

Beware if You are being a Cheap Charlie: Used Goods and Merchantable Quality

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Abstract—As specified by S.15 (2) of the Sale of Goods Ordinance No 11 of 1896 (SGO of 1896), where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality and when the sale is by sample, S. 16 (2) (c) specifies that there is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. It is quite clear that this condition of ‘merchantable quality’, would award protection to a buyer who purchases goods in the usual way from a shop. However, the question to be addressed in this context is whether a buyer who purchases used goods (second hand goods) is entitled to the same level of protection under the SGO of 1896 as received by a buyer of a brand new product. Utilizing the black letter approach, this doctrinal research aims to find out the solution for the above problem. Further, the comparative analysis method is used to examine the distinctions between the statutory provisions in the SGO of 1896 regarding ‘merchantable quality’ and the analogous provisions of the relevant statutes in the United Kingdom with the objective of making recommendations to develop the existing law in Sri Lanka.

Keywords: Used Goods, Merchantable Quality, Sale of Goods

I. INTRODUCTION

S.15 (2) of the SGO of 1896 specifies that ‘where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed’. Further, it is laid down by the S. 16 (2) (c) that ‘there is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample’.

SGO of 1896 does not provide a definition regarding ‘merchantability’ and hence judges are left with the only option of referring to precedence on the matter. The SGO of 1896 has heavily drawn from the Sale of Goods Act 1893 (SGA of 1893) of the United Kingdom which was

later replaced by the Sale of Goods Act of 1979 (SGA of 1979).

II. METHODOLOGY

This doctrinal research was conducted based on the traditional black letter approach. The relevant statutory provisions and case law are critically analysed. Qualitative data was collected through a review of primary sources; national and foreign legislation, case law and secondary sources; books with critical analysis, law journals and conference papers. The scope of this research is limited to an analysis of the applicability of the implied condition of ‘merchantable quality’ to used goods and to a brief discourse on related legal issues. Further, the comparative analysis method is used to examine difference between the statutory provisions in the SGO of 1896 regarding ‘merchantable quality’ and the analogous provisions of the relevant statutes in the United Kingdom with the objective of making recommendations to develop the existing law in Sri Lanka. Lack of availability of Sri Lankan case law and scholarly work in relation to the SGO of 1896, operated as the main restriction for furtherance of this research.

III. DISCUSSION AND ANALYSIS

A. Interpreting ‘Merchantable Quality’.

Schedule 01 to the SGA of 1979 provides a definition to the term ‘merchantable quality’ as “... fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.”. Yet, the SGO of 1896 fails to interpret this term.

However, it should be noted that in 1979 the United Kingdom Law Commission Report on Law of Contract (Law Co 95) stated that the term ‘merchantable quality’ should be reviewed. Later it was substituted by the term ‘satisfactory quality’ in 1995 by an amendment made to the Act and has been in effect for over two decades even though Sri Lanka still retains the old term ‘merchantable quality’. Hence, for the purpose of interpreting ‘merchantable quality’, Sri Lankan judiciary is compelled to make reference to the old regime of English case law,

decided prior to the amendment in 1979 which introduced the term 'satisfactory quality'.

In *G. W. P. Gunawardena v Ceylon Steel Corporation Oruwala* (2011) Gooneratne J. made reference to Lord Reid in *B.S. Brown & Sons Ltd. V. Craiks Ltd.* (1970). In the latter case, Subject matter of the sale of goods contract was industrial fabric and when sold, it was found to be unsuitable to stitch dresses although it could be used for other industrial purposes. The issue raised was whether the goods were of 'merchantable quality' to which the House of Lords responded in the affirmative. It had been held that goods were not of merchantable quality if "... the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description". In this case, since the goods had commercial value and it could be used for some other commercial purpose, they were held to meet the demand for 'merchantable quality'. On the other hand, if the goods could not be used for any purpose for which the goods of the same description were usually used, and they could not be resold for the same or a suitable price as if they were suited for every purpose, the goods would not have been held to be of 'merchantable quality'. Further, it was stated that the fact that the defective condition is easily removable, for instance an irritant can be washed away out of the clothes, is immaterial when assessing the desired level of quality.

Accordingly, goods do not qualify to be of merchantable quality if, in the condition in which they are tendered

(1) they have defects unfitting them for their ordinary use, or

(2) their condition is such that no reasonable buyer, with knowledge of their true condition, would accept them in performance of the contract.

Further, in *D. M. S. Office Products Ltd v D. Manikkam* (2012), reference has been made to *Summer, Permain & Co. v. Webb & Co.* (1922) where it had been emphasized that the goods will not be rendered 'unmerchantable' merely because the sale of those goods are illegal under a law of a foreign State.

However, as correctly pointed out by Lord Reid in *B.S. Brown & Sons Ltd. V. Craiks Ltd.* (1970), "...judicial observation can never be regarded as complete definitions; they must be read in light of the facts and issues raised in the particular case. ". He further emphasized that "it is not possible to frame, except in the vaguest terms, a definition of "merchantable quality" which can apply to every kind of case".

B. Merchantable Quality and Used Goods

It is clear from any doubts that this condition of 'merchantable quality', would award protection to a buyer who purchases goods in the usual way from a shop. In *David Jones v. Willis* (1934) cases, the plaintiff has purchased a pair of shoes from the defendant. The defendant was only the retailer distributor of the shoes and not the manufacturer. The plaintiff wore shoes for two times and on the third occasion, the heel came off causing him to fall over and get injured. Plaintiff sued the defendant to claim damages and the court decided that there was a breach of the condition of 'merchantable quality' and the shoes did not fit for the purpose.

However, the question to be addressed in this context is whether a buyer buying the second hand goods are entitled to the same level protection by the SGO of 1896 as received by a buyer of a brand new product. Further, it is necessary to inquire whether it is fair to expect a seller of used goods to offer the same level of quality as offered by a seller of brand new products.

Firstly, when considered from the buyers' side it should be emphasized that protection will be provided by the S. 15 (2) and 16 (2) if one buys a second hand product from a seller who deals in goods of that description. For instance, if the buyer buys a second hand bicycle on ebay from an official company dealing with the bicycles, the product should fit for the purpose and breaching this condition would give rise to the right to repudiate the contract. Further, the implied condition of merchantability is applicable, and the buyer exercises related rights, if the he or she buys goods from a second-hand shop, irrespective of whether the shop manufactures the products of not.

In *Crowther v Shannon Motor Co* (1975), a car was purchased for £950 and was driven 2,500 miles before the engine ceased up. The Court of Appeal held that the defect could not be reasonably anticipated for a car of this age and mileage, and there was a breach of merchantable quality.

Nevertheless, most of the time, second hand goods are sold by private individuals. It is a usual practice to sell items such as furniture, books or even machinery when those had been used for some time. In that context, such sellers will not fall within the meaning of 'a seller who deals in goods of that description' and hence buyers who deal with them will not get the protection provided by the implied condition as mentioned in the SGO of 1896. If one is purchasing second hand goods from a private seller, then the only conditions relating to the title and description will be applicable. Accordingly, the seller

should have a proper title to the goods he is selling and the goods should be free from any charge of encumbrances in favour of any third party, not declared or known to the buyer before or at the time the contract was made. Further, it is required that the goods when sold by description, should comply with the description although there is no condition applicable with regard to quality.

Therefore, if one buys a used designer dress of which the material was described as Velvet, the material cannot be Cotton. However, the SGO of 1896 will not provide any protection if the fabric has a lesser quality than what the buyer expected. Hence it is important to keep in mind the doctrine of *Caveat Emptor*, i.e., 'let the buyer beware', since where the transaction is informal, the risk will have to be borne by the buyer.

Further, it is important to emphasize that legal rights against lack of merchantable quality will not be available when the buyer has seen the goods before he purchases it and the complaint surrounds a defect which would have been revealed by a reasonable examination. As decided in *Thornett v Beers & Son* (1919), fact that the buyer did not engage in such an inspection is immaterial as long as he has had a reasonable opportunity to check the goods. Hence, even in an auction sale, if the buyer goes there in person and buys goods, complaints made afterwards regarding the quality of the goods will not be entertained.

C. Assessment of Merchantable Quality

In the United Kingdom even under the SGA of 1893, some guidance to assess merchantable quality had been provided stating that "... any description applied to them, the price (if relevant) and all the other relevant circumstances..." should be taken into account when assessing 'merchantable quality'. Nevertheless, in Sri Lanka, the SGO of 1896 leaves the parties to a sale of goods contract in dark with its failure to provide any guidelines.

Moving further from SGA of 1979, S. 14 of the SGA of 1979 in the United Kingdom which specifies implied terms about quality and fitness, in addition to replacing the term 'merchantable quality' with 'satisfactory quality', provides an objective yardstick to measure the 'satisfactory quality'. S. 14 (2A) states 'For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances'. Moreover, S. 14 (2B) states that quality of the goods include their state and condition and

specifies certain other factors viz. fitness for all the purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, safety, and durability, to be considered, inter alia, as aspects of quality in appropriate cases. It is noteworthy that these guidelines can be utilized by judges to evaluate the quality of goods regardless of whether the goods are new or second hand.

D. Distinguishing the Standard of Quality Expected from New and Used Goods.

In *Bartlett v Sidney Marcus* (1965), in which the claimant purchased a second hand jaguar for £950 from a car dealer, having been told that the clutch needed a small repair. However, when the car had done 300 miles, the claimant found out that the condition of the clutch was far graver than what he expected and it required a completely new clutch costing £84. Although, in the first instance of litigation, the judges decided that the clutch was not merchantable, in the appeal car dealers were successful. The car was held to be of merchantable quality as the defect was the kind that could be anticipated in a second hand car.

Lord Denning in *Bartlett v Sidney Marcus* (1965) stated "A second-hand car is 'reasonably fit for the purpose' if it is in roadworthy condition, fit to be driven along the road in safety, even though not as perfect as a new car. Applying those tests here, the car was far from perfect. It required a good deal of work to be done on it. But so do many second-hand cars. A buyer should realise that when he buys a second-hand car, defects may appear sooner or later; and, in the absence of an express warranty, he has no redress."

In the context of the SGO of 1896, if goods are bought from a dealer of second hand goods (not from a private seller) then it is seller's responsibility to make sure that the goods are of merchantable quality. However, this requirement cannot held to be justifiable since the Ordinance does not make any distinction between used and unused goods when applying this condition with regard to goods that are bought by description from a seller who deals in goods of that description.

It is obvious that, when goods are described as 'second hand' or 'used', a reasonable person will not expect the same level of quality as expected from a brand new unused product. In almost all circumstances, second hand goods are sold for a lesser price than the new products and, when considering the quality of the goods, the price paid should also be considered as specified by SGA of 1979. Absence of such a standard in the SGO of 1896 makes the transactions between buyers and sellers confusing.

IV. CONCLUSION AND RECOMMENDATIONS

Absence of a definition for the term 'merchantable quality' in SGO of 1896, makes the transactions between buyers and sellers complicated. Further, the Ordinance does not specify the relevant factors that should be taken into account when assessing the 'merchantable quality' and hence, particularly in cases regarding sales of used items, this lacuna can bring injustice.

It is submitted that the SGO of 1896 should provide guidelines as provided by the SGA of 1979 to measure the specified quality, irrespective of whether the goods are new or second hand. Such a reform can bring forth consistency as it will prevent the judges, to a greater extent, from deciding cases based on their individual opinion of quality and usage of different standards in similar cases.

Moreover, it is noteworthy, that the existing term of 'merchantable quality' as pointed out correctly by the United Kingdom Law Commission Report on the Sale and Supply of Goods, with regard to the SGA of 1893, reflects the 19th century trade and concepts of law. Hence, it is finally submitted that it is high time for the SGO of 1896 to replace the archaic term of 'merchantable quality' with the term 'satisfactory quality' following the example provided by the SGA of 1979.

I. References

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