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Caveat Emptor: A Judicial Evolution

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ABSTRACT

This paper is going to explore the current application of Caveat Emptor in various contractual obligations in the present scenario through judgements.

I. INTRODUCTION

The term Caveat Emptor is a part of a longer statement: *Caveat emptor, quiaignorare non debuit quod jus alienum emit* which means let a purchaser beware, for he ought not to be ignorant of the nature of the property which he is buying from another party.[2]It means a buyer is bound by actual as well as constructive knowledge of any fault in the thing purchased, which is evident, or which might have been known by proper diligence. However, the increase in the density of modern commerce has placed the buyer at a disadvantage with the rule of Caveat Emptor. There has been a decline in the concept of Caveat Emptor as the trend is moving from consumer oriented to consumer sovereignty. The first traceable decision in common law, which gave significance to the trust placed by the buyer on the seller's skill and judgment and which marked as a blow to Caveat Emptor was *Priest v. Last (1819)*[3]. In the case the buyer purchased a hot water bottle from the seller, a retail chemist. The supplied bottle burst after a few days use and injured the buyer's wife. The court held that seller was liable for the breach of implied condition because buyer had made known to the Chemist the purpose for which he was in need of the bottle. However this was just the beginning of what could be termed as the thinning process of the rule of Caveat Emptor. This paper is going to explore the current application of Caveat Emptor in various contractual obligations in the present scenario.

II. NECESSITY OF AWARENESS OF TERMS OF CONTRACT

Emerging cases expressed a view that it is not necessary for the buyer to express in clear

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[2]What Does 'Caveat Emptor' Mean? - FindLaw, Findlaw (2020), https://consumer.findlaw.com/consumer-transactions/what-does-caveat-emptor-mean-.html.
[3]Sowmya Christina & Prakash Munishamappa, *CAVEAT EMPTOR TO CAVEAT VENDITOR IN THE PROCESS*, 5 International Research Journal of Management Sociology & Humanity 428-434 (2014).

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terms the use of product or service in the contract as it is evident from the nature of contract or in the course of negotiations the reason behind the purchase. With its origin being traced in the need for disclosure of information for the purposes of facilitating the reason for purchase of the buyer, little by little this rule has gained importance and the obligations of the seller have been given more importance along with various statutes and case laws limiting the rule of Caveat emptor to reasonable examination. For example milk containing typhoid germs or beer contaminated with arsenic do not come under reasonable examination. With the above obligation of the seller to make proper disclosure, the question arises what would be the position of a seller if he himself is not aware of the defect in goods. This situation is explained in *Harlingdon and Leinster v. Christopher Hull Fine Art Ltd. (1991),* the claimant purchased a painting from the defendant. The painting was described in the auction catalogue as being of a German impressionist artist Gabrielle Munter. The sellers were not experts on German paintings while the buyers specialized in German paintings. The buyers sent their experts to study the painting before approving to purchase. Subsequent to the sale the buyers discovered that the painting was a fake and was worth less than half the amount paid. They filed a case based on Sale of Goods Act, 1979, Sec.13, that the painting was not as described. But it was held that by sending their experts to inspect the painting, the sale was no longer by description. S. 13 of Sale of Goods Act applies only to goods sold by description and therefore the buyers had no protection. Later this proposition was opposed by Justice Smith saying that it is the duty of the seller to beaware of the conditions of the goods being sold and making the buyer aware about the same.[4]

III. INDIAN TEST FOR MERCHANTABLE QUALITY

The Law Commission of India has come up with its own test for merchantable quality after considering the above cases. Merchantable quality means the goods tendered in performance of the contract shall be of such type and quality and in such condition that, having regard to the circumstances, as well as the value and description under which the goods are sold, a purchaser with full information of the quality and characteristics of the goods, including knowledge of any flaw, would accept the goods in performance of the agreement. In simple words it means that the buyer having full information including the defects in the goods would be acting reasonably to buy the same. So it is the seller's duty to make the buyer aware of all the defects in the goods being sold and all information relating to the usage of the

[4]Harlingdon and Leinster v. Christopher Hull Fine Art Ltd., (1991).

goods.[5]

IV. Concept and Application of Due Diligence

Another aspect which comes into the picture while dealing with the concept of caveat emptor is due diligence and the role it plays in formation of contracts. Most commercial agreements contain representations and warranties. Representations provide the underlying past and present facts about the business and compliance record of the target company on the basis of which the other party enters into the transaction and warranty is a written guarantee, issued to the purchaser of an article by its manufacturer, promising to repair or replace it if necessary within a specified period of time. The findings in a due diligence can impact the valuation and/or structure of a contract, give rise to specific indemnities and assist in determining the conditions on the basis of which the contract would be effectuated. Another function of a due diligence is established through Section 12 of The Indian Contract Act, 1872 i.e. to ensure that there is consensus ad idem between the parties about the obligations thereby ensuring that free consent is not vitiated. A due diligence cannot be seen as a substitute for representations and warranties since the due diligence report provides the purchaser with the basic facts to enable him to make an informed choice about the transaction, while the representations and warranties act as an assurance that these facts are true.

V. Disclosure of Relevant Information

English law has traditionally taken the view that it is not the duty of the parties to a proposed contract to give information to each other except in exceptional circumstances where the law or relationship between the parties (which could be fiduciary) requires such disclosure. Each party must make up their own mind and exercise their own judgment in deciding whether to contract or not, and it is not the duty of either party to put before the other facts in his knowledge which may influence the other in deciding whether to enter into the contract or not. The English law position is reflected in the Indian Contract Act, 1872, the explanation to Section 17 of the Act, which deals with fraud, provides that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. The principle that there is no duty to disclose in every contract appears to rest on the view that each party must obtain necessary information for themselves and cannot expect it to be, supplied by the

[5]Law Commission of India, Quality Control and Inspection of Consumer Goods. http://lawcommissionofindia.nic.in/101-169/report105.pdf

other, even when the other is aware of their ignorance and could easily put the other right.

However, there are special duties of disclosure in particular classes of contracts viz. in contracts between an insurer and insured, where one party stands in a fiduciary relationship with the other.[6] In such types of transactions involving contracts uberrima fides there is a legal and equitable duty on the parties, not only to speak and state truly whatever is stated, but also divulge with candor and completeness, facts regarding which there is no obligation to disclose at all in transactions which do not fall within the recognized class. It was held that the concealment of the true nature and effect of an arbitration agreement by a person standing in a fiduciary position to another, and obtaining consent of the latter, amounted to fraud. The duty of a person to speak is fact specific and arises only when the silence can be construed as misleading. Interestingly, Illustration (a) to Section 17 of the Indian Contract Act provides that if A sells, by auction, to B, a horse which A knows to be unsound and A says nothing about the horse's unsoundness, A has not committed fraud. Illustration (c) provides that if B says to A, If you do not deny it, I shall assume that the horse is sound and A says nothing, A's silence is equivalent to speech and fraud has been perpetrated.

Further, the exception to Section 19 of the Contract Act, which deals with void ability of agreements, provides that if consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17 of the Contract Act, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence. Ordinary diligence has been defined by Pollock and Mulla as: ... such diligence as a prudent man would consider appropriate to the matter, having regard to the importance of the transaction in itself and of the representation in question as affecting its results.[7] A possibility of discovering the truth by inquiries involving trouble or expense out of proportion to the value of the whole subject-matter would not, it is conceived, be means of discovering the truth with ordinary diligence. Whether ordinary diligence has been exercised by the purchaser is also fact specific. In *LIC v. Manjula Mohanlal Joshi (1975),* even though the contract involved was a contract of insurance, the Odisha High Court held that the contract, which was entered into by the assured by concealing the fact that she had hydrocele, could not be avoided by the insurer due to the provisions of the exception to Section 19 since the insurer had its own medical officer examine the assured and submit a confidential report.[8]In *John Minas Apcar v. Louis CairdMalchus (1938),* the facts involved the respondent sought to avoid a contract of purchase of a part of a property which the appellant had falsely

[6]Non-Disclosure by a Seller — An analysis, http://www.supremecourtcases.com/.
[7]POLLOCK & MULLA - THE INDIAN CONTRACT ACT, 1872. 15TH EDITION. R. YASHOD VARDHAN.
[8]In LIC v. Manjula Mohanlal Joshi, (1975).

claimed to be valued at a greater rate than it actually was. Further, the appellant caused his friend to write letters to the solicitors of the appellant quoting high prices, which the property was actually not worth, merely to give it a fictitiously high value. Upholding the decision of the trial court granting rescission in favor of the respondent, the Court, observed that there was deliberate fraud and of such a nature as a person with ordinary diligence could not be expected to discover. [9]

VI. CONCLUSION

The rule of Caveat Emptor has slowly been taken over by Caveat Venditor, the major liability lies on the seller to ensure the quality and condition of the product. This is because of instances where the seller managed to delude and deceive the buyer into buying the product despite proper appropriation. The modern world of commerce and trade has also necessitated the change. Judicial interpretation and judgement of Caveat Emptor and the increasing exceptions to it is also indicative of the shift of burden on the seller. This change needs to balance around the need and necessity of disclosure of information by the seller on one hand and consequences of reasonable inspections done by the buyer on the other. However, it is important to monitor this drift of change as becoming particularly pro-buyer might lead to misuse of the law under the shield of law.

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[9] John Minas Apcar v. Louis CairdMalchus, (1938).