

Sale of Goods Ordinance No 11 of 1896: A Call for Reforms

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Abstract— *Sale of Goods Ordinance No 11 of 1896 of Sri Lanka, which amends and codifies the law relating to the sale of goods in Sri Lanka is based on the English Sale of Goods Act of 1893 drafted by Sir Mackenzie Chalmers. Unlike the English Act which underwent many reforms since its enactment, Sale of Goods Ordinance of 1896 still remains static without any reforms, even after a century and two decades since its enactment. In this context, it is problematic whether the SGO of 1896, if remained unamended, will hinder economic development. The research aims to emphasize several areas in the Ordinance which should undergo reforms to reflect the needs and the changes of the current commercial world. Traditional black letter approach and the legal research methodology are employed to conduct this research. Qualitative data is gathered through a review of primary sources; national and foreign legislation, case law, and secondary sources; books with critical analysis, law journals and conference papers. It is submitted that revisiting some areas of the Sale of Goods Ordinance No 11 of 1896 as emphasized by the research is imperative to diminish unsatisfactory results.*

Keywords— Development, Sale of Goods, Reforms

I. INTRODUCTION

Development of commerce in a state is one of the most significant aspects which provide direct contribution to the stability of the nation. Driven by reasons such as the rapid growth of population, increased levels of consumption, industrial and technological development, the field of commerce continues to develop at an unimaginable pace both in international and national scope. Hence, it is important to keep the law governing the spectrum of commerce in a state, clear and up-to-date. In contemporary trade, entering into a contract for sale of goods can be recognized as the most common type of commercial transaction through which the property in goods can be transferred. Therefore, the law relating sale of goods which acquires prominence in the field of Commercial Law particularly should evolve to be on a par with the rapid growth and the changing nature of the business

transactions. The legal framework relating to the sale of goods in Sri Lanka is provided by the Sale of Goods Ordinance No 11 of 1896 (SGO of 1896) of Sri Lanka. This research paper aims to emphasize several problematic provisions in the SGO of 1896 which should undergo reforms to reflect the needs of the current commercial world.

II. RESEARCH PROBLEM

As specified by the S. 3 of the Civil Law Ordinance No. 5 of 1852, the main source of Commercial Law in Sri Lanka is English Law. SGO of 1896 of Sri Lanka is based on the English Sale of Goods Act of 1893 drafted by Sir Mackenzie Chalmers. Even though, the English Act of 1893 was a well-drafted piece of legislation, later it was repealed. The current statute which consolidates the law relating to sale of goods in the United Kingdom is the Sale of Goods Act of 1979 (SGA of 1979) and this Act has been undergoing many constant reforms since its enactment to embrace the development and the changing nature of the commercial world.

As correctly emphasized by jurists like Roscoe Pound, law cannot remain static and it should evolve. However, the SGO of 1896, contrary to the SGA of 1979, still remains static without any reforms even after a century and two decades since its enactment. In this context, it is problematic whether the SGO of 1896, if continues to remain unamended, will hinder the economic development of the country.

III. METHODOLOGY

Traditional black letter approach and the legal research methodology are employed to conduct this research. Qualitative data is gathered 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 research is restricted to an analysis of only several areas of the SGO of 1896 and not

the statute as a whole. The main limitation to expand this research was the unavailability of Sri Lankan case law and literature in the area.

IV. RESULTS AND DISCUSSION.

Following problematic areas in the SGO of 1896 should be addressed to be on a par with the commercial trends of the 21st Century.

A. Retention of the outmoded term, 'merchantable quality'

With regard to conditions and warranties, S.15 (2) of the SGO of 1896 specifies that "where the goods are bought by description from a seller who deals in goods of that description (Whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality...". Further, S. 16 (2) (c) of the Act specifies that "there is an implied condition that the goods shall be free from any defect rendering them merchantable, which would not be apparent on a reasonable examination of the sample". However, the Act does not provide a definition of the phrase 'merchantable quality' and therefore creates ambiguity.

The phrase 'merchantable quality' was included in the SGA of 1979. In 1987, the UK Law Commission Report on Sale and Supply of Goods suggested a revision of the phrase stating that the phrase, 'merchantable quality' reflects the trade practices of the 19th century. Later, it was altered and the phrase 'satisfactory quality' was substituted in 1995 through an amendment made to the act. Currently, S. 14 (2) of the SGA of 1979 specifies that "where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality". The lead taken by the English legislators have been followed by many states all around the globe. For example, in Singapore, the phrase 'merchantable quality' included in the Singapore Sale of Goods Act was substituted with the novel term, 'satisfactory quality' through an amendment made to the Act in 1996.

However, the SGO of 1896 still retains the phrase 'merchantable quality' even though this expression appears to be more appropriate for contracts between merchants and less appropriate for contracts made in the context of consumer sales. In 1910, Farwell LJ, in *Bristol Tramways v. Fiat Motors Ltd* (1910), observed that, "merchantable quality seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool, or flour, than to a complicated machine". Further, the phrase 'merchantable quality' does not enable minor defects of goods which do

not disturb the functionality of the goods to be considered adequate to render the goods unmerchantable (*Millars of Falkirk Ltd v. Turpie* 1976) and this diminishes the standard of quality of the goods.

The SGO of 1896 neither provides a definition to the phrase 'merchantable quality' nor states how to assess this particular quality. Therefore, a Sri Lankan judge when required to assess 'merchantable quality' will have consider terms of the contract in question and make reference to a myriad of English case law. In cases like *Kearley & Tonge v. Peter* (1922), the merchantable quality of the goods was assessed based on the evidence provided by a surveyor. This kind of a subjective approach can produce unfairness and result in inconsistent decisions since the Ordinance fails to provide a clear test or guidelines to be referred by the judges when assessing the 'merchantable quality'. On the other hand the SGA of 1979, under S. 14 (2A) of the Act has introduced an objective test to assess 'satisfactory quality' which specifies that '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". Further, S. 14 (2B) of the SGA of 1979 states that the quality of goods includes their state and condition and the following aspects, inter alia, which are to be considered as aspects of the quality of goods in suitable circumstances.

1. Fitness for all the purposes for which goods of the kind in question are commonly supplied.
2. Appearance and finish.
3. Freedom from minor defects.
4. Safety.
5. Durability.

These factors operate as guidelines for judges when assessing 'satisfactory quality' and they can promote consistency. Further, these factors elevate the overall standard of the required quality.

Before the substitution of the term 'satisfactory quality', English judges tended to define 'merchantable quality as' "reasonably fit for the particular purpose for which it is bought" (*Randall v. Newson* 1877) and Sri Lankan judges also interpreted the phrase deriving from this definition (*Assen Cutty V. Brooke Bond* (1934). This definition however, does not seem appropriate since the 'fitness for purpose' relates to sale of goods, ascertained or unascertained, for a specific purpose whereas the 'merchantable quality' relates to sale of particular goods not for specific use but for many possible uses. According to the guidelines provided by the S.14 (2A) and (2B) of the SGA of 1979, it is clear that 'fitness for purpose' merely operates as one of the aspects of 'satisfactory quality'.

In the light of the above circumstances it is recommended that the SGO of 1896 should follow the example provided by the SGO of 1979 by doing away with the outmoded term 'merchantable quality' and replacing it with the phrase 'satisfactory quality'. Further, it is significant for the Ordinance to provide a clear test and a set of guidelines for the purpose of reference by the judges when assessing this quality.

B. Problematic requirement under S.14 for the goods to comply with all parts of description.

S. 14 of the SGO of 1896 states that "Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description...". The section further specifies that, if the sale is by sample and description, the goods should correspond with both the sample and the description.

Since this requirement is a condition, breach of the requirement under S. 14 will give rise to a right to treat the contract as repudiated as per S. 12 (2) of the Ordinance. Usually, if a seller fails to comply with a condition, the buyer will have the right to completely reject the goods and reject to pay the price, or, if he has already paid for the goods, the right to recover the price. The effect of this is that the statutory obligation imposed by S. 14 should be strictly complied with by a seller and the failure to do so, no matter how trivial, unless microscopic, would justify the buyer in rejecting the goods (*Arcos v Ranaason* 1933). This is also known as 'the perfect tender rule' under which the buyer may reject the goods if they fail in any respect to conform to the contract (Beatty and Samuelson, 2012). Hence, this section can produce injustice. Undesirable results that can be produced by a strict interpretation of a statutory provision of this nature are clearly demonstrated by the case, *Re Moore & Co Ltd and Landauer & Co Ltd* (1921).

In *Re Moore* (1921), the buyer agreed to purchase 3000 tins of Australian canned fruit packed in cases containing 30 tins. When the goods were delivered, half of the cases only contained 24 tins even though, the value and quantity of the delivered tins (300) was correct. The statutory obligation imposed by S. 13 of the English Act is similar to the S. 14 of the SGO of 1893. Even though the disconformity in this case is a minor one, the Court of Appeal made a strict interpretation of

S. 13 and thereby held that the buyers have the right to completely reject the whole consignment of the goods.

It is submitted that this kind of a highly technical strict interpretation will not bring forward desirable results and it will hinder the growth of business transactions.

Further, it is suggested that when referring to S. 14 judges should make distinction between the breach of descriptive words which constitute a substantial ingredient of the 'identity' of the goods under the contract and therefore can be reasonably considered as a breach of a condition and the other terms, breach of which would give rise to liability for breach of warranty or of an intermediate or innominate term, as correctly emphasized by the Lord Wilberforce in *Reardon Smith Lines* case (1976).

C. The conflict between S. 34(1) and S. 35

S. 34 of the SGA of 1979 addresses buyer's right to examine the goods. S. 34 (1) provides that 'where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract'. S. 35 refers to three instances where the buyer will be deemed to have accepted the goods. Accordingly, a buyer is deemed to have accepted the goods, firstly when the buyer intimates to the seller that he has accepted the goods, secondly when the goods have been delivered to him and he does any act in connection with the goods which is inconsistent with the ownership of the seller and thirdly when he retains goods after a lapse of a reasonable time without intimating to the seller that he has rejected the goods.

The second way of accepting the goods is in conflict with S. 34 (1). It is possible and it is in fact a common practise for a buyer to do an act which disagrees with the seller's ownership before he get a reasonable opportunity to examine the goods for the purpose specified by S. 34(1). For instance, a buyer can send and resell the goods he buys to a sub-buyer and he may not have a reasonable chance to ascertain whether the goods are in compliance with the contract until the sub buyer receives the goods (*Hardy & Co v Hillerns and Fowler* 1923).

Even though, the same conflict existed between the analogous provisions in the English Act, this was later remedied by amendments. Currently the S. 35 (2) of the SGA of 1979 provides that the acceptance of the goods by

the buyer is conditional upon the buyer having had a reasonable opportunity of ascertaining whether the goods are in conformity with the contract, or in the case of a sale by sample, of comparing the bulk with the sample. Further the S. 35 (6) (b) of the Act provides that the buyer is not deemed to have accepted the goods merely because the goods are delivered to another under a sub-sale or other disposition.

The SGO of 1896 however still hasn't remedies the conflict between the two provisions and this kind of legal ambiguity can lead to unwanted problems and thereby undue delays. Therefore, it is recommended that the SGO of 1896 should remedy this unsatisfactory position by clearly specifying the governing provision out of the two.

D. Failure to envisage quasi-specific goods

S. 17 of the SGO of 1896 specifies that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. However, the Act fails to provide a definition for 'unascertained goods'. It is important to distinguish between two different categories of unascertained goods, namely the goods which are wholly unascertained and the goods which are quasi-specific (Goode and McKendrick, 2010). If the parties have not even specified a source from which the goods are to be supplied then such goods can be recognized as wholly unascertained (Bridge, 2009). However, if the goods that are to be supplied from an identified bulk, for example 100 bottles of wine from a stock of 1000 bottles of wine in seller's store room, then such goods will fall within the category of quasi-specific goods.

S. 17 of the SGO of 1896 provides that "where there is a contract for unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained". By virtue of this provision, a buyer of unascertained goods will have only contractual rights against the seller and he will not hold any rights in goods. In this context, Ordinance's failure to distinguish between unascertained and quasi-specific goods, can result in an outcome that can be highly detrimental to a buyer of quasi-specific goods. For example, in case of a sale of goods which form part of an undivided share in an identified bulk, if the goods are not delivered to the buyer due to seller's bankruptcy or any other reason, the buyer will not be able to sue the seller for conversion since the property in the goods has not yet been passed to the buyer. Further, he will be unable to claim the remedy of specific performance under the S. 51 of the Ordinance since the S. 51 applies only when the goods are specific or ascertained.

S. 16 of the English Act is similar to the S. 17 of the SGO of 1896 and the former also does not define unascertained goods. Therefore, the unsatisfactory position that can be brought forward by the statutory pitfall can be clearly understood by making reference to some English cases. In *Re Wait*, 500 tons of wheat from a cargo of 1000 tons was sold that was on board a ship named Challenger. However, the seller later went into liquidation and the court held that no property had passed to the buyer at the time of the contract since goods are unascertained. Therefore, the buyer did not have a right to claim the goods and he had to merely join the other general creditors. Similarly, in the case *Re Goldcorp Exchange Ltd* (in receivership) (1995), an investor who bought a bullion from a stock of a company was left without any ownership rights when the company went bankrupt.

The SGO of 1979 addressed this issue by introducing an amendment to the Act in 1995. Following the amendment, the S. 20A and 20B of the Act make specific reference to quasi-specific goods. By virtue of these sections, the Act, under S. 61 interprets 'specific goods' as "...goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid". However, the SGO of 1896 still has not marked a distinction between these two categories of goods and hence the issue is yet to be addressed. It is recommended that the term 'unascertained goods' and 'specific goods' should be clearly defined to demonstrate the difference between wholly unascertained goods and quasi-specific good.

V. CONCLUSION

It is known fact that the SGO of 1896 is a well drafted piece of legislation compared to most of the recently enacted statutes. Even though the language in the statute is readable and far simpler than most statutes, this simplicity is somewhat deceptive. Any practitioner, a law student or a layman when making reference to the SGO of 1896, without any doubt, would encounter problems enhanced, inter alia, due to the ambiguous and undefined terms encapsulated in the statute. Some provisions of the Act fail to embrace the development of the modern trade and hence the Act is commonly seen as a mercantile code which reflects the 19th century trade. However, it is unfair to expect the draftsmen in the 1896 to envisage the changed nature of commercial transactions of today's world. Therefore, it is imperative to revisit some areas of the SGO of 1896 as emphasized by the above discussion to diminish unsatisfactory results.

VI References

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