The Inception of Caveat Venditor Doctrine in Sales Law of Pakistan from an Islamic Perception

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ABSTRACT

The study shows how Islamic foundation opens the means of caveat venditor doctrine into the Sale of Goods Act, 1930 of Pakistan (SOGA). The doctrine says, "let the seller beware" which is a caution for the protection of buyer's interest regarding the quality of selling commodities. On the other hand, SOGA was influenced initially by the caveat emptor (let the buyer beware) doctrine. Yet to the extent of quality of goods, the Supreme Court of Pakistan suggested the legislature to abide by the injunctions of Quran and Sunnah in Wafaq-e-Pakistan versus Awamunnas, 1988. This study is a qualitative analysis for the caveat venditor doctrine and liabilities of a seller following Islamic law as discussed in the statutory provisions, case laws and literature on the subject. The study finds the concept of disclosure of defects in goods by the seller as an obligation under Islamic injunctions and the linkage between this concept and modern law doctrine of caveat venditor.

Keywords: Sale of Goods, Islamic Law, Caveat Venditor, SOGA, Caveat Emptor

Introduction:

Let the buyer beware, the rule of caveat emptor has been overridden, to a large extent, by the modern concept of caveat venditor in sales law. These days the judges are avoiding using the doctrine of caveat emptor which says, if the buyer is satisfied with the suitability of the product he is purchasing he cannot reject such product later on as a matter of his right. The doctrine of caveat emptor was the expansion of common law sale of goods since long.

Initially it was held by the House of Lords in 1878 that the concealment of the defects in the selling goods by the seller would tent amount to fraud on the buyer. However, the judgement did not impose any duty on the seller to disclose the defects of product and still the doctrine of caveat emptor was emphasised which obligates using care and skills of buyer while purchasing goods.[1]

The Court of Appeal of UK in 1902 focussing on the 'caveat emptor doctrine' explained its scope by the words; "the buyer must take care".[2] The care of buyer extends to the purchasing specific goods where he can exercise his own judgement and skills like book, picture etc. the interpretation also applies where the buyer could not rely on the judgement and skills of the seller by virtue of applied customs or usage or by the implied condition of the contract therein.

In 1903, from the history of common law, a decision held in favour of the buyer's reliance on the skills of the seller to judge the goods while the defected items which were purchased did not fulfil their purpose hence caused the relief for the buyer.[3] The limitation of 'reasonable

examination' was developed gradually by the courts upon the principle of 'caveat emptor' which helped the buyers for exemption from their duty especially wherein ordinary circumstances, it was hard to explore the defects in the goods. It was the emergence of new phenomenon 'caveat venditor'; let the seller beware.

In England a latest case turn the story round by declaring the obligation of the seller to disclose the defects of the goods to protect the interests of the buyer. It was held that irrespective of the skills and judgement of the seller he has to disclose the defects in the goods. It was further elaborated that where the expertise of the buyer is greater than the seller in a particular field like painting the buyer would hold the rejection right even for the purchased goods.[4]

The current study is based on the qualitative legal research methodology amalgamated with the doctrinal approach. The major source is the existing literature involved through an in-depth analysis of statutory provisions, court cases, texts of the Quran and Ahadith following by the opinions of the jurists. The findings or the outcomes of the study are extracted from the critical and content analyses methods.

Doctrinal Substance in the Sale of Goods Act, 1930:

The Sale of Goods Act, 1930 (SOGA) is an offshoot of the English law which was framed as a part of the Contract Act, 1872 for India and later on it was separated in 1930. Therefore, it has its fine roots in the laws of England. In this context, to understand the doctrine of caveat emptor, a historical view is necessary to look gradual impact in UK extending up-to the SOGA. The courts of England have been following the caveat emptor principle for many years.[5] The transactions comprising small quantity of goods were perfectly being working under the cover of caveat emptor

however not in massive quantity. In Latin language the verb *cavere* is using for caution and emptor stands for the buyer. During the medieval times the *lex mercatoria* (private merchant law) was working good to settle various disputes in the special courts yet few cases related to the extended rights of buyer to the goods and seller to the payments were found unaddressed. Therefore, the matter related to the adulteration of wine, beer and food and using the false measures in quantity of goods were dealt under the auspices of criminal law and statutes to address such faults in business transactions. The caveat emptor principle was a test of the buyer's knowledge and skills about the goods he was using to purchase with due care or at the cost of the loss, because no implied warranties were available to assure security.[6]

The merchants were used to avoid written warranties however they preferred to settle the issues with reduced prices to conclude transaction on disclosure of the defective goods. It was clearly illustrated for the first time in seventeenth century when a plaintiff claimed a default of stones found in few animals' stomach which were suppose to hold some medicinal properties against the defendant in *Chandelor v Lopus* (1603). The court didn't make the defendant liable by declaring the absence of written warranties as evidence.[7] Hence, a practice was started for violation of rights by contractual breach by admission of written warranties while in other case only the action for fraud was the remedy.

The sale of the simple goods was continued with the practice of buyer's skills and knowledge however some specific and uncertain goods were necessitated the written descriptions from the sellers.[8] With the passage of time, the markets expanded and massive scale production and competitions with parallel producers of similar goods changed the ordinary sales after

the industrial revolution.[9] However, the courts do not accept the change rapidly for instance the King's Bench Court in the Parkinson v Lee (1802) denied the admissibility of any implied warranty.[10]

The courts were influenced by the jurisprudence developed for the horse trading. Therefore, they were least concerned on quality of goods as the horses have specific background for their characteristics. Though, later on the courts realised gradually that horse trading and sales of other goods have differences.[11] It was a matter of fact that caveat emptor was not dead at all yet the courts were thinking otherwise as well. The industrial revolution, the massive production of goods and the bulk sale of products were happened till the ninetieth century yet the case law was not familiarised with modern needs as the things are going on presently.[12] Anyhow, few changes could be witnessed from the first half of the nineteenth century where the courts were finally diverted their thinking process for the non-written warranties about the quality of goods, for example, *John v Bright* (1829)[13] and *Laing v Fidgeon* (1815)[14]. The things became quite elaborated in these and later judgements, for instance, the goods were supposed to not only in conformity with the reported description but also the goods must be merchantable as an implied warranty. The introduction of implied warranties in the sale of goods law was considered as a first step towards demise of the caveat emptor principle series.[15]

The section 16 of the Sale of Goods Act, 1930 (SOGA) of Pakistan the rule of caveat emptor has been embodied which says:

> "Subject to the provisions of this Act and any other law for the time being in force there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale."[16]

According to the doctrine of caveat emptor, the buyer must be vigilant enough to test, check and examine the goods, he would like to purchase, at least to the extent of an ordinary prudent person. This doctrine passes the responsibility on the shoulder of the buyer to save him from being deceived by utilising his best discretion while purchasing goods. He has to be cautious as the risk in the goods remains on his side and not the seller is at any risk.

However, the SOGA provides few kinds of sales as exceptions in this doctrine i.e. purchase by description, purchase by sample and description, fitness for purpose, patent or trade name, merchantable quality, usage of trade, sale by sample, and consent availed by fraud or misrepresentation. The contracts usually comprised of various set of promises and statements which may differ by importance and character. Therefore, the parties to the contract may regard them as essential, collateral or subsidiary to main purpose of the contract. The vital or essential terms are regarded as condition while the non-essential terms are counted under warranty.[17] The stipulations in contract of sale regarding subject goods may be termed as condition as a general rule.

The conditions if written in the contract may be termed as 'express condition' and those are not incorporated but presumed by law are called 'implied conditions'. The breach of a condition being an essential part of the contract gives option to the party to claim damages or to repudiate the contract while the breach of warranty provides a right to claim damages only and not to, reject the goods or, right repudiation of contract.[18] The concept of caveat emptor was a concrete rule initially and thereafter emerged few exceptions gradually while nowadays the rule is replaced by new doctrine *caveat venditor* (seller beware). This doctrine created a

balance between the necessity of disclosure of information by the seller on the one end and the reasonable inspection by the buyer to the other end.

Inception of Caveat Venditor Doctrine in Sales Law:

The rule of caveat emptor is reduced to 'reasonable examination' due to a gradual prominence of the 'disclosure of information' before the buyer from the seller to facilitate the purchase by laying down the regular obligations of the seller through various statutes and case laws. In few examples like typhoid germs contamination into the milk and arsenic contamination in beer, the buyers were exempted from their duty of 'reasonable examination' by the courts because these defects couldn't have been traced out by the ordinary circumstances.

The obligation of the seller to disclose defects of the selling goods generated a new debate how a seller could disclose facts in the cases where he himself is not aware on such defects. The jurists were of two opinions in a variant situation. One side didn't accept the excuse of sellers being unaware of the defects in goods. While on the other end, the expertise of buyer if in a particular field are amounted higher than the seller's then the rejection of goods after examination by the buyer wouldn't be considered as a matter of right. The dominant view is however puts responsibility of defective goods upon the shoulders of the seller and the absence of his expertise wouldn't free him from this liability. Hence, the seller should aware about the condition of goods and let the buyer be informed as well. A numerous tests of merchantability emphasised that the quality of goods must be in "full knowledge" of the buyer. Justice Dixon test says that the buyer must be acquainted with all defects if any and apparent facts about the selling goods through the information sharing by the seller and he must not be instigated to purchase such goods only on special terms, price or and

conditions of sale.[19] Lord Reid imposes another usability test on the debate where his view relied upon the goods sold under description should meet the purpose of "merchantable quality" for which those were sold with such description.[20]

The 'merchantable quality' means that the buyer acting reasonably accepts the goods with such circumstance where the goods comply with the condition, quality, type, description, pricing, characteristics, and the purpose of the contract with his full knowledge including on the defects in the goods if present any therein. Therefore, it is a duty of the seller to inform the buyer about all the defects in the selling goods or in their utility irrespective of the seller's personal skill or knowledge. Because, it is expected from the seller no matters he lacks or possesses the same. Hence, it makes sense that the caveat emptor is dying a slow death and replacing with 'caveat venditor' in the modern consumer oriented market. The successful model of commercial transactions depends upon a balance between the responsibilities of both the seller and buyer; it must not tilt towards any singular end.

The Court's Intervention and Legislative Outcome as 16-A in SOGA:

The constitution of Pakistan discourages all such laws which are in repugnancy to the injunctions of Islam.[21] Therefore, the principle of 'caveat emptor' was also tested to the extent of disclosure of defects by the seller for the buyer and found against the injunctions of Islam. The court held in *Said Azam Khan v Adam Khan*[22] that the petitioner was taking a plea of 'caveat emptor' to protect his sale of such property which can't be acceptable under the norms of justice, equity or fairness. Furthermore, the principle of 'caveat emptor' itself is not justifiable under the Injunctions of Islam as the vendor is bound to disclose the defects in goods before the

vendee. The judgement relied upon another case decided by the Supreme Court, *Government of NWFP v IA Sherwani*,[23] where this concept is extracted from the Holy Quran which describe the aspect with explicit words:

> "Woe to those who give short measure, those who, when they have to receive by measure from men, exact full measures, but when they have to give by measure or weight to men give less than due."[24]

The word '*Tatfif*' means 'short weight' or 'giving short measure' however in routine life it covers all situations where a person asks too much and gives little in return. The judgement of the Supreme Court of Pakistan titled as *Wafaq-E-Pakistan Versus Awamunnas*[25] describes that the courts in Pakistan are bound by the precedents and a lot of well known work has already been done in the context of repugnancy against Islam. It further draws inference that following the principle of local and foreign precedents to resolve controversies, our courts can get incitement from Islamic jurists of and present in accordance of the Quran and the Sunnah. It was directed by the court to the legislature to incorporate this condition in SOGA in the pretext of contravening 'caveat emptor doctrine with the Injunctions of Islam and opened an avenue of 'caveat venditor' in the law of sales. Resultantly, the Parliament has enacted a new section of SOGA accordingly which is as follows: "Seller to inform buyer to defect in goods sold";

> "Notwithstanding anything contained in section 16, and save where the parties have entered into an agreement to the contrary, the seller shall be under an obligation to inform the buyer of any defect in the goods sold at the time of the contract, except in a

> case where the defect the defect is obviously known to the buyer."[26]

Prior to this judgement it was settled in various cases that contradiction to Islamic law brings effect to nullify the existing legislation. For instance, *AH Qureshi v Union of Sovier Socialist Republics*,[27] *Abdur Rahman Mobashir v Amir Ali Shah Bokhari*,[28] *Haji Nizam Khan v Additional District Judge Lyallpur*[29] and *Hamida Begum v Murad Begum*.[30]

The Substantive Islamic Approach for the Judicial Inferences:

Though the terminology of 'caveat venditor' is somehow new in the perspective of Islamic inception yet the concepts are quite similar if the particular provision of SOGA is being debated, i.e. S. 16-A. The Holy Quran uses the word "*Al-Mutaffifin*" for those people who increase or decrease in measure and weight of the selling commodities and the warns them for bitter consequences.[31] Explaining the context of this verse, *Tafsir Ibn Kathir* (a classic commentary of the Quran) refers a *Hadith* from two sources with the single narrator (Hazrat Ibn Abbas, Allah be pleased with him) said, "When the Prophet (SWS) came to *Al-Madinah*, the people of Al-Madinah were the most terrible people in giving measurement (i.e., they used to cheat)".[32] The word *Tatfif* means here is to be sparing with weight and measurement, either by decreasing it if it is a debt or increasing it if it is due from the others. The Holy Quran at another place says: "And give full measure and full weight with justice. We burden not any person, but with that which he can bear."[33] Moreover it emphasises: "And observe the weight with equity and do not make the balance deficient."[34] One *Hadith* is reported as:

> "Hakim bin Hazim (Allah be pleased with him) reported Allah's Messenger (SWS) as saying: Both parties in a business transaction... but if they tell a lie and conceal

> anything the blessing on their transaction will be blotted out."[35]

The Holy *Quran* and *Ahadith* are setting up few principles for the traders involve in business transactions. *Surah Mutaffin* explicitly prohibits all kinds of mischief including adulteration, misrepresentation and deception in selling goods.[36] Therefore, the disclosure of defects in goods stands compulsory on the seller for the protection of buyer's interests. Another *Hadith* reported by *Ibn Hazim* (RA) narrates: "The one who sells an item in which there is a fault must point out its faults, whether he is selling it to a Muslim or a *kaafir*, otherwise he will be deceiving and sinning."[37]

The Islamic law summarises that a defect in goods which can lessen its value that must be disclosed by the seller to a potential buyer. If he doesn't, it would amount to a fraud. A Hadith narrated by *Abu Huraira* (RA) that the Holy Prophet (SWS) once saw a pile of food stuffs and inserted his hand into that pile and found wetness inside. He inquired by the seller why it was wet. He responded, "The rain caught the stuff". The Messenger of Allah (SWS) said, "Why you didn't put the wet stuff on the top of the pile, so the buyer could judge it? The deception is not in our teachings."[38] Here, the disclosures of defects in the goods are again emphasised.

Conclusion:

The Islamic philosophy highlights the value of honesty in trade and it preserves the human relations between the sellers or manufactures with buyers. The seller is made responsible by honesty to inform the buyer about all defects in the selling goods and it presses to the extent if buyer purchases the goods even then the seller is bound to share the information. Moreover, an uncertain sale or purchase regarding quality or safety of the product is also disliked by the Islamic principles. The disclosure of defects is also considered in the doctrine of '*caveat venditor*'. On the other side,

'*caveat emptor*' doctrine has given advantages to the sellers or manufacturers only. Thus, the Section 16-A was incorporated by the legislature on the intervention of judicial inference from Islamic law to provide redressal against the prevalent principle of '*caveat emptor*' while the disclosure of defects in the goods being considered one of the primary features of the modern doctrine of '*caveat venditor*' for business transactions.

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