

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE

JURISDICTION

CIVIL APPEAL NO. 137 OF 1998

BETWEEN:

SHEIK INSANALLY individually and as
representative of **HABIBUL** (deceased)

Appellant/Plaintiff

- and -

1. **ALLAN PHILLIPS**
2. **PANSY MARSHALL**
3. **HERBERT WILSON**

Respondents/Defendants

- and -

BETWEEN:

SHEIK INSANALLY individually and as
Representative of **HABIBUL** (deceased)

Appellant/Plaintiff

- and -

1. **RAMBARRAN IMPORTS AND EXPORTS LIMITED**
2. **SAGAN TRADING COMPANY LIMITED**

Respondents/Defendants

BEFORE:

The Hon. Madame Justice Desiree Bernard	- Chancellor
The Hon. Madame Justice Claudette Singh	- Justice of Appeal
The Hon. Mr. Justice Ian Chang	- Justice of Appeal

Mr. Ashton Chase with Ms. Pauline Chase for Appellants
Mr. Frank James with Mr. R. Satram for First, Second & Third-named
Respondents.

Mr. Moendin McDoom, SC with Mr. Moendin McDoom for the Fourth and
Fifth-named Respondents.

2002: June, 5 and 6

October 7, 30
2003: April 1

J U D G M E N T

CHANG, JA:

In 1936, one Nazeban in her own right and as sole executrix of the estate of her deceased husband vested title by transport in Habibul and Sheik Mohamed Insanally (the appellants) and Bibi Zaphitoon Nisa, all then minors, in respect of Plantation Land of Canaan save and except certain portions of the said Plantation already transported.

In 1957, the appellants and Bibi Zaphitoon Nisa then adults, subdivided and partitioned the North part of the said Plantation into lots A,B,C and D among themselves. Bibi Zaphitoon Nisa became the transported owner of lots A and B and the appellants became joint transported owners of lots C and D. Transport No. 2475 of 1957 relates to lots C and D. In the new 1957 transports, no portions were saved and excepted.

In 1985, the respondent Herbert Wilson applied for and obtained under section 35 of the Deeds Registry Act, Chapter 5:01, an order of court that title to lot 1 of Plantation Land of Canaan as shown on a plan by Sworn Land Surveyor Caesar Van Duben dated 28th April, 1847 be passed and registered in his favour. Consequent upon the said order of court, the Registrar of Deeds executed and passed transport No. 207 of 1985 in respect of Lot 1 in favour of the respondent Wilson. Similarly, in 1986, the respondents, Phillips and Marshall, by separate applications but using the same procedural route, obtained in May, 1986 separate orders of court under section 35 of the Deeds Registry that lots 2-6 and lots 7-12, as shown on the said plan by Caesar Van Duben of 1847, be passed and registered in their

favour respectively. Consequent upon the said orders of court, transports No. 478 of 1986 in respect of lots 2-6 in favour of the respondent Phillips and transport No. 479 of 1986 in respect of lots 7-12 in favour of the respondent Marshall were executed and passed by the Registrar of Deeds.

In August 1987, the appellants, Sheik Insanally and Habibul (represented by the said Sheik Insanally) filed an action against the respondents, Phillips, Marshall and Wilson seeking, inter alia, declarations that their transport No. 2475 of 1957 which relates to lots C and D was valid and effective in respect of ownership of all lands described therein and that transports No. 307 of 1985, No. 478 and No. 479 of 1986 held by the said respondents were invalid, ineffective and inapplicable in respect of lands held by the appellants as lots C and D in transport No. 2475 of 1957 (Action No. 2787 of 1987). The dispute arose because lands held by the said respondents in their transports formed part of lots C and D in transport No. 2475 of 1957.

The action brought by the appellants was heard by **Pompey J** who found in favour of the appellants and granted the declarations sought. The respondents appealed against the decision of **Pompey J** to the Court of Appeal. However, the appeal was never heard on merits. Neither the notes nor the records were available. Moreover, it was brought to the attention of the Court of Appeal that the decision of **Pompey J** was written and delivered after he had demitted judicial office on retirement. The Court of Appeal concluded that the decision of **Pompey J** was invalid and remitted the matter to be heard de novo by the High Court.

While hearing of the action de novo was pending, the respondent Wilson, on the 1st July, 1992, entered into an agreement of sale and purchase with Sagan Trading Company Limited, the second-named respondent in

Appeal No. of 1998, in respect of lot 1 on transport No. 267 of 1985. Under the agreement, the full purchase price of \$1,000,000 was paid to Wilson. On the 2nd March, 1993, while the de novo hearing was still pending, the respondent Phillips entered into an agreement of sale and purchase with Rambarran Imports and Exports Company Limited, the first-named respondent in Appeal No. of 1998, in respect of lots 2-6 on transport No. 478 of 1986. The full purchase price of \$3,000,000 was paid under the agreement to Phillips. In both instances, possession was given to the vendors.

The appellants opposed the passing of transport by Wilson to Sagan Trading Company Limited and followed up their opposition with Action No. 1091 of 1993. However, it appears that this action was never heard.

In August 1994, the appellants filed two actions against Rambarran Imports and Exports Company Limited and Sagan Trading Company Limited (Nos. 3547 and 3550 of 1994) seeking, inter alia, declarations that their purported purchases of lot 1 from Wilson and lots 2-6 from Phillips were invalid, null and void. These actions were not at all related to any opposition proceedings.

By consent of all the parties, three actions (No. 2787 of 1987 against Phillips, Marshall and Wilson and No. 3547 and No. 3550 of 1994 against Rambarran and Sagan) were heard together by **Trotman J.**

The appellants alleged against the respondents Phillips, Marshall and Wilson that since 1957, they were owners by transport No. 2475 of 1957 of 290 acres of land comprising lots C and D, parts of the North part of Plantation Land of Canaan, and that they had leased the said lots from 1965 to 1986 to one Mohamed Khan who had assigned the lease to Demerara Company (later Guyana Sugar Corporation); further, in 1985 and 1986, the

respondents irregularly obtained transports in respect of lands owned by the appellants as lots C and D in transport No. 2475 of 1957 and had been in occupation and possession of the said lands (lots 1-12) on transport Nos. 207 of 1985, 378 and 379 of 1986). The appellants further alleged that, in 1993, the respondents, Rambarran Imports and Exports Company Limited and Sagan Trading Company Limited, purported to purchase from Wilson and Phillips portions of the said lands (lots 1-6) owned by them under transport No. 2475 of 1957, took occupation and possession of the said portions of land and erected structures thereon.

The respondents, Phillips, Marshall and Wilson, alleged in their defence that they had obtained titles to lots 1-12 by transport pursuant to the provisions of the Deeds Registry Act, Section 35, and denied that the appellants were owners of the said lands. They further alleged that transport No. 2475 of 1957 was inaccurate in that the said transport did not reflect that portions of Plantation Land of Canaan which were sold or transported before the passing of that transport in 1957 were excepted from lots C and D. They further claimed that, even assuming that the lands, lots C and D without exception, were leased by the appellants until 1986, such leases did not affect the validity of their titles obtained under Section 35 of the Deeds Registry Act. They claimed further that Guyana Sugar Corporation (formerly Demerara Company) ceased to occupy lots C and D long before 1986 and that, in any event, any pre-existing rights of the appellants to the disputed lands were barred and extinguished by their possession for over 12 years.

The respondents, Rambarran Imports and Exports Company Limited and Sagan Trading Company Limited claimed in their defence that they were innocent purchasers for value of lots 1-6 from Wilson and Phillips

without any notice of claim to ownership of the said lands by the appellants and that the appellants had acquiesced in the rights of ownership to the said lands by Wilson and Phillips and were not entitled to any remedy against them or any of the other respondents.

The learned trial judge, having reviewed the technical and non-technical evidence adduced at the hearing by the parties, found that:

1. the portions of land for which Phillips, Marshall and Wilson obtained titles by transport fell within the area of land, lots C and D for which the appellants had earlier obtained transport No. 2475 of 1957.
2. the said portions of land for which Phillips, Marshall and Wilson obtained titles by transport in 1985 and 1986 fell within those portions of lands which ought to have been saved and excepted from lots C and D in transport No. 2475 of 1957.
3. the titles obtained by Phillips, Marshall and Wilson must be presumed to have been lawfully obtained by virtue of Orders of Court of Barnwell and Baburam JJ sitting as High Court Judges since there was no evidence that they had been since set aside by any Court of competent jurisdiction.
4. Assuming that the appellants did have original rights of ownership to the said lands, such rights were barred and extinguished by 12 years' adverse possession by Phillips, Marshall and Wilson by the time they obtained titles to the said lands under Section 35 of the Deeds Registry Act.
5. That the appellants were guilty of delay and laches and were therefore not entitled to equitable reliefs.
6. The appellants were not in possession of the lands when Phillips, Marshall and Wilson obtained titles by transport and subsequently, and therefore the action for the appellants for trespass was not maintainable.
7. the purchases of the lands by Rambarran Imports and Exports Company Limited and Sagan Trading Company Limited were lawful and capable of passing valid rights to ownership by transport.

The learned trial judge dismissed the actions brought by the appellants and refused to grant the declarations or other reliefs and orders sought by the appellants. He awarded costs to each respondent in the sum of \$100,000. The appellants appealed to this court against the decisions of the learned trial judge in the said actions.

Let me say at once that I do not share the view of the learned trial judge that, assuming that lots 1-12 did form part of lots C and D in transport No. 2475 of 1957 and ought not to have been excluded therefrom, the appellants' rights to ownership thereto were barred and extinguished by over 12 years' adverse possession by the respondents, Phillips, Marshall and Wilson.

It is pellucidly clear from Exhibit DD, a written lease agreement dated 4th January, 1965 between the appellants and Mohamed Haniff Khan, that the appellants had leased lots C and D for 21 years to Mohamed Haniff Khan. From the evidence, it appears that Khan assigned that lease to Demerara Company (later Guyana Sugar Corporation). Because of this lease, neither of the appellants had the legal right to exclude anyone from the leased lands. The right to exclusive possession during the validity of the lease resided in the lessee or his assignee. Therefore, possession of the respondents Phillips, Marshall and Wilson could have been adverse only against the lessee or his assignee and not against the lessors, the appellants. The lease with Khan had to terminate before adverse possession could have begun to run against the appellants. According to Badrudeen Hassan, a witness called on behalf of the appellants, Guysuco surrendered the lease to lots C and D in 1986. Therefore, prescription could only have begun to run against the appellants from 1986. I therefore hold that the learned trial judge fell into error in holding in the alternative that the appellants rights to ownership of the disputed lands were barred and extinguished by over 12 years' adverse possession on the part of the respondents, Phillips, Marshall and Wilson.

In any event, the evidence of Magnal Phillips did not suffice to enable a finding of sole exclusive possession of the disputed lands for over 12 years

by the respondents. At the highest, the evidence disclosed occupation of parts of the said land. But occupation is not exclusive possession.

On the other hand, it is not clear that the Demerara Company or its successor, Guysuco, did exclusively possess the disputed lands for over 12 years to enable the appellants to be successful in an alternative claim for prescriptive rights. The right to exclusive possession does not mean that such right was exercised.

The factual state of affairs which confronted the learned trial Judge was that there were several transports – one held by the appellants and three held by the respondents, Phillips, Marshall and Wilson – covering lots 1-12. The trial Judge, in dealing with transport No. 2475 of 1957 held by the appellants found, on the evidence of T.A. Earle, Sworn Land Surveyor and University of Guyana lecturer, that transport No. 2475 of 1957 incorrectly described the lands which could have been conveyed by that transport in that it omitted to except from the conveyance portions of Plantation Land of Canaan which had been sold or transported before its passing. In other words, the learned trial Judge went behind what was stated on the said transport.

In The Development of Land Law in British Guiana by Dr. Fenton

Ramsahoye, the learned author, stated at page 236:

“Although a transport gives warranty of title, it must not be presumed that the title is in itself indefeasible in the hands of the holder. It could always be set aside for fraud, for example, and also for other reasons including an incapacity to convey what the transport purported to pass. In the case of Crown grants, titles do not appear to be indefeasible. The authorities available in Ceylon appear to be against that they are, although the position appears to have been settled only after a considerable amount of judicial controversy. The position as settled there may well be taken to be the position in British Guiana under the present conveyancing system with the result that it would be

permissible to go beyond a grant to establish its weakness. The position in respect of transports in British Guiana is similar to that in the case of Crown grants in Ceylon. In Rodney v. Rodney in 1868, it was sought to establish in proceedings for trespass that transport established the "irrefragable conclusiveness" of the holder's title to the land. The Court rejected the argument that this is necessarily the effect of the execution of a transport. **Beaumont CJ** observed that while it may provide a "conclusive prima facie title" to that which is expressed to pass, it was an 'extravagant fallacy to treat it as concluding forever and in all modes and respect, all claims adverse to its apparent effect'."

In Codett v. Thomas (1957) LRBG 181, a portion of land already included in the transport of Thomas and belonging to him was transported to Codett due to the deliberate act of the Sub-Registrar in changing the boundaries set out in the advertisement submitted to him relative to a transport to be executed in favour of Codett. Thomas sued for a declaration that she was entitled to the portion of land and Codett claimed that his title by transport was indefeasible by virtue of Section 23 of the Deeds Registry Ordinance. It was held that the element of indefeasibility which a purchaser obtains when he receives his title is derived and flows from adherence to the statutory procedure which includes the requirement that an owner of property must lodge his title with the Registrar together with affidavits of seller and purchaser. Since Thomas had lodged no title or affidavits, the statutory procedure was not complied with. It was further held that it would be contrary to the dictates of justice to allow Thomas to be victimised by the unauthorised and illegal act of the officer in question.

In Heeralall v. Shivcharran (1958) LRBG 133, it was *held* that, since property purchased by Shivcharran at a sale for rates and taxes was wrongly described in the notice demanding the rates and in the advertisement for the sale of the property, the sale and transport issued thereafter were both invalid. Shivcharran could not rely on the invalid

transport as against Heeralall's right to an undivided share in property which included that portion purportedly purchased by Shivcharan.

Since transport is not itself title but is rather prima facie evidence of conclusive title, the learned trial judge cannot be faulted in law in going behind what was stated on transport No. 2475 of 1957 in order to determine whether the Registrar of Deeds acted correctly in conveying to the appellants, without providing for any exception, all the lands stated thereon since transport No. 2475 of 1957 derived from the 1936 transport in which Plantation Land of Canaan was conveyed to the appellants and Bibi Zaphitoon Nisa but with certain portions of lands excepted.

If, as found by the learned trial Judge, lots 1-12 held by the respondents Phillips, Marshall and Wilson fall within those portions of land which ought to have been excepted by the Registrar of Deeds from Lots C and D, having regard to the exceptions stated in the 1936 transport, then this necessarily meant that the appellants had no right to ownership in the portions of land comprising lots 1-12 and therefore had no basis to sustain the action for the declarations and remedies sought. This would be so whether or not the respondents Phillips, Marshall and Wilson had obtained their titles through an illegality or irregularity. The appellants as plaintiffs in the action in the High Court had to establish their case on the strength of the claims and not by the weakness of the respondents' claims (or, to put it another way, on the indefeasibility of their own transport rather than on the defeasibility of the respondents' transport).

Of course, the appellants were entitled to rely on the transport itself (No. 2475 of 1957) as prima facie evidence of conclusive title to lots C and D. The evidential burden thus fell upon the respondents to raise the issue as to whether the transport accurately or correctly defined the lands which the

appellants were entitled to have conveyed to them. To discharge this evidential burden, the respondents had to adduce evidence sufficient to justify consideration of the issue. The appellants as plaintiffs and as the parties bearing the persuasive burden then had to satisfy the court on a balance of probabilities, that the issue should be decided in their favour.

In Cross and Tapper on Evidence 9th edition the learned authors stated at pg. 138:

“Once the party who bears the evidential burden has discharged it by adducing evidence sufficient to justify consideration of a particular issue, it becomes necessary for the party bearing the persuasive burden on that issue, the proponent, to persuade the trier of fact that it should be decided in his favour.”

And at page 140:

“For the sake of theoretical completeness, it may be added that when, in a civil case, the party with the persuasive burden on a particular issue also bears the evidential burden, it is discharged by the adduction of sufficient evidence to satisfy a reasonable trier of fact on the balance of probabilities. If the party bearing the evidential burden does not bear the persuasive burden, the former is discharged by the adduction of sufficient evidence to leave the mind of a reasonable trier of fact in a state of equilibrium.”

Since the parties were *ad idem* that Lots 1-12 fall within lots C and D without exception and since the issue arose as to whether the appellants were entitled to have lots C and D conveyed to them without exception i.e. without excepting the portions of land covered by lots 1-12, the appellants bore the persuasive burden of satisfying the trial Judge that they were entitled to have lots C and D conveyed to them without such exception. To succeed, the evidence adduced by the appellants as plaintiffs in the court below had to be more persuasive and not equally persuasive. It is clear that, at the end of the case, the trial Judge found that the evidence adduced by the respondents was more persuasive than the evidence adduced by the

appellants on the issue. Even if the trial Judge had found that the evidence adduced by the respondents was equally persuasive as the evidence adduced by the appellants, the appellants would have failed to discharge their persuasive burden and would not have been entitled to succeed on the issue.

In the absence of some compelling or telling factor or circumstance, once there is ample evidence to support a finding of fact, an appellate court ought not to upset or differ from the finding made by the trial Judge where such finding turned on the credibility of the various witnesses whom the trial Judge had heard and seen (Bookers Stores Limited v. Mustapha Ally (1972) 19 WIR 230 and Dufour v. Helenair Corporation (1996) 52 WIR 188). In the instant case, Counsel for the appellants has not pointed out any compelling or telling circumstance which can cause this court to upset or differ from the finding of the trial Judge. There is therefore no basis for this court to interfere with the finding of fact made by the learned trial Judge that lots 1-12 fall within portions of land which ought to have been excepted by the Registrar of Deeds from lots C and D in transport No. 2475 of 1957.

Counsel for the appellants had submitted to the learned trial Judge (as indeed he did before this Court) that the respondents Phillips, Marshall and Wilson had irregularly obtained titles by transport to lots 1-12 and that such titles are null, void and of no legal effect. The learned trial Judge stated in his decision as follows:

“ I am satisfied on a balance of probabilities
(2) that the titles obtained by the defendants Phillips, Marshall and Wilson are good, lawful and subsisting and must be presumed to have been lawfully obtained by virtue of the orders of **Barnwell** and **Baburam JJ** sitting in a court of competent jurisdiction – the High Court of the Supreme Court of Judicature of Guyana.

I do not consider it proper and lawful for me to conduct a judicial exhumation of these orders and the prerequisite proceedings which led to the making of them.

These orders must be presumed to be valid as there is no evidence before me of them being set aside by appeal to a superior court or otherwise; nor is there evidence before me that they or the titles granted by them to the defendants Phillips, Marshall and Wilson were made or obtained by fraud illegality or some other vitiating mode or circumstance.”

Clearly, what the learned trial Judge was saying was that he was satisfied that the orders under which the titles were obtained were made by Judges of competent jurisdiction of the High Court and that he was not competent to review the proceedings or the validity of the orders made by **Persaud and Baburam JJ.** **Barnwell, J** made the nisi order for Phillips and Marshall, and **Baburam, J** made it absolute. It is clear that he was saying that he had found on a balance of probabilities that the orders by which the titles were obtained were made by High Court Judges of competent jurisdiction and not that he himself, on review, had found them to have been made lawfully or regularly. In other words, their presumed validity was based not on his own finding of validity but on the fact that High Court Judges of competent jurisdiction had granted such orders which were not set aside by any appellate court or otherwise. The trial Judge held that he had no jurisdiction to question the validity of the orders made by High Court Judges.

The said orders were made in Chambers under Section 35 of the Deeds Registry Act, Chapter 5:01 Section 36(1) of the said Act provides:

“Any person affected by a decision of a Judge of the Court refusing to permit the passing of a transport, mortgage, cancellation of mortgage, lease or other document or by any order or decision of a Judge in Chambers may appeal to the Full Court and the Provisions of the Rules of the Supreme Court (Appeals) Act 1924 shall apply to such appeals so far as practicable.”

In my opinion, the appellants could have appealed to the Full Court under Section 36(1) of the Deeds Registry Act as persons affected by the

orders or decisions of **Persaud and Baburam, JJ in Chambers**. However, the orders made by **Persaud and Baburam, JJ** under **Section 35** were never challenged under **Section 36(1)**. Nor were the validity of the transports themselves issued upon the said orders challenged on the ground of fraud under **Section 22** of the said Act.

The question arises as to whether **Trotman, J** in the proceedings in the court below could have declared or set aside the orders made by **Persaud and Baburam, JJ** as nullities.

The cases of **Codett v. Thomas** (supra) and **Heeralall v. Shivcharran** (supra) do not appear to be helpful in the resolution of this issue. In those cases, the transports were issued on the basis of procedurally irregular acts done by public officers. In the instant case, the transports were issued on the basis of orders made by a judge of the High Court in proceedings which were not attended by procedural irregularities.

The case of **Adams v. London (1964) LRBG 188** also does not appear to be helpful. In that case, it was held that, normally to have a judgment set aside for fraud, there must be collusion but a judgment can be set aside if obtained by a unilateral fraud upon the court. In that case, the plaintiff, who had obtained a declaration of title to land under the Land Registry Ordinance 1959 by a deliberate and fraudulent suppression of evidence in respect of the defendant's occupation of a portion of the land sued the defendant in trespass. The defendant counter-claimed for an order that the award made by the Commissioner of Title in favour of the plaintiff be set aside on the ground of fraud. The High Court ordered the declaration made by the Commissioner of Title be set aside and the plaintiff's action based on the title obtained by virtue of that declaration failed. **Luckhoo CJ** said at pgs. 192-193:-

“Normally to have a judgment set aside for fraud, there must be collusion. However, a judgment can be set aside by unilateral fraud upon the court (see Tommey v. White [1853] 4 HLC 734). In Patch v. Ward 1867 LRC Ch. App.203 at 207, Lord Cairns said that the fraud “must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the malus animus, and mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him”. In that case, **Rolt LJ** said (at 212-213):

“I think, for the reasons which have been given by my learned brother, that the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and obtaining that decree by that contrivance. Mere constructive fraud not originating in actual contrivance but consisting of acts tending to deceive or mislead without any such intention or contrivance would probably not be sufficient”

However, it will be noted that a judgment will not be set aside on the ground of perjury or falsification of evidence.”

In the instant case, the appellants neither pleaded nor adduced evidence of actual deliberate fraud on the court presided over by **Persaud and Baburam, JJ** in their applications under Section 35 of the Deeds Registry Act for titles to be passed and registered in their favour. Moreover, there was no evidence that the orders were obtained on the basis of such fraud.

In Allicock v. Demerara Bauxite Company (1968) GLR 140, **George J** drew the distinction between “void” and “voidable” and held that the proviso to Section 23 (1) of the Deeds Registry Act does not debar the High Court in the exercise of its equitable jurisdiction from ordering rescission of a transport obtained by fraud even though the action was not brought under the said proviso which empowered the High Court to declare a transport so obtained “void” in an action brought within twelve months of the discovery of the fraud. According to **George J**, the High Court has a statutory jurisdiction to declare a transport obtained by fraud as “void” in an

action brought within twelve months of discovery of the fraud and also an equitable jurisdiction to set aside or rescind a transport obtained by fraud.

At pg. 152, **George J** said,

“However, the proviso does not, in my opinion, deny to the court its power under the general principles of equity, to order a rescission of a transport obtained by fraud, and accordingly one which is voidable, and to direct a reconveyance of the property to the plaintiff in a suit brought after one year from the discovery of the fraud”.

Both **Adams v. London (supra)** and **Allicock v. Demerara Bauxite Company (supra)** were decisions of first instance and were concerned with allegations and evidence of fraud. I do not see it necessary to pronounce on the rectitude of those decisions for the purposes of the instant case. It suffices to say that, in the instant case, both decisions are materially distinguishable since before the High Court the appellants neither pleaded nor alleged fraud.

In **Sigismund Lewis v. Herbert Benn (1974) GLR 171**, **Massiah J**, acting under **Order 35 Rule 13 of the Rules of the High Court**, set aside a judgment obtained in breach of Order 25 Rule 9 which requires Notice of Fixture to be served on a defendant by registered post and not by ordinary post. The judgment was set aside *ex debito justitiae* by the judge as having been irregularly obtained. In the instant case, there was no allegation of any procedural breach which vitiated the orders made by **Persaud** and **Baburam, JJ**. The Complaint was that the applications were misconceived in that the supporting affidavits could not and did not satisfy the essential requirements of section 35 of the Deeds Registry Act to enable any order to be made thereunder in favour of the applicants. The attack against the orders was on the basis of evidential insufficiency rather than procedural irregularity.

In Craig v. Kanseen (1943) AC 108, it was held that the court in its inherent jurisdiction can set aside its own order ex debito justitiae where the order was a nullity for reason of procedural irregularity. In that case, the impugned order was made on a summons which was not served on the defendant. In the instant case, there was no procedural irregularity and the decisions of **Persaud and Baburam, JJ** were not impugned on the ground of any material procedural error or omission.

Order 25 Rule 13 of the Rules of the High Court States:

“Any judgment by default or on an ex parte hearing, whether under this or any other order, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as the Court or Judge may think fit”.

I have no doubt that a judge can set aside a default judgment or ex parte judgment made by another Judge. However, the orders made by **Persaud and Baburam, JJ** were not default or ex parte orders. There was no default of procedure and, since the appellants and other persons were not precluded from objecting to the applications after their publication in the Gazette, the hearings were not ex parte hearing and, as such, the orders made were not ex parte orders.

The distinction between a judgment obtained ex parte and a judgment obtained for non-appearance at trial is clearly illustrated by a comparison of Order 25 Rule 13 with Order 35 Rule 13 which states:

“Any judgment obtained where one of the party does not appear at the trial may be set aside by the court or a Judge upon such terms as may seem fit on an application made within fourteen days”.

Clearly, Order 25 Rule 13 applies where there has been an ex parte application which has remained ex parte and has precluded an appearance by another party while Order 35 Rule 13 applies where another party has been free to appear at the hearing but has failed to do so. It should be noted that a

party who has failed to appear at the hearing cannot apply to set aside the judgment outside of fourteen days. There is no such limitation for an application to set aside a default or ex parte order –i.e. an order obtained without any hearing to which the defendant could have appeared.

In the instant case, there was no room for the application of either Order 25 Rule 13 nor Order 35 Rule 13 of the Rules of the High Court by the trial judge (**Trotman J.**) since the orders made by **Persaud** and **Baburam, JJ** were neither default nor ex parte orders and, even if they were orders which fall within Order 35 Rule 13, no application to set any of them aside was made within fourteen days.

Since the appellants neither pleaded nor adduced evidence of fraud before the trial judge, he was powerless to set them aside on the ground of fraud.

The question is therefore reduced to whether the trial judge could have declared or set aside those orders as nullities in the exercise of the inherent jurisdiction (whether equitable or otherwise) of the court.

While dicta of Lord Greene M.R. in **Craig v. Kanseen** (supra) are sufficiently wide to suggest that the High court in its inherent jurisdiction can set aside its own order ex debito justitiae if the order is a nullity – rendering an appeal unnecessary, it has already been noted that, in that case, the nullity stemmed from failing to serve the summons on which the order was made i.e. from a procedural irregularity. The order made in that case was in effect an ex-parte order which would now be covered by our Order 25 Rule 13.

In **Sigismund Lewis v. Herbert Benn** (supra) Massiah J., after referring to Order 35 Rule 13 of the Rules of the High Court said at 176:

“I understand the legal position to be that if judgment is irregularly obtained, then it may set aside *ex debito justitiae*; but if regularly obtained, then it may be set aside in the exercise of the judge’s discretion if the defendant satisfies him that his case is meritorious”.

My understanding of this dictum in the context of Order 35 Rule 13 is that, where a party does not appear at the trial due to some procedural irregularity and judgment is obtained, then that judgment has been irregularly obtained and must be set aside *ex debito justitiae*. However, where the non-appearance of the defendant is not due to some procedural irregularity and judgment is obtained in a procedurally regular way, the judgment cannot be set aside *ex debito justitiae* but can be set aside in the exercise of the discretion of the Court or Judge only after the court is satisfied that the defendant has a meritorious defence. In the instant case, the appellants did not allege any breach of the procedural rules and, while they might have well have been able to satisfy a judge that they had a case of merit if any application to set aside was made within 14 days of the judgment, the action to declare the orders as nullities was made over one year after the transports were passed in favour of Phillips, Marshall and Wilson and only after the respondents, Rambarran Imports and Exports Limited and Sagan Trading Company Limited had purchased lots 1-12 i.e. after these respondents had acquired rights *ad rem* in equity to those lots.

I entertain extreme doubt as to whether the inherent jurisdiction of the High Court to declare or set aside as a nullity *ex debito justitiae* its own order or decision is uncircumscribed. The authorities seem to indicate that the High Court can exercise such a jurisdiction where there has been collusive fraud or deliberate fraud upon the court or where the order or decision has been obtained in a procedurally irregular way. However, where the allegation is that the trial judge has erred in his adjudication on the

merits of the case, I do not think that a judge has an inherent jurisdiction to declare or set aside the previous decision or order of another judge of co-ordinate jurisdiction as a nullity *ex debito justitiae*. In my view, in such a case, the only appropriate way of obtaining a remedy is by way of appeal for, in such a case, the aggrieved party is seeking to fault the trial judge himself in the discharge of his adjudicative function.

Jurisdictional division in the hierarchy of the superior courts cannot be unduly sacrificed on the altar of an inherent jurisdiction to declare or set aside decisions or orders of Co-ordinate courts as nullities *ex debito justitiae*. Such a jurisdiction must of necessity be circumscribed. Otherwise, the floodgates will be opened wide to jurisdictional confusion and chaos in the administration of justice.

In the instant case, although the Statement of Claim alleged that the orders were nullities for procedural irregularity, no evidence of procedural irregularity was adduced at the trial before **Trotman J.** In substance, the challenge to the validity of the orders made by **Persaud and Baburam, JJ** was on the ground of evidential insufficiency or deficiency. Since there was no evidence of fraud or procedural impropriety at the trial, had the trial judge declared or set aside those orders, he would have been guilty of elevating himself to a substitute appellate tribunal. He could not do what the Full Court could have done had there been appeals against the orders under section 36(1) of the Deeds Registry Act. Neither could he do what a judge of co-ordinate jurisdiction could have done if the subject matter of the proceedings was an application under Order 35 Rule 13. It was not. If the trial judge had no jurisdiction to declare or set aside as nullities the orders made by **Persaud and Baburam, JJ** this court as the court hearing an

appeal from the decision of the trial judge can do no more than he could have done.

I therefore hold that the trial Judge rightly declined to review the validity of the orders made by **Persaud and Baburam JJ** and that this court in this appeal cannot do so either.

There is another reason why this court cannot review the decisions or orders of **Persaud and Baburam JJ**. If, as found by the trial judge on the evidence of the witness Earle, lots 1-12 ought to have been excepted from lots C and D in transport No. 2475 of 1957, then the appellants had no right, title or interest in lots 1-12 and would therefore have lacked the locus standi in private law to challenge the validity of the orders made by **Persaud and Baburam JJ** in favour of the respondents, Phillips, Marshall and Wilson in respect of those lands. Even if the trial judge had found that lots 1-12 did not form part of the exceptions but fell outside of lots C and D, then again the appellants would have had no locus standi to challenge the validity of the orders of **Persaud and Baburam JJ** since the appellants would have had no right, title, or interest in lots 1-12 and therefore no basis for a private law challenge. If the appellants had no locus standi in private law to challenge the orders, then the trial judge could not have reviewed the said orders and this court can do no more than the trial judge could have done.

I feel obliged to mention that had the learned trial judge (or this court) the jurisdiction to review the validity of the orders made by **Persaud and Baburam JJ**, the said orders might well have been invalidated or declared invalid. Mr. Chase's submission that Section 35 of the Deeds Registry Act has application only where the right to title can be traced to or is derived from a previous title by transport does appear to accord with a correct interpretation of the said section. However, it is regrettable that we have no

jurisdiction in these proceedings to review the validity of the orders made **Persaud and Baburam JJ.**

Even if the trial Judge could and did invalidate the orders of **Persaud and Baburam JJ**, it would have availed the Appellants nothing if, as the trial Judge found, Lots 1-12 fall within the portions of land which ought to have been excluded from lots C and D on transport No. 2475 of 1957.

It must be noted that the trial Judge could have questioned the validity of the transports themselves but only on the ground that such transports did not accurately reflect what was ordered by **Persaud and Baburam JJ** or that the transports were in some respect inconsistent with the said orders. This was not the contention of the appellants in the High Court or in this appeal.

Counsel for the appellants submitted that the learned trial Judge inhibited his appreciation of the issues before him by considering himself bound by the presumed validity of the orders made by **Persaud and Baburam JJ**. In my view, if the trial Judge had allowed himself to be influenced by the presumed validity of the previous orders of **Persaud and Baburam JJ** in considering and deciding the issue whether Lots 1-12 ought to have been excepted from lots C and D in transport No. 2475 of 1957, he would have fallen into grave error and would have surely opened his decision to interference by this court. He would have, in effect, wrongly allowed his own decision to be coloured by the earlier decisions of other courts on an issue to which the principle of res judicata had no application. The issue before the trial Judge was the defeasibility of transport No. 2475 of 1957 and not the validity of the orders made by **Persaud and Baburam JJ** or the indefeasibility of the transports which derived from those orders of Court. The question of the defeasibility of transport No. 2475 of 1957 did not at all depend on the validity of the orders made by **Persaud and**

Baburam JJ. Therefore, neither the validity of the orders of **Persaud and Baburam JJ** nor the indefeasibility of the transports derived from them had any relevance at all to this issue.

But, did the trial Judge allow himself to be wrongly influenced by the presumed validity of such orders or the indefeasibility of the transports which derived from them? On a perusal of his judgement, I am unable to agree with the submission of Counsel for the appellants. It is clear that the trial Judge decided the issue on the evidence of the witness Earle. The trial Judge stated:

“In the end, I preferred to accept the expert explanations and opinions of the witness, Earle instead of the witness Howard, even though the latter impressed me, like the former, as a witness of considerable professional competence. I felt that Earle’s evidence assisted me more in my own examination of the relevant technical and historical aspects of the facts in issue and better facilitated my appreciation and understanding of the plans, transports and related matters concerning positions and descriptions of the lands in question and the surrounding areas. Earle impressed me as having done his homework not to please the teacher but to satisfy the highest possible standards of professional performance.”

Nowhere in his decision did the trial Judge treat the previous decisions of **Persaud and Baburam JJ** as relevant to the determination of the issue whether lots 1-12 should have been excepted from lots C and D in transport No. 2475 of 1957. He first determined the said issue before going on to consider whether it was proper for him to review those previous orders of court.

For the reasons stated above, I would dismiss the appeals by the appellants and affirm the decision of the trial Judge. Costs to be taxed fit for counsel unless otherwise agreed between the parties.

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Ian N. Chang
Justice of Appeal.

Dated this 1st day of April, 2003.