular he said that in atta, sooji, rawa and maida combustion was much slower than with grain. These products merely smoulder. Bran however would burn a little quicker. It is apparent that Mr. Sheringham who had had ample experience of fires took the same view, as is shown by his contemporary report that the amount of stock burnt was "small".

In regard to the claim for the gunny bags alleged to have been destroyed the plaintiffs were of course aware that the policy covered only gunny bags in bales. They used to be supplied in bales of 300 bags with iron hoops round them. In the particulars the plaintiffs claimed for gunny bags "in bales only", the number claimed for being 55,000, value Rs.50,663. Ladli Das supported this claim by an affidavit stating that "most if not all the bags were in bales of 300 bags". At the trial however the evidence proved that very few of the gunny bags were in bales and Seth Rustomji said that most of the bales were in bundles of 25 tied with thick string, and he contended that these bundles were in bales within the meaning of the policy. The gunny bags according to the head clerk were purchased from Calcutta, and it would not have been difficult to prove the numbers purchased during the six months preceding the fire. No such evidence was however produced. In the High Court the claim in respect of gunny bags was abandoned; but their Lordships must agree with the High Court that the circumstances relating to this part of the claim must be borne in mind when weighing the credibility of Seth Rustomji's evidence.

For these reasons as well as other reasons referred to in the judgment of Dalip Singh J. their Lordships have come to the same conclusion as that at which the High Court arrived. The alleged loss was not proved by the plaintiffs in the action and there was sufficient evidence to justify the conclusion of the High Court that the claim was grossly exaggerated, and as Seth Rustomji must have been aware of this fact the claim must have been fraudulent, with the result that under condition 13 of the policy, all benefit was forfeited by Seth Rustomji. This however would not necessarily bar the claim of the Central Bank to whom the policies had been assigned in an absolute form in respect of the losses and damage which was proved or admitted to have been occasioned by the fire, namely, a loss of some Rs.43,000. The difficulty here as already mentioned is that counsel who appeared on the appeal to the High Court for both Seth Rustomji and the Central Bank had taken the view that the insurance was a joint insurance and that fraud on the part of either of the plaintiffs would equally affect the claim of the other plaintiff even though the insurable interests were different. The learned Judge who delivered the judgment in the High Court observed in his concluding remarks that in view of the concessions made by the learned Counsel for the respondents, it was unnecessary to decide whether the Central Bank also were concerned in the making of a fraudulent claim. Their Lordships have a difficulty in understanding what was meant by the concession that there was in this case a joint insurance, a phrase which seems to be applied accurately only in a case where an insurance is effected as regards property jointly owned by the assured. However, a number of points of some difficulty would arise if the claim of the Central Bank were

to be considered on its merits so far as regards the Rs.43,000, including questions of construction both of the original charge and of the policies and of the documents passing between the insurance company and the Central Bank, and also questions under section 106 of the Indian Evidence Act of 1872. Moreover it may well be that if a different course had been taken in the Courts below further evidence might have been called. It is observed that Mr. Jariwala who had made an affidavit on behalf of the plaintiffs on the 16th August, 1927, was not called at the trial, and indeed no witness who could explain the course taken by the Central Bank was so called. Counsel for the plaintiffs is said to have observed that he did not consider it advisable to call Mr. Jariwala. On the whole and bearing in mind the reluctance of this Board to consider an issue or an objection which has been abandoned or not raised in the lower Courts (see *Lingangowda v. Basangowda* L.R. 54 I.A. 122 at page 125, *Uduma Lebbe Ahamath v. Levena Marikar* [1931] A.C. 799 at p. 801 and *Skinner v. Bank of Upper India* L.R. 62 I.A. p. 115) it appears that their Lordships would not be justified in allowing these questions to be raised on this appeal.

In these circumstances their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.



In the Privy Council.

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THE CENTRAL BANK OF INDIA,  
LIMITED

2.

THE GUARDIAN ASSURANCE  
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