EXCHANGE CONTRACT — ILLEGAL OR UNENFORCEABLE

Abdul Shukor v. *Hood Mohamed.*[1]

Abdul Shukor v. *Hood Mohamed* a very recent decision of the High Court of Singapore deserves a note, for this is the first occasion when the High Court of the Republic of Singapore was required to consider the effect of the exchange control law law of a foreign country,[2] on a contract made in Singapore. It is to be regretted, therefore, that the opportunity was not taken to consider the provisions of Article (viii) 2(b) of the Bretton Woods Agreement to which Singapore is a signatory. This agreement has been ratified by Parliament *viz.* The Bretton Woods Agreement Act, 1966. In this case the plaintiff resident in Singapore paid a sum of money in Sngapore dollars to the defendant also resident in Singapore on the understanding that the latter should pay to the plaintiff in India, the equivalent amount in Indian Rupees calculated at the "black market rate of exchange." [3] This not having been done, the plaintiff brought an action against the defendant in the High Court of Singapore, for the recovery of this amount as money had and received by the defendant. Ambrose J. dismissed the plaintiff's action on the grounds that (a) the contract in question was illegal by the law of India, in so far as it was a violation of section 4(2) of the Indian Foreign Exchange Regulations Act, 1947, which applied to the plaintiff by section 1(2) thereof, in so far as the latter was a citizen of India at the material time; (b) accordingly, the Courts of Singapore will not enforce a contract illegal "according to the *lex loci solutionis;"*[4] (c) an action for money had and received depended on an imputed promise to pay on the basis of an implied contract.

"In my opinion, the weight of judicial authority has been strongly in favour of the theory that the action for money had and received depends on an imputed promise to pay." [5] His Lordship stated further, "If, on the other hand, the action for money had and received is based on the theory that a person who has been unjustly enriched at the expense of another is required to make restitution *to* that other, then it has to be borne in mind that the Courts in England have found it necessary to impose limitations on claims to restitution, and that in England these limitations are imposed by the test of the implied contract." [6] It may be pointed

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1. [1968] 1 M.L.J. 258.
2. India, Foreign Exchange Regulations Act, 1947,
3. It is interesting to observe that the term "black market rate of exchange" received judicial recognition in the instant case [1968] 1 M.L.J. 258 at p.260.
4. [1968] 1 M.L.J. 258 at p.261.
5. Ambrose J. at p.262 citing Lord Simner's *dictum in Sinclair* v. *Brougham* (1914) A.C. 398 at p.452.
6. [1968] 1 M.L.J. 258 at p.262. In support his Lordship cites the decision of the House of Lords in *Boissevain* v. *Weil* [1950] A.C. 327 at p. 841 (*per* Lord Radcliffe).

out here that the notion that an action for money had and received is based on an implied contract is not altogether settled in English law. Lord Denning says[7] that this "fallacy" was exposed and the true position restored by Lord Simon and Lord Atkin in *United Australia Ltd.* v. *Barclays Bank* Ltd.[8] Similarly it has been said that the view that this action (for money had and received) was founded on a *quasi* contract is "obsolete and far fetched."[9] The better view would seem to be that at the present time the law implies a debt as the basis of the action for money had and received.

On facts identical with the present case, however, the Supreme Court of Ceylon reached the conclusion that an action for money had and received would lie notwithstanding that the agreement was in violation of the exchange control law of Ceylon.[10] In this case a Ceylonese national resident in Malaya and employed in the Malayan Railway remitted large sums of money to Ceylon to his agent through the "black market" plainly in violation of the Ceylon exchange control law. On his return to Ceylon, differencecs arose between the parties and an action was instituted in the Ceylon courts. The Supreme Court of Ceylon held, that notwithstanding the illegality with which this contract was tainted, an action for money had and received would lie. The Court relied as did Ambrose J., but on different reasoning on the very case of *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*[11] H. N. G. Fernando S.P.J. (now C.J.) quoted with approval the following passage from the judgment of the Court of Appeal in England:[12] "In our opinion a man's right to possess his own chattels will as a great rule be enforced even though it may appear either from the pleadings, or in the course of the trial that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced either to found his claim on the illegal contract, or to plead its illegality in order to support his claim."[13] Even if it be conceded, therefore, that the action for money had and received rests on an implied contract or on an imputed promise to pay, yet the question is whether the plaintiff is forced to rely on the illegal contract or whether his action is independent of it? The treatment of this aspect of the matter by Ambrose J. seems to be unsatisfactory. Says his lordship:[14]

> Here it is to be borne in mind that an action for money had and received lies for the recovery of money paid in pursuance of an illegal contract, provided it is brought while the contract is still executory or before the illegal purpose has been substantially performed. In the present case the illegal purpose had been substantially performed before the action for money had and received was brought. In my judgment it was brought too late for the plaintiff to have the assistance of the court."

It may be noted that the learned judge cites no authority in support of this proposition. Be that as it may, however, it is submitted that the matter could and ought to have been considered from a different standpoint.

Both India and Singapore are members of the International Monetary Fund and are signatories to the Bretton Woods Agreement, Article viii(2)(b) of which provides that *"Exchange Contracts* which involve the currency of any member and which are contrary to the Exchange Control Regulations of that member maintained or imposed consistently with this agreement shall be *unenforceable* in the territories of any member."

The meaning of the terms "Exchange Contracts" and "unenforceable" occurring in this provision has given rise to acute controversy among distinguished academic

7. 65 L.Q.R. 39.

8. [1941] A.C. 1.

9. See Lord Wright, *Legal Essays and Addresses*, p.20; see *Fibrosa Spoeka Akeyjura* v. *Fairbairn etc* [1943] A.C. 32 at p.62.

10. *Bastian* v. *Benedict* (1964:65), 66 N.L.R. 563.

11. [1945] K.B. 65.

12 (1964:63), 66 N.L.R. at p.563.

13. [1944] 2 All E.R. 579.

14. [1968] 1 M.L.J. 268 at p.261.

writers.[15] It was, therefore, welcome that these matters received the close and careful attention of the English Court of Appeal in the very recent case of *Shariff* v. *Azad,*[16] a decision which unfortunately does not seem to have been cited before Ambrose J. In this case, the facts briefly were as follows: One Latiff, a resident of Pakistan arrived in England and was in need of sterling for which permission was not granted by the authorities in Pakistan. Therefore, Latiff approached the plaintiff and requested the latter to give him £300/- in return for his cheque for 6,000 Pakistani Rupees calculated at the "black market rate of exchange." The plaintiff agreed and gave the cheque for £300/- to the defendant at Latiff's request. The later cheque for the 6,000 rupees was "blocked" by the Pakistani authorities.

Lord Denning observed "now it is plain to me that the cheque drawn by Latiff for Pakistan Rupees 6,000, did offend the currency regulations of Pakistan. It was a flagrant breach of section 5(f)(e) and (b) of the Foreign Exchange Regulations Act 1947 of Pakistan." [17]

Nevertheless, the Court of Appeal was unanimous in the view that the plaintiff ought to succeed, because though the agreement was tainted with illegality it was nevertheless enforceable by English law.

"The cheque drawn by the defendant in favour of the plaintiff does not offend against the currency regulations of Pakistan at all; these only apply where at least one of the parties is resident in Pakistan." [18] The "contract" in this case would probably have been held to be illegal had there been a tripartite agreement to which Latiff was a party.[19] Ambrose J. in the present case appears to have been influenced by the fact that the plaintiff being a citizen of India was subject to section 1(2) of the Indian Foreign Exchange Regulations Act, 1947. He said "I found on the evidence before me that in 1960 the plaintiff was a citizen of India and that therefore, section 4(2) (of the Indian Act) applied to him." [20] Is it to be inferred from this that His Lordship would have come to a different conclusion if a national of Singapore, who intending to go on a holiday to India and being aware of the exchange restrictions in India and desiring to get a higher rate of exchange in the "black market" entered into the same agreement with the defendant. Such a result would certainly be a *non-sequitur.* It is submitted with respect that the decision in the case under discussion ought to have been approached from the language of Article (viii) 2(b) of the Bretton Woods Agreement. Ambrose J. would then have been compelled to say whether the agreement in the case he was considering was an "exchange contract." If the answer was yes, then the agreement was plainly unenforceable. Whatever view his Lordship took would have added to the scarce literature on the subject of "exchange contract" and depending on the view taken by the learned judge on the matter, it would have been possible for a commentator to consider the matter at greater length. It is to be hoped that the meaning of "exchange contract" will receive further consideration in Singapore.

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15. Dicey and Morris, *Conflict of Laws,* (8th ed.), p.927. Mann, *Legal Aspects of Money,* (2nd ed.), 1958. Gold, *The Fund Agreement in the Court,* (I.M.F.) p.60.

16. [1966] 3 All E.R. 786.

17. [1966] 3 All E.R. at p.787.

18. Lord Denning M.R. at p.787.

19. See Mann [1968] *I.C.L.Q.* p.539.

20. [1968] 1 M.L.J. 258 at p.261.