1953 *Present :* **Gratiaen J. and Gunasekara J.**

A. A. JAFFERJEE *et al.*, Appellants, *and* P. R. SUBBIAH PILLAI *et al.*, Respondents

S. C. 319—D. C. Colombo, 17,563

Contract—Sale of goods— Executory contract—Price in excess of statutory maximum—Illegality—Refund of part payment of price.

Where, in a contract for sale of goods, the price agreed upon exceeded the statutory maximum permitted by a Price Control Order which was in operation at the time when the contract was entered into—

Held, (i) that the contract was contrary to public policy and, therefore, void. The supervening circumstance that the control was lifted, and the price charged became legal, during what remained of the period fixed for delivery of the goods could not have the effect of removing the taint of illegality which vitiated the contract at its very inception.

(ii) that the defaulting seller could not, in the circumstances of the case, be ordered to refund any payment made to him under the illegal contract.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *V. A. Kandiah, W. D. Gunasekera* and *Ivan Perera*, for the defendants appellants.

H. V. Perera, Q.C., with *H. W. Tambiah, C. Renganathan*, and *V. Arulambalam*, for the plaintiffs respondents.

Cur. adv. vult.

March 25, 1953. GRATIAEN J.—

The plaintiffs who are a firm of dealers in Colombo sued the defendants in this action for the recovery of an aggregate sum of Rs. 38,500 alleged to be due to them for failure to deliver certain goods in terms of two separate contracts.

As to the first cause of action, they pleaded that the defendants had on 31st October, 1946, agreed to sell to them 500 bags (each containing 2 cwt.) of grain known as " vallai chelam " or " juwari " at Rs. 31 per cwt. to be delivered in Colombo on or before 30th November, 1946 ; that they had paid to the defendants a sum of Rs. 1,000 in part payment of the purchase price ; but that the defendants had failed to deliver any part of the goods within the stipulated period.

As to the second cause of action, they pleaded that the defendants had on 2nd November, 1946, agreed to sell to them 500 bags (each containing

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200 lb.) of " kambu arisi " or " bajiri " at Rs. 35 per bag to be delivered to them in Colombo on or before 30th November, 1946 ; that they had paid to the defendants a sum of Rs. 5,000 in part-payment of the purchase price ; but that on this occasion too the defendants had failed to deliver any part of the goods within the stipulated period. The defendants admitted that they had contracted to sell 500 bags of " juwari " and 500 bags of " bajiri " to the plaintiffs, that the contract price of the consignment of " juwari " was Rs. 31 per cwt. and that they had received Rs. 1,000 and Rs. 5,000 respectively as advances against these transactions. They fixed the date of each contract, however, at 1st November, 1946, and the contract price for the consignment of " bajiri " at Rs. 43 per cwt. ; they also alleged that the date fixed for delivery in each case was not " on or before 30th November, 1946 " but " against November/December shipment ". They counterclaimed a sum of Rs. 15,096·69 as damages on the ground that the plaintiffs had refused to accept the goods which were duly tendered to them on their arrival in Colombo in January and February, 1947, respectively.

The parties had not taken the elementary precaution of having the terms of either contract reduced to writing, and each side in turn alleged that the other had deliberately presented a false version of the facts with the aid of documents fabricated for the purpose. The manner in which the litigation developed at the trial left no room for a decision that there possibly might have been a genuine misunderstanding as to the terms of either transaction in respect of date, price or the time for performance. At the close of the evidence, senior Counsel for the parties each addressed the Court for three days, during which period, I have no doubt, all the oral and documentary evidence was subjected to the most detailed scrutiny. Twelve days later the learned District Judge pronounced judgment accepting the plaintiffs' version, and holding that the defendants were the defaulting parties in respect of each contract. With regard to the first cause of action, he awarded the plaintiffs a sum of Rs. 2,000 as damages and also ordered the defendants to repay the sum of Rs. 1,000 advanced to them. With regard to the second, he awarded Rs. 27,500 as damages and ordered the return of the advance of Rs. 5,000. The present appeal is from this judgment. Mr. Weerasuriya does not complain that, if his clients were liable on either cause of action, the quantum of damages was excessive.

We ourselves have had the advantage of a critical analysis of the evidence led at the trial. Mr. Weerasuriya submitted *inter alia* that the learned Judge was in error in that, more particularly in respect of the " bajiri " contract, he had (*a*) declined to give consideration to the relevancy of certain admissible evidence which the defendants had led in support of their case, (*b*) ruled out other items of evidence which were relevant and which, if admitted, might well have turned the scales against the plaintiffs, and (*c*) failed to take into account certain other matters which vitally affected the credibility of the 4th plaintiff. Mr. Weerasuriya also argued, as a matter of law, that the transaction in respect of the consignment of " bajiri " was in any event an illegal contract which was *ab initio* void and unenforceable.

It will be convenient if I first dispose of the " bajiri " contract. I have arrived at the conclusion that, whichever version of the transaction be taken as true, the contract between the parties was unenforceable. The following additional issues were framed in the course of the trial :—

22A. Is the alleged contract price referred to in issue 6 in excess of the " control price " of " bajiri " at the relevant date ?

22B. If so, is the alleged contract in issue 5 contrary to public policy and/or illegal and therefore void ?

23. If issue 22 is answered in the affirmative, can the plaintiffs have and maintain their claim for damages even if issues 5 and 6 are answered in the plaintiffs' favour ?

It is common ground that the learned Judge correctly answered issue 22A in the affirmative. In my opinion he should, on the basis of that finding, have answered issue 22B in the affirmative and issue 23 in the negative. For the same reasons, the defendants' claim in reconvention in respect of the " bajiri " contract should also have been dismissed *ex mero motu* by the learned Judge.

The facts relating to these three issues are beyond controversy. At the time when the contract was entered into, there was in operation a statutory order, made by the Controller of Prices under section 3 of the Control of Prices Ordinance, No. 39 of 1939, as amended by Defence (Control of Prices, Supplementary Provisions No. 2) Regulations, fixing Rs. 32·50 per bag of 200 lb. as the maximum wholesale price beyond which " bajiri " could not be sold within the Municipal limits of the town of Colombo. On either the plaintiffs' or the defendants' version, therefore, the contract price, which was admittedly a wholesale price, exceeded this statutory maximum. The 4th plaintiff, who had negotiated the transaction on behalf of the partnership and was well aware of this circumstance, explained that his firm's intention was to buy " wholesale " in order to sell the goods at the ruling retail rate of 36 cts. a measure in order to make a small profit and also, in view of the prevailing scarcity of " bajiri " in the local market, to attract custom generally to their business.

The Price Control Order in question (P66) came into operation on 7th July, 1943, and remained continuously in force until 13th November, 1946, when the control was lifted altogether. It is true that, *after that date*, and during what remained of the period fixed for delivery by the sellers, there was no longer any legal objection to a sale of " bajiri " at the original contract price. The question is whether this supervening circumstance had the effect of removing the taint of illegality which vitiated the contract at its very inception.

The learned District Judge took the view that, as the Control of Prices Ordinance directly penalised only a seller, but not a purchaser, in a transaction where the contract price exceeds the controlled price, " the plaintiffs could insist on specific performance of the contract and the defendants are liable for breach of contract ". Mr. H. V. Perera did not associate himself with this line of reasoning, and, with respect, it is unsound.

Even though the Ordinance does not in terms prohibit contracts for sale at prices exceeding the controlled price, it authorises the Controller to make statutory orders from time to time fixing the maximum permissible price for any particular commodity " if it appears to (him) that there is, or is likely to arise, in any part of Ceylon, any shortage of (that) article or any unreasonable increase in (its) price ". Sec. 5 prescribes the punishment for a contravention of such an order. The object of the legislature is clearly to protect the public from the sinister activities of dealers in essential commodities which are in short supply, and, by imposing a penalty on the seller, it prohibits by implication all contracts which are designed to contravene the statute. A dealer who enters into a contract to sell controlled commodities at a prohibited price undertakes, in effect, to commit a criminal offence, and the purchaser cannot seek the assistance of the law for the enforcement of a bargain of that kind. The decision in *Hull Blythe & Co. v. Valliappa Chetty* [1] is distinguishable because it was based on the interpretation of an Ordinance which was designed, in the opinion of the Court, to achieve a different object.

Mr. H. V. Perera based his argument on the *ratio decidendi* of *Mischeff v. Springett* [2]. In that case, A had agreed to sell to B, for delivery at a future date, a quantity of sardines at an agreed price. Before the time for performance had arrived, however, legislation had been introduced prohibiting the sale of sardines at a price exceeding that prescribed by a statutory order. In the result, the original contract price exceeded the controlled price. The Court held that A, by implementing his earlier contract, was guilty of an offence. Although the agreement was perfectly legitimate at the time when it was entered into, the performance of the seller's obligation after the statutory order came into force contravened the statute. This decision is based on the well-recognised doctrine that " if the subject matter of a contract is *in commercio* at the time when the agreement is concluded, but ceases to be *in commercio* before the contract is carried out, then the contract has no binding force ". *Wessels on Contract*, Vol. 1, para 682, citing *Justinian* 3.19.2.

We are here concerned with the converse case, and Mr. Perera argued that, by parity of reasoning, the contract being for the sale of unascertained goods, there was no concluded sale until the goods were appropriated to the contract, i.e., in this instance, until the time came for delivery to the buyer. He conceded that the defendants could not have lawfully fulfilled their contractual obligation before November 13th, but pointed out that there still remained 17 days within which delivery could have been effected without contravening the law.

I confess that I was much attracted by the argument that, in the case of a forward contract, the proper time for testing the legality of the transaction is the date fixed for performance, i.e., when the agreement " matures into a sale ". Since we reserved judgment, however, I find that the Court of Appeal in England pronounced judgment in a case which in all essentials corresponds precisely to that which now arises for our decision—*David Taylor and Sons Ltd. v. Barnett Trading Company* (The " Times " Newspaper of 5.3.53).

[1] *(1937) 39 N. L. R. 97.*

[2] *(1942) 2 K. B. 331.*

In *Taylor's case* (supra) the defendants had agreed on 27th February, 1952, to sell to the plaintiffs 10,000 cases of Irish stewed steak at a price of 2*s.* 5*d.* a pound, delivery April, May, June, July, 1952. At the date of the contract the sale of goods of this description was subject to control under statutory regulations and the contract price in fact exceeded the controlled price. Two months later, however, the regulations were altered, and a higher maximum price was sanctioned, so that the original contract price was no longer prohibited. The defendants refused to deliver the goods in terms of the contract, and the plaintiffs claimed damages. Goddard L.C.J. had ruled at the trial that the contract was not illegal, but Singleton L.J. held in appeal (Denning L.J. and Hodson L.J. agreeing) that " *the contract at the date when it was made was illegal, and the fact that the price charged had become legal by the date of delivery did not affect the matter* ". The full report of the judgment is unfortunately not yet available to us.

The test of legality laid down by Singleton L.J. is certainly in accordance with the principles of Roman-Dutch law which, in this respect, governs all contracts including those for the sale of goods. *Wessels* (Vol. 1, para 683) declares that if a contract was illegal when entered into, it remains illegal, and even though a new law should make such contracts legal, no action could be brought on it. He cites as authority for this proposition the rule laid down in the *Digest* (50.17.29) " *quod initio vitiosum est non potest tractu temporis convalescere* " which means that " what is bad from its inception cannot be cured by passage of time ". Certain earlier English decisions indicate that the law in England is identical. " No contract ", said Lord Ellenborough in *Atkinson v. Ritchie* [1], " can properly be carried into effect which was originally contrary to the provisions of law, *or* which, being made consistently with the rules of law, has become illegal in virtue of some subsequent law ". In other words an unconditional executory contract is not enforceable unless the act to be performed would have been legal not only at the date of the contract but also at the date fixed for performance.

It was contended on behalf of the plaintiffs that the present case can in any event be distinguished because, at the time when the contract was made, it was well-known in the trade that price control in respect of " bajiri " would shortly be lifted. I do not think that, in principle, this circumstance concludes the argument. It is true that the Director of Food Supplies, who gave evidence at the trial, stated that he had informed a number of traders about the end of October, 1946, of his decision to recommend to the Controller of Prices the revocation of the ruling price fixed by the earlier *Gazette* notification P66. His intention in releasing this information was, apparently, to persuade dealers to bring back into the market large quantities of " bajiri " which, in his belief, had been taken underground owing to dissatisfaction over the terms of the price order. But the Director admitted that the ultimate decision rested not with him but with the Controller of Prices, and there was no guarantee that his recommendation would be adopted.

[1] *10 East 330* (= *103 E. R. 877*).

In any event, the present contract is unambiguously a contract whereby the sellers undertook to do something which contravened the law obtaining at the time when they made their bargain. *Pollock on Contracts* (10th Edn.) p. 314 points out that the conflicting judgments in *Mayor of Norwich v. Norfolk Railway Company*[1] " gives this practical warning that whenever it is desired to contract for the doing of something which is not certainly lawful at the time, or the lawfulness of which depends on some event not within the control of the parties, *the terms of the contract should make it clear that the thing is not to be done unless it becomes or is ascertained to be lawful* ".

The plaintiffs do not allege that the present contract was intended to be conditional upon the anticipated adoption by the Controller of Prices of the rumoured recommendation of the Director of Food Supplies. On the contrary the 4th plaintiff does not even claim to have shared the 1st defendant's knowledge that such a recommendation had in fact been made. Indeed, as I have already pointed out, he admitted in re-examination, after the issue of illegality had expressly been raised, that he contracted, for the purposes of his retail business, to buy the goods at a wholesale price which exceeded the statutory rate. " People in general must always be considered as contracting with reference to the laws as existing *at the time of the contract*, and the words showing a contrary intention ought to be perfectly clear to rebut that presumption."—*Bailey v. de Crespigny* [2]. There is nothing in the pleadings or in the evidence of the 4th plaintiff which rebuts this presumption.

It is interesting to note that in *Taylor's case* (supra) the plaintiffs had also argued, but without success, that the contract was not illegal because the parties knew that the ruling price order would shortly be varied. The true principle, I think, is laid down in *Mahmoud v. Ispahani* [3]. Where a contract is *ab initio* illegal, there is no room for applying the rule that where a contract can be performed either in a lawful or in an unlawful manner, a party cannot avoid his obligations by seeking to adopt the latter alternative.

Mr. Perera suggested at one stage of his argument that, even if the original contract was illegal, the defendants had, according to the evidence of the 4th plaintiff, repeated their undertaking at the end of November, 1946—i.e., after the control had lifted—to deliver the " bajiri " two weeks later. He submitted that the acceptance of this offer constituted a fresh contract, not tainted with illegality, which could be enforced against the defendants. When it was pointed out, however, that no such substituted contract was either pleaded or suggested in the form of an issue, Mr. Perera very properly abandoned this line of argument. Indeed, I think that the 4th plaintiff's evidence, even if true, does not go beyond suggesting that the defendants had merely asked for and obtained an extension of time within which to implement the original undertaking which they had already broken.

[1] *4 E. & B. 397 (= 119 E. R. 143).*

[2] *(1869) L. R. 4 Q. B. 180.*

[3] *(1921) 2 K. B. 731.*

For the reasons which I have given, I am satisfied that, whichever version of the " bajiri " contract be true, neither the defendants nor the plaintiffs can invoke the assistance of the Court to enforce a bargain which was *ab initio* tainted with illegality. It is therefore unnecessary to consider whether the learned Judge's findings of fact in respect of the " bajiri " contract should be disturbed. The plaintiffs' claim and the defendants' claim in reconvention on their respective second causes of action must therefore both be dismissed.

This is not a case in which the plaintiffs can properly claim even a decree for the refund of the sum of Rs. 5,000 paid by them in part-payment of the contract price under the illegal contract. The general rule *in pari delicto potior est conditio defendentis* must be applied, and justice does not require that, in the circumstances of this case, the Court should assist a party to recover what he has voluntarily paid in terms of an illegal contract which he has subsequently sought so strenuously to enforce. Both parties to the transaction were dealers in the controlled commodity, and were equally aware of the price control order P66 at the time of their bargain. The money was paid for what the law regards as a " dishonourable purpose ". The Roman-Dutch law recognises that the general rule may be relaxed only in exceptional cases, " where it is necessary to prevent injustice or to promote public policy "— *Jajbhay v. Cassim* [1]. To grant relief to either party in this case would, I fancy, achieve just the opposite result.

There remains for consideration the judgment in favour of the plaintiffs in respect of the " juwari " contract which was not affected by illegality. I find it quite impossible to say that the learned Judge's finding of fact on that issue should be disturbed. The only substantial controversy with regard to this particular transaction relates to the time fixed for delivery, and to a lesser degree, the date of the contract. The learned trial Judge had the advantage, which we lack, of having seen and heard the witnesses, and most of Mr. Weerasuriya's criticisms of the judgment touched upon issues which directly affected only the terms of the " bajiri " contract. The judgment under appeal in respect of the plaintiffs' first cause of action must therefore be affirmed.

In the result, I would substitute for the decree passed by the learned Judge a decree ordering the defendants to pay to the plaintiffs a sum of Rs. 3,000 together with (*a*) legal interest thereon from the date of the institution of the action until payment in full, and (*b*) costs in the Court below, to be taxed on the basis that the action was instituted for the recovery of Rs. 3,000 only. The defendants have substantially succeeded in this Court, and are therefore entitled to their costs of appeal.

GUNASEKARA J.—I agree.

Appeal partly allowed.

[1] (*1939*) *S. A. A. D. 537.*