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**BREACH OF WARRANTY AND ITS REMEDIES  
UNDER ETHIOPIAN SALES LAW  
(A Case Oriented Analysis)**

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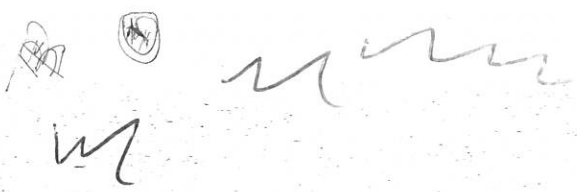
***Thank you all!***

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## Introduction

Transfer of ownership of the thing sold is one of the primary obligations of the seller in a contract of sale. The seller must have a perfect title over the thing he sells. If the seller has no title, he cannot transfer the ownership of the thing. But if he has a perfect title he transfers a perfect title via a contract of sale and if his title is defective he transfers only a defective title to the buyer. This is because according to the principle of *Nemo Dat Quod Non Habet*, no one can transfer a title which he/she himself/herself doesn't have.

By a contract of sale exactly the title which the seller has over the thing he sold is transferred to the buyer. The buyer of the thing will not get any better or worse title than which the seller conveyed upon him. Thus, if the seller sold to the buyer a thing which is already encumbered by the rights of third parties who have any kind of right over the thing sold, then it is likely that the third parties may come and claim the right which they have over the thing. There may also be the possibility of the buyer being dispossessed by the third parties through judicial proceedings. That means the buyer will be under the fear that his title over the thing he bought might be challenged or questioned by other persons who are not party to the contract. Therefore, there need a mechanism for the buyer by which his title over the thing sold to him is guaranteed against any form of dispossession by third parties who claim to have right over the thing. In other words, the seller must confirm to the buyer that the title which he conferred upon the buyer in respect of the thing which he sold is perfect and not encumbered by the right of other persons.

Moreover, the duty of the seller in a contract of sale in relation to the thing he sells goes beyond the transfer of ownership of the thing. That means the seller is expected also to deliver a defect free thing that may be put to use for the purpose envisaged by the buyer. For example, the buyer might have bought the thing for domestic use or commercial exploitation (to resell it). In such a case the buyer wants to get the thing fit for the purpose for which he required it. The

thing must possess the quality required for its normal use or merchantability use. If the thing sold to the buyer is affected by defects or non-conformity, then it cannot serve the purpose for which it was bought. Therefore, the seller is under a legal duty to ensure to the buyer that the thing he sold is not affected by defects and conforms to the contract.

Therefore, in order to protect the right of the buyer over the thing he bought from dispossession by third parties and guarantee to the buyer that the thing sold to him possesses the qualities required for its normal, particular and commercial use, the 1960 Civil Code of Ethiopia introduced into our legal system the concept of warranty as an obligation of seller which we find in Articles 2281 and following. This writer has also analyzed these provisions of the civil code which deal with the warranty obligations of the seller in a contract of sale with particular emphasis to the remedies available to the buyer upon breach of warranty by the seller. Thus, this research paper is divided into three broad chapters.

**CHAPTER ONE:** deals with the meaning, nature and classification of the concept "warranty" in general terms and particularly the concept of the notion under Ethiopian legal system.

**CHAPTER TWO:** deals with the various forms of warranties recognized in the civil code as a duty which are independently imposed by law on the seller by an act which is completely outside the agreement of the parties. These are: warranty against dispossession, defect and non-conformity.

**CHAPTER THREE:** is the central section where the writer's critical analysis of the warranty obligation of the seller is emphasized. It deals with the remedies available to the buyer where the seller is found to be in breach of the warranty obligation imposed upon him by law.

**Objective of the paper:** - is to show how the seller of goods is legally bound under Ethiopian law to warrant the buyer that the title he transferred to the buyer in respect of the thing he sold is perfect and that the thing is free from defects and conforms to the contract. It is also to signify the remedies to which the buyer may resort to in case of breach of warranty and the stringent procedures through which he may exercise his right.

**Methodology of the Research:** The research paper is based on the critical analysis of some court cases, which are exhaustively assessed to show how the seller warrants the buyer against dispossession, defect and non-conformity and how buyers resort to the remedies available for them upon breach of warranty.

Finally the research paper ends with summary conclusions, which briefly summarize statements of the problem and recommendations forwarded by the writer to solve some of the problems.

## Chapter One

### 1. Warranties In General

#### 1.1 Nature of Warranties

*Peculiar*

\*The purpose of sale is to pass title to personal property for a price<sup>\*1</sup>. If the seller does not have the title, then there is no sale or a contract to sell because all that is transferred is possession. Exceptionally, however, a thing belonging to a third party may be sold. If the title is transferred but not for a price, the transaction becomes a gift, not sale.

All of the elements essential to a valid and enforceable general contracts are likewise essential to a contract to sell. Also, the rules of interpretation and performance of general contracts apply to contract of sale. What makes the contract of sale different from the subjects of general contracts is the existence of certain additional aspects peculiar to sales and contract to sell which are not covered in the study of general contracts. One of the major additional matters peculiar to the contract of sale is the concept of warranties<sup>\*2</sup>.

\*When negotiating a contract parties tend to make all kinds of statements. Such statements when embodied into the agreement of sale itself constitute terms and stipulations of the contract<sup>\*3</sup>. Terms of the contract of sale are normally classified into conditions and warranties<sup>\*4</sup>. A condition goes to the root of the contract. It is a term which goes so directly to the substance of the contract or, in other words, is so essential to the very nature of the contract that its non-performance may fairly be regarded by the other party as a substantial failure to perform the contract at all<sup>\*5</sup>. A warranty is a term, which though it must be performed is not so vital that a failure to perform it goes to the substance of the contract<sup>\*6</sup>.

Warranties are often thought of and described as some sort of collateral undertakings relating to a contract of sale<sup>\*7</sup>. That means for the existence of every warranty there must be a valid sale contract the purpose of which is the transfer of title to personal property. Warranty is an incident to a contract of sale and assumes or necessarily implies the existence of the same. It cannot exist without a contract of sale. Even though it is not an essential element of a sale contract, it is dependent on a contract of sale and hence there can be no warranty without a valid sale contract.

Seller's warranty obligation may either be promissory in nature or independently imposed by law<sup>\*8</sup>. From the American and common-law legal system perspective, warranty seems to have a promissory nature than it seems a creation of the law. Promissory warranty is strictly contractual in nature depending on the actual terms of the seller's express or implied promises. It is a collateral contract incident to a contract to sell or sale of goods. The seller, in connection with the contract of sale, promises to be answerable for "certain" indicated matters relating to the goods sold. The word "certain" implies that the seller is not responsible for each and every bit of matters relating to the thing sold. According to Article 2273 (2) of the Ethiopian Civil Code, he shall warrant the buyer only against certain matters in the thing that are warrantable.

However, the term warranty is broader than the ordinary word "promise". The warranty obligation is not necessarily contractual in nature. It may also be in whole or in part a duty independently imposed by law for reasons of supposed social advantages<sup>\*9</sup>. That is the case also under our legal system where warranty as an obligation is a creation of the law than an agreement to be determined by the whim of the parties to the contract. This applies where the parties stand towards other either in the relation of sellers and buyers of goods or in analogous relations.

In both kinds of warranties the seller warrants that the title conveyed shall be good and its transfer rightful; and that the goods shall be delivered free from any security interests or other lien or encumbrances of which the buyer at the time of contracting has no knowledge. The seller is under an obligation to make the buyer owner. To this effect the corresponding legal provision under Article 2281 of the Ethiopian Civil Code provides that the seller shall take the necessary steps for transferring to the buyer unassailable rights (of ownership) over the thing sold. He shall also guarantee to the buyer as well as quiet possession for both sales of movables and immovables<sup>\*10</sup>. He shall warrant the buyer against any total or partial dispossession, which he might suffer in consequence of a third party exercising a right he enjoyed at the time of the contract<sup>\*11</sup>. As a result, if the buyer did not get the title for which he had contracted he has the right not only to claim damages, but also to refuse to be bound by the terms of the contract on the ground that the seller had not given him complete “*dominium*” or on the ground that the seller had no right to convey the ‘*res*’<sup>\*12</sup>.

As a warranty is an agreement forming part of the contract, it follows that antecedent representations made by the seller as an inducement to the buyer, to purchase the goods, but not forming part of the contract when concluded are not warranties. Indeed, it does not necessarily, mean that the representation, in order to constitute a warranty<sup>\*13</sup>, should be simultaneous with the conclusion of the contract of sale, but only that it should be made during the course of the bargain which leads to the contract of sale and should enter into the contract as part of it<sup>\*14</sup>. Moreover, a warranty given after a sale has been made is void, unless some new considerations be given for it. The consideration already given is exhausted by the transfer of property right in the goods without a warranty and there is nothing to support the subsequent warranty unless a new consideration be given for it<sup>\*15</sup>.

No special form of words is necessary to create a warranty. Just an affirmation made by the seller at the time of the contract of sale is a warranty provided it appears on evidence that both parties have the intention to consider it as a warranty<sup>\*16</sup>. There is an intention to warrant on the part of the seller when he assumes to assert a fact of which the buyer has no knowledge<sup>\*17</sup>. This intention is a question of fact for courts to be inferred from the nature of the sale and the circumstances of the particular case<sup>\*18</sup>.

There is no doubt that one may warrant a future event. However, a general warranty does not extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects which are known to the buyer<sup>\*19</sup>. On this point, Article 2296 (1) of our civil code provides that the seller shall not be liable on warranty against defects, which are so obvious that the buyer could overlook them except as a result of his gross negligence. Also, per Article 2295 (1) of the same, the seller shall not be liable on his warranty against defects where he can prove that the buyer knew of the defects at the time of the contract.

As we are going to see in section 1.3 of this chapter, warranties are classified as express or implied. Whether they be express or implied, should be construed as consistent with each other and as cumulative. But if such construction is unreasonable, the intention of the parties shall determine which warranty shall be dominant<sup>\*20</sup>. And once the buyer has proved that he is within the terms of the warranty, there is no escape whatsoever for the seller<sup>\*21</sup>. That means the seller is obliged to perform his obligation. This is because in both express and implied warranties the purpose is primarily for the benefit and protection of the buyer<sup>\*22</sup>. And in either case, the relations between the parties arise from the contract of sale itself and are not based on what is known as tort or any other theory unrelated to the contract<sup>\*23</sup>.

## 1.2 Definition of Warranty

The term '*warranty*' has been described as one of the most ill used expressions in the legal dictionary<sup>\*24</sup>. It has been used in many varying senses to cover many divergent meanings<sup>\*25</sup>. Even in connection with the law of sales of goods sharply divergent meanings have been attached to it<sup>\*26</sup>. Therefore, in this section we will try to see the meaning of warranty in different legal systems and then finally discuss the meaning of the notion under the Ethiopian legal context.

The Sale of Goods Act of 1979 in its section 61(1) defined the term warranty, in its most technical sense, as:

*Surprisingly*  
"an agreement with reference to goods, which are the subject of contract of sale but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated".

According to this definition, warranty is not a term, which is somehow outside the contract of sale; it is in fact a term of the contract. But it is considered as a less serious term of the contract either intrinsically or by agreement, which is only collateral to the main purpose of the contract. It is a term of the contract the breach of which by one party does not entitle the other party to treat his obligation as discharged. In case of breach, the innocent party may claim damages but must still perform his part of the bargain. The injured party can generally set up the damages to which he is entitled by reason of breach of warranty in diminution or extinction of the price.

Surprisingly enough, the conception of warranty according to the above definition will not give the buyer the right to reject the goods and cancel the contract

whenever the seller breaches his obligation of warranty. Rather the only remedy the buyer has in accordance with this definition is to claim damages for the breach.

Also, Warranty has been defined as: -

" a statement or representation made by the seller of goods, contemporaneously with and as part of, the contract of sale.....by which he promises or undertakes to insure or guarantee that certain facts are as he then represents them <sup>\*27</sup>."

This definition is taken from the common law legal system. As can be seen from the definition, warranty is defined in a manner that is based on the sole discretion of the seller. It seems a solemn promise of the seller rather than it to be an emanation from the law. Thus it doesn't seem to have a force of law that arises from the very existence of the contract of sale. As evidenced from the readings of the definition, it is a declaration or a promise made by the seller that certain facts are as he then utters. All these imply that warranty is not an implied obligation that exists by virtue of a contract of sale but it exists only where there exists a promise to this effect. More or less, the definition of warranty in this latter case is similar to the one we have seen previously. In both cases, the inclusion of warranty in a contract of sale is based on the agreement of the parties based on the consent of the seller. Hence, both definitions signify a contractual nature of warranties than it seems a creation of the law.

### **1.2.1 The concept of Warranty in Ethiopian Legal System**

On the whole, the above two definitions of warranty contradict with our civil code conception of warranty. The reason for this is that according to the definitions, warranty is created solely by the consent of the seller and he is under no legal duty

to warrant the buyer against certain defined matters relating to the thing he sells. The seller promises by his free will to guarantee to the buyer that the thing he sells is as he described them in the contract. Therefore, warranty in accordance with the two definitions have a contractual character which is based on the agreement of the parties rather than a creation of the law.

On top of this, pursuant to the previous definitions, it is not possible for the buyer to reject the thing sold to him and cancel the contract for breach of warranty. The buyer can only claim damages for the breach. Whatever may be the kind of warranty, however, cancellation is permitted in our legal system depending on certain circumstances whenever there is a breach of the same. Let us have a look to Articles 2282 and 2287 of our civil code in order to grasp the concept of the notion under Ethiopian legal context. Article 2282 proceeds as follows:

"The seller Shall warrant the buyer against any total or partial dispossession which he might suffer in consequence of a third party exercising a right he enjoyed at the time of the contract."

Similarly Article 2287 flows as:

"The seller Shall guarantee to the buyer that the thing sold conforms to the contract and is not affected by defects" (Emphasis is added in the two Articles)

In the above two quoted articles of our civil code, we observe a mandatory modal verb "Shall" showing that the warranty to be given by the seller against dispossession, defect and non-conformity is an obligation imposed by law on the seller rather than it be a fruit of the agreement of the parties. In accordance with our law, therefore, warranty as a right to the buyer and as an obligation to the

seller has a force of law. Because under this code the seller is legally bound to warrant the buyer from being dispossessed; and guarantee to the buyer that the thing he sells conforms to the contract and is not affected by defects.

*affirm*

In principle, this obligation of the seller is always there by virtue of a contract of sale. However, the parties are allowed by law to exclude or restrict the warranty due from the seller. Even in such an exception the provisions which exclude or restrict the warranty obligation of the seller shall be construed <sup>restrictively</sup> strictly in a manner that does not prejudice the right of the buyer to claim the return of the price in case he is dispossessed or the thing is affected by defects or non-conformity. There is also a situation where the provision which the parties included in their contract to exclude or restrict the warranty due from the seller shall be of no effect. This is where the seller has fraudulently concealed from the buyer the defects in the thing.

Thus, in Ethiopian legal context warranty as an obligation is a creation of the law than an agreement to be determined by the whim of the parties to the contract. The concept is not defined in the fashion it is understood in the common legal systems. It is a right the buyer has over the seller in a contract of sale. And failure to perform this obligation by the seller results in not only the right to claim damages by the buyer but also the right to cancel the contract as a whole.

## 1.3 Classification of Warranties

### 1.3.1 Express Warranties

Warranty may be express or implied. Express warranty may be created in one of the following three ways. Firstly, it is created when the seller makes any affirmation of fact to the buyer with respect to the thing to be sold that it shall conform to the contract and is not affected by defects<sup>\*28</sup>. The intention of the seller in making this affirmation should be to make the buyer rely on such affirmation in

purchasing the thing. Secondly, any description concerning the thing sold made by the seller which constitutes part of the principal obligation of the contract will also create an express warranty that the thing shall conform to the description<sup>\*29</sup>. Thirdly, the seller may also produce samples or models to guarantee to the buyer that the whole of the goods sold conform to the sample or model<sup>\*30</sup>.

In all of the three ways of creating an express warranty, it is not mandatory that the seller use formal words such as "*warrant*" or "*guarantee*" in order to constitute an express warranty. Just a simple representation or affirmation with respect to the thing sold may be given by the seller in such terms and under such circumstances as to create an express warranty. However, this does not mean that a mere affirmation of the value of the goods or a statement purporting to be the seller's opinion constitutes an express warranty. What is more, the fact that a stipulation in a contract of sale is specifically called a "*warranty*" does not of itself make the stipulation so referred a warranty.

Generally speaking, in order to constitute an express warranty there must be either an express undertaking to warrant or, if representations are to be made to create the warranty, they must be made in such a clear manner as to enable the buyer to understand that the seller intended to be bound by his warranty as part of the contract of sale and the buyer must have purchased that goods in reliance on the warranty. The natural tendency of the affirmation or promise made by the seller must be to induce the buyer to purchase the goods.

Under the Uniform Sales Act also it is provided that "any affirmation or any promise by the seller relating to the goods is an express warranty if the natural tendency of the affirmation or promise is to induce the buyer to purchase the goods relying thereon."

### 1.3.2 Implied Warranties

Implied warranties are created by operation of the law and they do not arise from any agreement of the parties, but they will not be created contrary to the manifest intention of the parties<sup>\*31</sup>. They are not one of the contractual elements of an agreement of sale. They are created independently of the actual contract. They are not one of the essentials to be stated in the contract nor does their application or effective existence depend on the affirmative intention of the parties. They are imposed by law because of the acts of the parties. They are obligations, which the law raises upon principles which are foreign to the actual contract. But once an implied warranty comes into existence by reason of a contract of sale, the law conceives of such a warranty as being a term of the contract based on the presumed intention of the parties<sup>\*32</sup>.

Implied warranties are to be construed in connection with the express stipulations of the sale agreement. <sup>\*33</sup> They are implied according to the presumed intention of the parties. <sup>\*34</sup> They will not be implied in conflict with the express terms of the sale agreement, or contrary to the manifest purposes of the parties. Moreover, the fact that the contract of sale is made in writing does not necessarily exclude warranties implied by law.

In the Uniform Sales Act also it is provided that implied warranties are imposed by operation of the law and, unless specifically negated, become part of the contract of sale by virtue of the law. <sup>\*35</sup> In many countries, laws have been providing that certain warranties are implied in the sales of certain commodities, or in cases of sales under certain circumstances. In our law too, warranties are created by operation of the law and they are implied into the contract of sale by the mere fact of the existence of the sale contract. The seller is legally bound to warrant the buyer against any total or partial dispossessions of the thing sold

him. He is also to guarantee to the buyer that the thing sold conforms to the contract and is not affected by defects. This is a law-emanating warranty, which is imposed on the seller on every contract of sale. It is not subject to the contractual agreement of the parties.

Ordinarily, however, there is no implied warranty when a contract of sale contains a provision that the buyer takes the thing in the condition in which it is or in other words "as is".<sup>36</sup> The parties may by their mutual agreement set aside or put a limitation to the warranty obligation imposed on the seller by law. For instance, under our law, pursuant to Article 2294 of the Civil Code, the warranty obligation of the seller may be limited by agreement of the parties to certain qualities or the good working condition of the thing sold only during a specified period of time.

No Warranty is implied where there is an express warranty relating to the same matter. On the other hand, if the express warranty does not relate to the matter guaranteed by the implied warranty, but relates to another matter as to which the contract is silent, both kinds of warranties (express and implied) may exist under the same contract.

Warranty as regards title to the goods may be implied in a contract of sale. The Ethiopian civil law provides for three distinct warranties as regards implied warranties of title.

- 1) Implied warranty of the right to sell<sup>\*37</sup> *title*
- 2) Implied warranty of quiet possession by the buyer<sup>\*38</sup>
- 3) Implied warranty against undeclared or unknown encumbrances by third parties.<sup>\* 39</sup>

Concerning implied warranty of the right to sell, Article 2281 of our Civil Code provides that the seller shall take the necessary steps for transferring to the buyer unassailable rights over the thing. Equivalently, section 12(1) of the Sale of Goods Act also provides that there is an implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement for the future sale of the goods he will have such right at the time when the property is to pass <sup>40</sup>. It is clear that the main purpose and effect of these provisions is to require the seller to transfer the property right or title to the goods to the buyer.

⊕ Plainly enough, if the seller is himself the owner, and no body else has any claims on the goods, the seller's property right in the goods will pass to the buyer under the contract. However, if the seller has no right to transfer the property to the buyer, he will be in breach of the provisions.

✱ The above provision will be broken if, for example, the seller had stolen the goods. They can also be broken if the seller is completely innocent but where he himself had bought the thing in good faith from some one who could pass no title to him. In such situations the buyer has the right to return the goods to the seller and to recover the full price which he had paid for them. This is so even where the buyer has had the use of the goods for some time so that they have depreciated in value. <sup>\*41</sup>

But Article 2281 of the Civil Code does not require that the seller should himself be owner of the goods, or even that he should acquire a title to the goods before transferring them to the buyer. This is because a contract of sale can perfectly well be performed by a seller who never has title over the thing he sells at any time by causing a third party to transfer it directly to the buyer. <sup>\*42</sup>

There are exceptional situations in which a seller may not have the power to confer unassailable title on the buyer. For instance, a debtor who sells goods, which are under an order of attachment, but not yet physically removed from possession of the debtor, has a right to sell them (at least until they are sold by public auction) but he sells them subject to the executor's right. <sup>\*43</sup> Thus he is unable to confer unassailable title on the buyer free from the creditor's claims.

\*An implied warranty of title under our civil code is not confined only to the seller's right to sell. Pursuant to Article 2282 of the code, he shall also guarantee to the buyer that the buyer shall have and enjoy quiet possession of the goods sold to him as against any lawful claims existing at the time of the sale. This warranty is not broken unless and until a disturbance occurs on the possession of the buyer <sup>\*44</sup>

The other implied warranty of title is that the goods shall be free at the time of the sale from any charge of encumbrances in favour of any third person not declared or known to the buyer before or at the time of the contract. <sup>\*45</sup> This warranty is not that the goods are free from undisclosed encumbrances, but that the goods shall be free from them <sup>\*46</sup>. • That means the seller warrants the buyer that the buyer's possession shall not be disturbed by reason of the existence of such encumbrance.

→ A breach of such warranty will occur when the buyer discharges the amount of the encumbrances. <sup>\*47</sup> When the seller warrants the buyer against dispossession, if there is a better title in another person, and the buyer is dispossessed, the warranty is broken. <sup>\*48</sup>

• It seems that this warranty would protect the buyer against a wrongful disturbance of his possession by the seller himself. <sup>\*49</sup> Where the disturbance of the buyer's possession is by a third party exercising a right he enjoyed at the time of the contract, the buyer may be entitled to treat this disturbance as the responsibility of the seller; provided that, it is as a result of any act or defaults of the seller that the

third party with whom the seller is in contractual relations asserts an encumbrance or lien on the goods. <sup>\*50</sup>

There is also an implied warranty as to the quality of the thing sold or its fitness for any particular purpose under a contract of sale. Articles 2287 cumulative 2289 of the Ethiopian Civil Code provide that the seller shall guarantee to the buyer that the thing sold possesses the quality required for its normal use or commercial exploitation; or that it possesses the quality required for its particular use or specifications provided in the contract where the buyer purchased the goods for commercial exploitation, he has a right to expect a saleable goods which fit to the description in the contract. <sup>\*51</sup> In this case there is always an implied warranty that the goods supplied under the contract shall be of merchantable quality. <sup>\*52</sup> Goods of any kind are of merchantable quality when they are as fit for the purpose(s) for which goods of that kind are commonly bought.

• The buyer may also make known to the seller the particular purpose for which he wants the goods. In such a case, there is an implied warranty that the goods supplied under the contract shall reasonably be fit for such purpose. <sup>\*53</sup> A particular purpose is, in fact, the purpose expressly or impliedly communicated to the seller for which the buyer buys the goods. <sup>\*54</sup> Where the purpose is the one for which any one would require the goods, there is no need to specify in terms the particular purpose for which the buyer requires the goods. <sup>\*55</sup> But where the thing sold is capable of being applied to a variety of purposes, the buyer must particularize the specific purpose for which he requires the goods.

Finally, when the buyer has required no warranty as regards the quality or fitness of the thing sold, he takes the risk of quality upon himself, and has no remedy if he chose to rely on the bare representation of the seller.

## CHAPTER TWO

### 2 Various Forms of Warranties Recognized By The Civil Code

#### 2.1 Dispossession In General

Dispossession is a wider denotation that can possibly be made lawfully through the order of court or by force through unlawful means. That means the acts of dispossession can be performed not only by persons who claim to have a right over the thing but also by persons who do not have any right over the thing. Thus, it will be more appropriate here to define what dispossession is all about because it is not defined in our civil code except mere usage of the term. Hence,

“dispossession is the action of dispossessing; or fact of being dispossessed; deprivation or ejection from possession...<sup>1</sup> or to dispossess means to put out of possession... or dispossess a man of his goods and chattels; to strip of possession... to put out of occupancy; eject; oust; to drive out of; to free from possession...”<sup>2</sup>

It may also be defined otherwise:

“ Dispossession is the act of ousting or removing one from possession of property previously held by him which may be tortious and unlawful incase of forcible amotion or by the help of judicial poeceeding i.e by the order of court.”<sup>3</sup>

As evidenced by the latter definition, dispossession can be lawful or unlawful depending on the status of the dispossessor before the law. Here in this chapter, the author is concerned mainly with the

Handwritten notes: A box containing the words 'legal' and 'unlawful' written twice, with a circled 'X' next to the second 'unlawful'.

former form of dispossession i.e the lawful dispossession. Because, the seller is only responsible for the form of dispossession that comes as a result of judicial proceeding.<sup>4</sup>

*judicial proceeding*

• The Ethiopian Civil Code recognizes two forms of warranty as a mechanism to protect the buyer from being dispossessed. These are:

- 1) the warranty given by the seller to the buyer by virtue of the law which is found in clear terms under Article 2282 of the Civil Code; and
- 2) the warranty provided by law to protect the good faith acquirer of a corporeal chattel from being dispossessed by third parties which is found under Article 1161 of our civil code.

Both of them are similar in that their very purpose is to protect persons who claim to have a right over a thing from being dispossessed by third parties. As it would be beyond the scope of this paper to discuss the two kinds of warranties, the prime interest of this writer is limited to discuss only the first form of warranty due from the seller by virtue of the contract of sale and the law.

## **2.2 Warranty Against Dispossession By Virtue of The Law**

One of the most important and basic obligations of seller is to transfer valid ownership to the buyer. It is the primary object of a contract of sale that the seller undertakes to deliver a thing and transfer its ownership to the buyer. When we say transfer of ownership the transferer must be the owner of the thing. That means for the seller to transfer ownership of the thing, he must

quid 9

own the thing because according to the common law maxim "Nemo Dat Quod Non Habet", no one can transfer a right he /she himself/herself doesn't own. One can only assign a right he/himself has. If one doesn't have the title, then no right of ownership to be transferred by contract. If the seller has a perfect title then he transfers a perfect title and if his title is defective he transfers defective title. There is no transfer of valid ownership unless the seller has ownership title.

~~work~~

Unlike acquisition, in assignment or transfer of ownership the transferee will not get any better title or worse title than what the assignor had before transferring his title. In case of acquisition, however, things are totally different. Here, there is a chance for the transferee to get a better title than the transferer because of good faith. For example, if the buyer purchased the thing from a thief in good faith he absolutely becomes an owner of the thing through the operation of the law. The law protects good faith acquirers to become owner of the thing eventhough the transferer who transferred the thing to them had a defective title. It is the law and not the seller which makes goodfaith acquirers an owner of the thing. The seller (in our example the thief) cannot transfer ownership title to the good faith purchaser because he himself doesn't have the ownership title. The law plays the role of the seller in bestowing title on the good faith buyer. Therefore, the "Nemo Dat Quod Non Habet" principle doesn't apply in cases of acquisition.

Nemo Dat Quod Non Habet  
...  
...

Nevertheless in transfer of ownership by a contract of sale, the seller must have a good title<sup>6</sup>. He should have a perfect title to transfer the ownership right in the property to the purchaser<sup>7</sup>. The main question is what a good title is "A good title exists when the seller shows that he alone or with the concurrence of some person or persons whose concurrence he can require, can convey to the purchaser the whole legal estate and equitable interest on the thing sold."<sup>8</sup> To this effect, the corresponding provision in our civil code states that "the seller shall take the necessary steps for transferring to the buyer unassailable right over the thing."<sup>9</sup> The seller is bound to transfer a perfect and absolute right a right that cannot be defeated, questioned or disputed<sup>10</sup> over the thing sold to the buyer. The reason for this is that the buyer is supposed to have a free right over the thing he bought once the ownership right is transferred to him via a contract of sale.

Now, it needs some kind of elaboration to know what unassailable right is in a contract of sale. Here the existence of unassailable right doesn't relate to the right to sell the thing. In the absence of such right we can never speak about sale and infact the "seller" has the right to "sell" the thing. This is because, in any contract of sale, the seller is presumed to have the ownership of the thing he sold. Whenever we speak of sale we should bear in mind the presumption that the seller is the owner of the thing he sells. The phrase "unassailable right" rather, in the opinion of this author, relates to whether or not the seller has full right over the thing he sold at the first time he enters in to the contract of sale. The first question here is then whether or not the thing sold is charged or

encumbered by other prior rights. Thus this phrase does not relate to the validity of the right to sell but to the existence of an unencumbered ownership right over the thing sold. One will not be entitled to such right unless a valid ownership right has been transferred to him.

Under Ethiopian law, the transfer of ownership for the majority of corporeal chattels made by virtue of a contract shall be effective at the time when the thing is delivered.<sup>11</sup> The same is true in a contract of sale i.e transfer of ownership by virtue of a contract of sale is effected at the time when the seller delivers the thing sold to the buyer. This is because the provisions dealing with the sale of goods in our civil code apply to the sale of corporeal chattels.<sup>12</sup> Therefore, delivery is a very decisive duty of the seller in a contract of sale. He can never transfer an unassailable right over the thing he sold to the buyer except by means of delivery. Before delivery one can not be a man of title under our law. But the exception to this is nothing affects the sale of special kinds of corporeal chattels. That means the transfer of ownership of such chattels doesn't necessarily follow from their delivery. Transfer of ownership may be effected by the delivery of the documents representing the things.<sup>13</sup> The buyer can demand the forced performance of the contract, or cancellation of the contract and payment of damage so long as delivery is not yet effected.<sup>14</sup> Thus it could be said that delivery is one of the primary obligation of the seller and other obligations of the seller are secondary obligations.

However, the duty of the seller to transfer ownership of the thing sold perfectly goes beyond delivery of the thing sold. The buyer may be dispossessed by a third party when a third party comes in to picture and claims ownership of the thing sold to the buyer. If the peaceful enjoyment of the buyer is going to be disturbed by a third party who have a certain type of encumbrance over the thing sold, the duty of the seller to transfer ownership of the thing continues till the buyer gets a perfect title over the thing or till the third party succeeds in totally dispossessing the buyer in which case the seller refunds the buyer. The seller is presumed to know whether third parties have encumbrances over the thing sold and he is also expected to know whether he has a perfect title or a defective title over the thing he sells. If there are third parties who have encumbrance over the thing, the seller can only assign it with the encumbrance.

In one case,<sup>15</sup> the appellants (buyers) appealed to the supreme court to have the judgment of the high court reversed which was rendered in favour of the respondents. In that case the appellants bought a car from one of the respondents (the seller) who was joined as a defendant together with the rest of the three respondents. The car which the appellants bought has already been encumbered with the right of the three respondents which existed prior to the sale agreement between the appellants (buyers) and the respondent seller which was concluded on Megabit (March) 19, 1978 E.C.

One of the respondents in his response to the appeal, contended that the seller owed a debt amounting to \$15,000 Eth. Birr to him and that he has already attached the car as pledge to secure the payment of the debt the seller owed to him. He also stated that he has already obtained a judgment on October 4, 1978 to the effect that the car be sold by public auction so that his money be paid to him out of the proceeds as the debtor (the seller ) has failed to discharge his debt.

Similarly, the second respondent contended that the seller owes a debt to him the amount of which equals 14,500 Eth. Birr. He had sued the respondent seller for the payment of his money and obtained a decree of court which authorized him to sell the same car by public auction to get his money back.

Likewise the third respondent sued the same respondent seller for a debt the seller owes him the amount of which is \$ 5,710 Eth. Birr and obtained a judgment on Megabit ( March) 14,1979 E.C to the effect that the aforementioned car be sold by public auction so that his money be paid to him out of the proceeds. So now, the three respondents are judgment creditors where as the respondent seller is judgment debtor and the problem arose during execution.

Upon an action taken by the three judgment-creditors to sell the said car in execution of their decrees, the present appellants (the buyers) came up with an objection saying that they have already bought the car and now it is under their possession. That filed their objection to the High Court and the court decided that the said car

be sold by public auction stating that the transfer of ownership of the car sold to the appellants was not a valid transfer of ownership because the car has already been encumbered by the rights of the judgment-creditors before the conclusion of the sale agreement between the appellants and also the respondent seller and the contract of sale was not validly concluded. It is against the judgment of the High Court that the present appellants (buyers) appealed to the supreme court.

The supreme court on its part decided on the issue whether or not the said car should be sold by public auction due to the debt of the respondent seller. In other words whether or not the appellants should be dispossessed due to the encumbrances over the car sold to them. The court, affirming the judgment of the High Court, held that the appellants should be dispossessed and the car should be sold by public auction to satisfy the claims of the third parties (judgment-creditors) because the contract of sale was not validly concluded and the encumbrance over the car existed before the appellants bought the car from the respondent seller. Therefore, it is difficult to say the appellants bought the car free from encumbrances.

This is a clear case of dispossession by third parties where the seller should be held liable on his warranty against dispossession. The warranty emanates from the law not from the agreement of the parties.

The seller is legally bound to warrant the buyers (appellants) against any dispossession as he transferred to them a thing already encumbered by the claims of the judgment creditor. Therefore, the appellant buyer may cancel or demand the cancellation of the contract because the respondent seller had defective title and he has not procured the car for the buyers free from all the rights belonging to third parties. The buyers may require the seller to refund the price they paid. The reason is that the seller is under legal obligation to warrant the buyer against any total or partial dispossession.

In this regard the Ethiopian civil code provides: " the seller shall warrant the buyer against any total or partial dispossession which he might suffer in consequence of a third party exercising a right he enjoyed at the ~~he~~ time of the contract" <sup>16</sup> This warranty as a right to the buyer and as an obligation to the seller is a creation of the law than an agreement to be determined by the whim of the parties to the contract. That means the seller is legally bound to warrant the buyer from being dispossessed. The Uniform Sale Act of American law also provides that "...the goods shall be free at the time of sale from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract of sale is made"<sup>17</sup>

The seller in order to fulfil his obligation under Art. 22811 of the Civil Code must transfer to the buyer an ownership right over the thing sold that may neither be devided nor restricted as a result of a third party exercising a right he enjoyed at the time of the

contract. <sup>18</sup> On the other hand, for the buyer to avail himself of his warranty right under Article 2282, he must be in actual possession of the thing sold. In other words, unless the buyer has not possessed the thing, he could not be said to have been disposed of. By a mere promise made by the seller to deliver and transfer the ownership right over the thing he sells, the buyer cannot become a true owner of the thing. Thus, a person who has concluded a sale contract in accordance with Article 2266 of the Civil Code cannot become an immediate owner of the thing sold unless the thing or a document representing it is actually handed over to him. This is because mere conclusion of a contract of sale is not sufficient by itself to transfer to the buyer the ownership right of the thing sold. Therefore, transfer of possession or ownership of the thing is a prerequisite for the buyer to be entitled to the warranty right under Article 2282. Dispossession presupposes possession.

The next main issue will be which right should first be protected? The right of the third party exercising his right at the time of the contract? or that of the buyer who is now in possession of the thing sold? Article 2282 seems to protect and balance the right of both third parties and buyers. On the one hand it provides a legal warranty for buyers against any total or partial dispossession by third parties who have right or encumbrance over the thing sold at the time of the contract. On the other hand it also protects the right of third parties at the time of the contract. In such a case, for the warranty to be operative the right of the third party should exist before the thing was sold and delivered to the buyer. Here the time

Time factor

factor is very essential. If the third party was already enjoying a right at the time of the sale contract, this right would be a better protectable right as compared to the right of the buyer. In such a case, the buyer will be entitled to his warranty right under Article 2282 of the civil code and consequently the seller shall be held liable for breach of warranty. The seller may be obliged to return the purchase price and make good the damages arising there from. In the case considered above<sup>19</sup> the Supreme Court gave priority right to the claims of the judgment creditors (third parties) than the right of the appellant buyers. The court held that since the date of the conclusion of the sale contract between the appellants and the respondent seller is not clearly stipulated in the instrument of the contract it is difficult to say that the buyers have bought the car before the judgment creditors have had right over the car. For this reason, the court said, the buyers did not buy the car free from encumbrance.

One can understand from the judgment of the court that it (the court) preferably protected the right of the creditors which existed prior to the conclusion of the sale contract. Thus the only remedy available for the appellants in this case is to resort to their warranty right under Article 2282 of the Civil Code and sue the respondent seller for breach of warranty. By doing so the appellants may require the seller to refund them the purchase price and claim any damage they have sustained in consequence of the dispossession.

Conversely, if the right of the buyer prevails over that of the third parties, the law protects the right of the buyer from any total or partial dispossession and not that of the third parties who have acquired right over the thing after the buyer has bought the thing. This can be inferred from the provision of Article 2282 of the Civil Code when it says "the seller shall warrant the buyer against any total or partial dispossession which he might suffer in consequence of third party exercising a right he enjoyed at the time of the contract" (Emphasis added). This implies that the rights of third parties which did not exist at the time of the contract have no effect before the law.

However, there is an exception where the legal warranty under Article 2282 of the civil code doesn't help the buyer any more. This is in situations where the buyer is aware that there is some body who may come and dispossess him of the thing sold to him. Article 2283 (1) states that "where, at the time of the contract, the buyer knows that he risks dispossession, the seller shall not warrant the thing" The buyer may enter in to a sale agreement knowing that some third party has right over the <sup>h</sup> thing he bought at the time of the contract. In such a case the warranty that comes from the law doesn't work. Awareness on the part of the buyer lifts the warranty obligation from the seller.

Nevertheless, if the seller expressly warranted the buyer against any dispossession irrespective of the knowledge of the buyer about the encumbrance over the thing sold, still the legal warranty applies. <sup>20</sup> That means the seller shall be liable on his warranty if

the buyer is dispossessed. Thus an express warranty given by the seller on top of the knowledge of the buyer about the encumbrance makes the legal warranty operative. ✓

The other exception to the operativeness of Article 2283 (1) of the Civil Code is the case under sub article (2) of the same article. The legal warranty still comes to effect even if the buyer was aware of the risk of dispossession where the dispossession is due to the falling in of the pledge made by the seller with respect to the thing sold and delivered to the buyer. Here, there is encumbrance over the thing because the seller has sold a thing already pledged for the performance of certain obligation.

By virtue of a contract of pledge, the pledger undertakes to deliver a thing to the pledgee as a security for the performance of another primary obligation <sup>21</sup>. The pledgee, thus, has a right over the thing sold in case the pledger failed to discharge his obligation. The law states that "the pledgee shall have on his debtor's property the rights of the creditor"<sup>22</sup> Therefore, if the seller sold to the buyer a thing which he has already pledged to his creditor for the payment of another debt but he failed to perform his obligation towards the creditor (pledgee), then there is the possibility of the pledgee to come and dispossess the thing which is sold and delivered to the buyer. . This is because the pledgee is entitled by law to sell the thing pledged as a security to satisfy his claim<sup>23</sup> In such situations, even if the buyer knows at time of the sale contract that the thing sold and delivered to him is encumbered by the right of the pledgee, the seller shall be liable on his warranty against dispossession

where the buyer is dispossessed by the pledge. This is because pledge is always an act necessarily related to the act of the seller whereas other dispossessions may not necessarily be from the act of the seller. Therefore it could be said that the buyer is dispossessed due to the act of the seller and not by his own fault.

A question may arise as to why pledge is singled out as an exception. In the opinion of this writer, the reason could be the belief of the buyer. He enters in to the sale contract with the belief that the thing he bought will be freed from the pledge encumbrance at the moment the seller discharges his main obligation towards the pledgee. Because the very purpose of pledge contract is not to make the pledgee an owner permanently but to guarantee the payment of his claim towards the pledge.

Warranty against dispossession may be set a side or restricted by the agreement of the contracting parties. To this effect, Article 2284 (1) of the Civil Code provides that the contracting parties are at liberty to exclude or restrict to certain qualities of the thing the warranty due from the seller against dispossession. The background for this article is Articles 1679 and 1711 which provide cumulatively that "a contract shall depend on the consent of the parties who freely determine the object of their undertaking subject to such restrictions and prohibitions as are provided by law" Therefore, the parties can exclude or restrict the warranty against dispossession by their consent. But such exclusion or restriction shall be construed strictly. <sup>24</sup>

However, even if the contracting parties may exclude or restrict the warranty due from the seller by their agreement, the seller will not be <sup>relieved</sup> relieved from the warranty obligation imposed upon him in whole. He shall still remain liable to return the price to the buyer, in whole or in part, in case of dispossession.<sup>25</sup> That is why the law needs the provision excluding or restricting warranty to be interpreted strictly. Nevertheless, if there is an express agreement between the contracting parties to the effect that the purchase price will not be returned in whole or in part, the money will not be repaid to the buyer. But in the absence of an express agreement to this effect, then the money will be returned to the buyer in case of dispossession irrespective of the excluding or restricting provision. Moreover, the agreement of the parties to exclude or restrict the warranty obligation of the seller shall be of no effect where the seller has intentionally concealed from the buyer the fact that a third party had a right on the thing at the time of the contract.<sup>26</sup> If, instead of communicating the encumbrance over the thing to the buyer the seller fraudulently concealed it, the agreement to exclude or restrict the warranty shall be void.

What if the buyer acknowledges the right of the third party over the thing sold before judicial proceeding and /or arbitral adjudication? In this case, the buyer may not avail himself of his warranty right and also the seller is released from his warranty obligation under the law.<sup>27</sup> The only exception to this is where the buyer can show that even if he did not recognize the right of the third party before judicial proceeding, there is no way for the seller to prevent dispossession because of the conclusive proof on the part of the

third party that he has a right over the thing.<sup>28</sup> But if there is no conclusive evidence by the third party as to his right over the thing then the buyer may not avail himself of the warranty.

### 2.3 Warranty Against Defect

Obligations of seller are not only limited to delivery and transfer of ownership of the thing sold but also he shall warrant the buyer against certain defect in the thing. He shall guarantee to the buyer that the thing sold is not affected by defects.<sup>29</sup> He is duty bound to deliver a defect free thing. This does not mean that the seller is responsible for all and any kind of defects, but only for certain defects which are Warrantable. The seller shall warrant that the thing sold and delivered to the buyer is free from warrantable defects as per Art. 2287 of the Civil Code which is a law-emanating warranty. when the article refers to "certain defects", it is making reference to warrantable defects and not all defects.

Warrantable defect relates to the quality, utility or usability of the thing sold. It does not refer to the quantity of the thing sold. If a defect is negligible, so that the buyer wouldn't care for, it is not considered as a warrantable defect pursuant to Art 2344 (1) & (2) of the Civil Code. So, warrantable defect is a serious defect certainly affecting the quality or usability of the thing. The contract may be cancelled where the thing is affected by warrantable defect against which the seller warranted the buyer.<sup>30</sup> The background for this is article 2287 of the Civil Code which deals with a legal guarantee (a law emanating warranty).

The contract, however, may not be cancelled where the thing is affected by a non-warrantable defect. Non-warrantable defects are defects of such nature that the thing sold can be put in to use irrespective of its defects. They are defects of small or minor importance and the buyer would have bought the goods even if he had known of the defects. <sup>31</sup> There are also obvious defects which the buyer accepts them knowingly. These are also non-warrantable defect. Where the buyer bought the thing knowing the defects at the time of the contract, he will have no legal guarantee against the defects. And any warranty made by the seller in a situation where the buyer knows the defects is void eventhough the warranty is made expressly. <sup>32</sup> Awareness of the buyer about the defects entails invalidity of the warranty. Hence if the seller is liable only for warrantable defects, then what are cases of warrantable defects under our Civil Code?

### **2.3.1 Warrantable Defects**

Article 2289 of the Civil Code, under its three sub articles recognizes four cases of warrantable defects. It states as follows:

"The warranty shall become effective where the thing:

- a) does not possess the quality required for its normal use or commercial exploitation; or
- b) does not possess the quality required for its particular use as provided expressly or impliedly in the contract; or
- c) does not possess the quality or specifications provided expressly or impliedly in the contract."

As we can see from the provisions of this article the seller has the duty to ensure that the thing he sold possesses the inherent quality to put it to its ordinary or normal use, or particular use as agreed or implied in the contract. The thing must also possess the necessary quality for its commercial exploitation or the specification provided expressly or impliedly in the contract. So warrantable defect is a serious defect certainly affecting the quality, utility or usability of the thing sold. Normal use refers to the known and clear use of the thing sold. Normal use is known and it serves the same purpose for every body every where. It is impersonal because it makes no difference or discrimination between buyers. If the thing cannot be used for the usual purpose for which it is required, then it is defective. For example, the use of a Television is known and normal. The buyer need not tell for what purpose he requires the Television since its use is known and the same every where. Thus, if the television does not possess one of its qualities, tele or vision then it is defective and, consequently the buyer can make the seller liable on warranty as per Art 2287 of the Civil Code.

usage

The other case of warrantable defect is where the thing sold and delivered to the buyer doesn't possess the quality required for its commercial exploitation. Commercial exploitation refers to the merchantability of the thing sold.<sup>33</sup> This is provided in the civil code particularly with a view to include cases where items are used in further commercial and trade activities. Its application is not confined to things of direct domestic consumption. It is for the protection of merchants and traders who buy the thing not for

personal consumption but to resell it and get further profit. Although things commercially exploitable may be good for normal use, just because these things can be put to normal use doesn't always imply that they qualify for commercial <sup>exploitation</sup> expatiation. Therefore the merchantability defect should be related to the non-consumability defect of the thing sold.

The merchantability defect occurs when the consumer doesn't want the thing for normal use. Thus, if the thing you bought to resell it for profit doesn't possess the merchantability quality to resell it, then in such a case you may make the seller liable on warranty for the defect. Sub-section(2)- (c) of the Uniform Commercial Code also provides that "Goods to be merchantable must be at least such as...are fit for the ordinary purposes for which such goods are used" It is also interesting to observe that the International Code also states, under its Article 33 (1) (d) that "the seller shall not have fulfilled his obligations to deliver the goods where he has handed over goods which do not possess the qualities necessary for their ordinary or commercial use."<sup>35</sup> The merchantability quality simply means that the goods "must be suitable for the purpose for which they are normally used."<sup>36</sup> Therefore, the seller will be liable for defects affecting the normal or commercial use of the thing he sold and delivered to the buyer.

There is warrantable defect according to Article 2289 (b) of the Civil Code where the thing sold and delivered to the buyer does not possess the quality required for its particular use as provided expressly or impliedly in the contract. The goods sold must be fit

for the particular purpose envisaged by the buyer. What this article attempts to address is the case where the thing sold doesn't possess the quality required for its particular use. The buyer must expressly or impliedly tell the seller the particular purpose for which he requires the thing. Otherwise, he can't avail himself of this sub-article. In this case reference is made to the contract. If the thing cannot be used for the particular purposes described in the contract, then it is defective because the buyer cannot use the thing particularly for the purpose he intended. But there must be an agreement, express or implied, in the contract concerning the quality or the special purpose for which the thing is required. If not specifically agreed between the parties, the buyer cannot complain of the defect in the thing. The Sale of Goods Act of 1979 under its sub-section 14 (1) also provides that " where the buyer, expressly or by implication, makes known to the seller the particular purposes for which the goods are required there is an implied condition that the goods shall be fit for the purposes." <sup>37</sup> Therefore, the buyer must specifically make known to the seller the special purpose for which he needs the thing in order to make the seller liable on warranty. It is easy to see that mention of the name of the thing or its patent name only would not be adequate for the application of this article. It is mandatory that the buyer indicates the particular purpose for which he intended to use the thing in addition to the calling of the name of the thing sold.

The remaining situation where there exists a warrantable defect under our Civil Code is where the buyer makes specification about the thing he wants but the thing sold and delivered to the buyer

doesn't possess the quality or specifications provided expressly or impliedly in the contract.<sup>38</sup> Nowadays, this article (2289 (U)) is becoming more important because it plays an important role in modern sale transactions. For the application of this article, the parties must state in the contract about the specifications required from the thing, either expressly or impliedly, without which the seller cannot be held liable on warranty. The buyer can make specifications of the thing he requires to buy and if the seller accepts that specifications he has to warrant the defect in case he fails to deliver the thing in accordance with the specifications given by the buyer. If the thing doesn't comply with the specifications provided in the contract, then the thing is defective and the seller shall be made liable for breach of warranty. But the specifications provided by the seller should be detail and clear.

Warranty against defects may however be excluded or restricted by agreement of the parties. The warranty may be limited time wise or to the qualities of the thing sold. The seller may warrant the buyer only for a specified period of time with respect to certain qualities or the good working condition of the thing sold.<sup>39</sup> In such a case, it is sufficient for the buyer to inform the seller the existence of any defect in thing before the expiry of the specified period of time. The seller has also the duty to disclose to the buyer, if he himself is aware, all material facts as to the defect in the thing he sold. If he fraudulently concealed from the buyer the defect in the thing then the agreement between the parties to exclude or restrict the warranty shall be of no effect.<sup>40</sup> In this case the seller will be held liable on his warranty.

## 2.2.2 Duties of the Buyer With Respect to Defects

We have so far considered in detail what warrantable defects are and the circumstances in which they occur in a contract of sale. We have seen that a seller is legally bound to warrant the buyer against defects of firstly, normal or commercial use and secondly, the particular use as well as qualities or specifications expressly or impliedly provided for in the contract of sale. Now our next task will be to consider the duties imposed upon the buyer by law.

### 2.2.2.1 Duty to Examine the Thing

The buyer is under duty to examine the goods delivered to him within as short period of time as possible in the circumstance starting from the moment when he has the opportunity to do so. In connection to this Article 2291(1) of the Civil Code stipulates that "as soon as the buyer has the opportunity he shall without delay examine the thing" As soon as he has the opportunity to examine the thing delivered to him, the buyer must immediately examine the thing in order to reveal any latent defect in the thing. Examination is carried out in order to check whether the thing is defective or not and conforms with the contract or not. The best time of examination is then the time when the risk of the thing is transferred to the buyer.<sup>2324(1)</sup> <sup>41</sup> If not, examination should be conducted as soon as there is the opportunity to examine the thing. Risk is transferred to the buyer from the day when the thing was delivered to him in accordance with the provision of the contract or the code.<sup>42</sup> Therefore, the buyer should examine the goods as soon

▷ a defect examined in the course of operation of the thing not during the time  
7  
2893(2)

as the goods are delivered to him. But this is true only when delivery of the goods is effected according to the agreement of the parties i.e without delay when the contract is performed. Nonetheless, sometimes, circumstances do not permit the buyer to examine the thing at the time when risk is transferred. This is where risk does not pass to the buyer as a result of declaration of cancellation of the contract or replacement of the things having been required by the buyer. In such a case, the risk shall not be transferred to buyer on the day when the thing has been handed over to him. Here, defects are to be considered having regarded to the time when the risk would have passed had the thing been delivered in conformity and with out defect.

Moreover, when defects occur later on transfer of risk and caused by the seller or a person for whom he is responsible, the buyer should examine the thing without delay as soon as he has the opportunity to do so.<sup>2290(2)</sup> \*43 Article 2290 (3) of the civil code also makes it clear that the seller shall be held liable to his warranty where... defects occur at a date later than the time of the transfer of risk and are caused by the seller or a person for whom he is liable. In connection to this, Benjamin said that:

J. <sup>goods</sup> "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 a ascertaining whether they are defective or not."\*44

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Handwritten mark resembling '44/0' in the top center.

\* On the other hand, there is a defect which could not be detected by normal or usual examination of the thing. This is called latent defect. Latent defect is a hidden defect which cannot be discovered by normal examination of the thing. In this case, the rule under article 2293 (2) is that "for a latent defect let the seller beware, for obvious defects let the buyer be ware." Even for latent defect the buyer should inform the seller about the latent defect as soon as possible.

Examination of the thing should be carried out in accordance with the usage of the place of examination. Article 2291(2) of the Civil Code provides that "Unless otherwise agreed such examination shall be made as provided by the usages of the place of examination" Therefore, the manner of examination should follow the usage or the practice of the place of examination. But the parties may agree not to examine the thing in accordance with the usage of the place of examination. Moreover, the buyer must invite the seller or his representative at the place of examination and conduct the examination in their presence if he wants to avail himself of the results of the examination of the thing. The exception, however, to this rule is where the thing to be examined is likely to perish or be destroyed. If the thing is a perishable one, then the buyer can examine the thing in the absence of the seller or his representatives.\*46 In this case unless the examination is carried out within a short period of time, the thing is going to perish. Therefore, the buyer must examine the thing even in the absence of the seller or his representative to disclose defects. In all other cases, it is only if there are officials or witnesses at the place

of the examination that the buyer can avail himself of the results of the examination.

#### **2.2.2.2. Duty to Give Notice**

After having examined the thing the buyer shall without delay notify the results of the examination to the seller as to the existence of warrantable defect in the thing.<sup>47</sup> The buyer must also identify and describe the nature of the defect disclosed by examination for which he is intending to hold the seller liable on warranty.<sup>48</sup> Where latent defect, which could not have been discovered by the normal process of examination is discovered later, the buyer can avail himself of the defect only if he gives the seller notice of the defect as soon as he has discovered it. Even if the defect is a latent one the buyer should inform the seller about the defect as soon as the latent defect becomes patent and surfaces itself up.

In the absence of notification article 2293 (1) of the Civil Code provides that where the buyer has not notified the seller of the defects, he may no longer avail himself of the defects unless the seller admitted their existence. Unless the seller admits the defects the buyer cannot make the seller liable on his warranty if he (the buyer) fails to notify the seller.

Where the defects are *technical defects* latent defects which could not be discovered by the normal process of examination and the buyer subsequently discovered it, then he may avail himself of such defect by notifying the seller of the defect as soon as he discovers it.<sup>49</sup> But, the seller

may have intentionally hidden the defects in the thing at the time of delivery and /or at the time examination. The seller who intentionally misled the buyer may not avail himself of the fact that the notification of the defects is not made precisely or in due time.\*<sup>50</sup> Usually the misleading or fraudulent act of the seller takes place at the time of the transfer of risk. Misleading acts are acts that make the buyer not properly examine the thing sold. The defects are known to the seller at the time of the transfer of risk but he did not communicate them to the buyer. Intentional misrepresentation of facts related to the defect of the thing and concealment of material fact amount to misleading. But the acts of the seller must be intentional; negligent conduct of the seller doesn't amount to misleading. Even statements uttered by the seller depending on the relation he has with the buyer may affect the normal course of examination of the thing. In such a case, even if there is no notification made precisely or in due time, if the culpable conduct of the seller is discovered later on, then the seller can no longer avail himself of the absence of notification and he will be liable on his warranty.

In addition, in the event of warranty given during a specified period of time only for certain qualities or the good working condition of the thing, it suffices if the buyer informs the seller of the defect in the thing before the expiry of the given period of time.<sup>51</sup>\*According to this rule, there is no necessity of immediate notification of the defect. It is sufficient for the buyer to notify of the defects within the agreed period of time. This, however, contradicts with the rule under Art. 2292(1) which states that "the buyer shall without delay

notify the existence of defects to the seller." In the opinion of this writer, even if under 2294, the buyer should notify the defects to the seller within the period of time limited by the agreement of the parties, it does not mean that even if the buyer discovers the defects at the earliest time he can notify the seller at the end of the fixed time. The best time to he should notify would still be as soon as the defect is discovered. *Why not?*

In one case, <sup>52</sup> the buyers Ato Zergaw Hailemariam and Ato Getachew Manaye sued the seller Ato Tewodros Ashenafi for the cancellation of the sale contract concluded between them on February 9, 1992 E.C. In that case the buyers bought a car (plate NO. 3-25957) from the seller for \$100,000 Eth. Birr. And for the payment of the purchase price they handed over two cheques No. B.C 090109 and B.C090108 to the seller the value of each equals to \$50,000 Eth. Birr. The maturity date of the two cheques are written to be May, 30/1992 and September 30, 1993 E.C respectively.

The buyers are now requiring the cancellation of the contract before the maturity dates of each cheque is due. The main reason for their claim was that the car sold to them was full of defects. They said that at the time of the contract the car was not functioning (ተበላሽቶ ቆሞ ነበር). And they said that at the time of the contract the seller had promised to examine the car so as to reveal and ascertain any defects on the car. But, they said, the seller did not carry out the examination for them.

The buyers stated also that they have given notice to the seller on May 11, 1992 E.C so that he performs the examination of the car. But the seller refused to comply with the notice given to him. Upon an examination carried out by the buyers them selves at a later time (three months after the delivery of the car) they observed that about Ten important parts of the car were affected by serious defects and it costs them about \$ 50,000 Eth. Birr to put the defects right.

The court refused to grant the cancellation of the contract for irrelevant reasons stating that the fact that the buyers have given the cheques to the seller amounts to paying the purchase price. Also, the buyers did not prove to the satisfaction of the court that the defects affecting the car may result in the cancellation of the contract.

Now let us see how warrantable defect, the duty of the buyer to examine the thing and the duty to give notice are illustrated in the above case.

As we have said earlier warrantable defects are defects which certainly affect the quality, usability and utility of the thing sold as per Art. 2289 of the Civil Code. If the defect affects the normal use of the thing or its particular use as agreed or implied in the contract or if the commercial exploitation of the thing and the specification made about the thing is affected by the defect, the defect falls under what we have described as warrantable defects. In the case considered above, the defects discovered by the buyers

up on the examination of the car are clearly the one which affect the ordinary and normal use of the car. The car cannot be used for the usual purpose for which it is bought because about Ten important parts of the car were affected by defects. That means the car does not possess the necessary qualities required for its normal use. Essentially, the car is also useless for commercial exploitation as it cannot serve for normal use because commercial exploitation is dependent on normal use.

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On the other hand, it is the duty of buyers to examine the thing sold to them at their earliest opportunity so as to overlook any warrantable defect in the thing. Pursuant to Article 2290(1) of the Civil Code, buyers must check the absence of defects in the thing at the time when risk is transferred to them. Risk is transferred at the time when the thing is delivered. So the best time to check for the existence of defects is immediately as the thing is delivered to the buyer. It is only if the defects are latent and cannot be revealed at the time of transfer of risk that the buyer is allowed to disclose the defect at a later time. In all other situations examination of the thing should be carried out as soon as the buyer has the opportunity to examine having regard to the condition of the thing.

In the case briefed above the buyers have made a great mistake when they left the examination of the car sold to them to the seller so that he examines it at a later time instead of examining the car by themselves at the time when they have received it. Once they have received the car the risk is transferred to them and it is not the duty of the seller to examine the car for the buyers. Because, there are sellers who may fraudulently conceal the defects in the

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thing in order to sell it. Unless the buyer examines the thing and reveals the defects at the time of delivery, the risk of the thing is transferred to the buyer together with the defects. After all it is not the duty of the seller to follow up and examine the thing sold once it is delivered to the hands of the buyer. ] Consequently, the seller \* shall not be liable for defects which are not revealed and notified to him at the time of delivery unless it is proved to be a latent one in which case the buyer may sue the seller for breach of warranty at the time when he discovers the latent defects. Therefore, it was the fault of the buyers and not of the seller as they failed to examine the car at the time of the contract.

Moreover, it was the duty of the buyers to notify the seller the kind and nature of the defects in the car by examining it early at the time of the transfer of risk. But as they did not examine the car at the time of delivery, they could not give notice to the seller. They examined and notified the seller about the defects only Three months after the contract was performed. Therefore, the buyers cannot avail themselves of the defects in the car in order to cancel the contract because they are too late in giving notice to the seller.

On the other hand, there are defects which are known to the buyer at the time of the contract. If the buyer knows at the time of the contract that there is defect in the thing, then the seller shall not be liable on his warranty against defects;<sup>53</sup> the buyer himself would be responsible. In such a case even an express warranty given by the seller knowing that the buyer knew of the defect at the time of the contract is void. This means awareness on the part of the buyer lifts the warranty obligation from the seller. But in order to be

relieved from his warranty obligation the seller has to prove that the buyer had knowledge of the defects at the time of the contract. Also the seller shall not be liable on his warranty for defects which are so obvious that the buyer could have discovered them at the time of the contract except for his gross negligence<sup>54\*</sup>. However, if the seller has expressly declared that the thing is free from defect knowing that it is defective or where he has expressly warranted certain qualities of the thing, he shall be held liable on his warranty.

### 2.3 Warranty of Non- Conformity

According to article 2287 of the Civil Code, seller is under <sup>a legal</sup> ~~legal~~ duty to guarantee to the buyer that the thing sold conforms to the contract. This is a law-emanating warranty. This article should have been included in Art 2273 (2) which provides for warranty against defect. Because it is one of the obligation of the seller to warrant the buyer that the thing sold and delivered to the buyer exactly conforms to the one agreed on in the contract of the sale. Therefore, this warranty should be readable in to the provision of Art. 2273 (2) of the Civil Code.

Non-conformity has got nothing to do with the quality of the thing. Quality is for defect. Non-conformity doesn't affect the utility and usability of the thing. The seller is not liable for every kind of non-conformity; he is liable only for warrantable non-conformity. Then what is non-conformity and in particular what constitutes warrantable non-conformity?

The warrantable non-conformity cases are mentioned under Art. 2288 of the Civil Code. According to this article there exists a warrantable non-conformity where.

- i. the seller delivers part only of the thing sold
- ii. the seller delivered lesser quantity of the thing sold
- iii. the seller delivered greater quantity than agreed in the contract
- iv. the seller delivered to the buyer a thing different to that provided in the contract
- v. the seller delivered a thing of a different specie to the buyer.

Partial delivery constitutes warrantable non-conformity where the seller delivered part only of the thing sold and part remains undelivered. \*This kind of non-conformity applies to countable things. For example if the seller contracted to deliver Five Tape Recorders, but he delivered only Four of them, there exists non-conformity which is warrantable. For the part which is delivered the contract remains in force whereas for the part which is not delivered, the contract may be cancelled.<sup>55</sup> Therefore, the seller will be held liable on his warranty for the part which is in non-conformity with the contract.

\* The second case of warrantable non-conformity is where the seller delivers a lesser quantity than agreed in the contract. This is about quantity. So, if, in the example given above, the seller delivered only Three of the Tape Recorders instead of delivering Five of them, then

*What makes partial delivery different from that of delivery of lesser quantity?*

it is said that there is non-conformity in the contract. The seller delivered a lesser quantity than agreed in the contract. Therefore, the seller shall be held liable on his warranty.

The third situation is where the seller delivers greater quantity than agreed in the contract. Here a big question may arise. Is the buyer affected by receiving a greater quantity of the thing he required? The answer is absolutely yes! Delivery of greater quantity of the thing sold by the seller may cause trouble to the buyer. A number of problems may be encountered by the buyer : who is going to bear the cost of preservation of the excess quantity? Who shall take care for the excess things if they are perishable one? Who is going to provide storage meanses for the excess? According to Article 2308 (1) of the Civil Code, the buyer is at liberty to accept or refuse such quantity as exceeds the agreed quantity. In such a case, who shall bear the cost of transporting the excess quantity back to the seller in case the buyer refuses to accept them? Such and the like difficulties may be faced by the buyer if the seller delivers greater quantity of the thing than agreed. The remedy for this is provided under Art 2308 of the civil code whereby the buyer is entitled to accept or refuse the excess quantity.

The feasible cases of warrantable non-conformity figure under Article 2288 (b) of the Civil Code. Firstly, when the seller delivered to the buyer a thing different from that provided in the contract. The seller delivered an entirely different thing to the one agreed upon in the contract. Here we don't mean part difference; we mean completely /totally different thing. What is agreed upon may be "x"

but what is delivered is “y”. If, for example, in their agreement the seller is to deliver a Television, but instead he delivered a big Video Camera, this would constitute a clear case of non-conformity. Because the seller delivered a completely different thing from the one which he is required to deliver. The buyer cannot use at all a Video Camera for the purpose for which he wanted a Television. This is a plain example where the thing delivered by the seller is entirely different from the one agreed upon. Thus, the seller shall be held liable on the warranty he has given against non-conformity. The remaining situation where a warrantable non-conformity occurs in our civil code is where the seller delivers to the buyer thing of a different specie to the one agreed upon in the contract. Here, the thing is not completely different from the one agreed but there is a difference in specie. The thing delivered could be put to use for the same purpose. For example, the seller is required to deliver Meta Beer, but he delivered Castle Beer. Here, there is difference in specie but both of the things could be put to use for the same purpose. This also constitutes a warrantable non-conformity. Consequently, the seller shall be held liable on his warranty for the difference in specie because the buyer is not obliged to accept a thing other than that due to him, even though the thing offered to him is of the same or of a greater value than the thing due to him.

In one case,<sup>56</sup> between Ato Ibrahim Sharmlo Vs Ato Leggesse Waqkenne, on a sale contract dated June 15, 1990 E.C the defendant (buyer ) bought a car (plate No. 3-38575 A.A) from the plaintiff (seller) for \$ 120,000 Birr. On the very date of the

conclusion of the contract the defendant paid \$20,000 Birr and took possession of the car at the presence of witness. According to the agreement of the parties, \$80,000 Birr out of the purchase price is to be paid by the defendant at the time when the working condition and the usability of the car is ascertained by experts. Accordingly the working condition and usability of the car was ascertained by experts and the defendant paid \$ 80,000 Eth. Birr to the plaintiff on July 15, 1990 E.C.

The remaining \$20,000 Birr was to be paid when the plaintiff transfers the full ownership of the car to the defendant by registering the car in the name of the defendant and transfers all title deeds to the defendant. The plaintiff fulfilled all the requirements needed to transfer the ownership of the car to the defendant and notified him on August 15, 1990 to appear before the concerned Authority to effect the registration of the car in the name of the defendant. But the defendant failed to appear at the said place on the fixed date and hence failed to pay the remaining price \$ 20,000 Birr.

The defendant is now sued to pay the remaining purchase price \$ 20,000 Birr. And in his response, the defendant raised as a defense the fact that one part of the car was not delivered to him at the time of delivery. He alleged that the plaintiff promised at the time of the contract to deliver the car's "piston" "( የመኪና ማንኛ ክሬክ ፒስቶን)" at a later time. But he said, the plaintiff did not deliver to him this part of the car. That is why he failed to pay the remaining purchase price to the plaintiff. As a result, the defendant prayed

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the court to dismiss the case and order the plaintiff to deliver that missing part of the car to him before requiring the payment of the remaining purchase price.

The court however, held that the claim for the delivery of the missing part of the car should have been instituted in a separate suit not as a counter claim in the present case. Thus the court rejected the defense of the defendant which was based on non-

conformity. Why you should give possible comments?

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## Chapter Three

# Available Remedies to the Buyer up on Breach of Warranty

In the previous chapter we have seen in some what detailed fashion that the seller is -legally bound to warrant the buyer against any total or partial dispossession and; that the seller is obliged to guarantee to the buyer that the thing sold conforms to the contract and is not affected by defects. We have said that the warranty obligation of the seller is a law-emanating obligation rather than the creation of the agreement of the parties. But the seller may break this obligation either by repudiating or not making any deliver at all or by making a delivery which does not conform to the contract. The seller may deliver defective thing or a thing which does not possess the necessary quality for its normal use, particular use or commercial exploitation. The buyer may also suffer the risk of dispossession by third parties who have right over the thing when the seller transfers defective title to the buyer, Under such circumstances the law must create remedial mechanisms, which the buyer may resort to.

In case of breach of warranty various remedies are available to the buyer against the seller where the requirements of Article 2282, 2288 and 2289 of the Civil Code are satisfied, Among the remedies available to the buyer are specific performance (Art 2332), cancellation (Arts 2342-2346), claim for damages (Art. 2360) and price reduction Art. 2343 (3); Forced performance of the contract may only be granted by courts when it is of essential necessity to the buyer. Also, cancellation, as a rule, is a judicial declaration but it may be exercised by the parties when the discretion to that effect is reserved in the contract by the mutual consent of the parties or the law permits. Claim for damages and price reduction may also be contractual terms of the contract or the privilege granted by law.

### 3.1 Forced Performance

When the seller fails to comply with the warranty arising from the law, one of the known and of course top remedy available to the buyer is to require the court to force the seller in order to fulfill his warranty obligation. Under Article 2332 of the Civil Code it is provided that the buyer who has regularly given notice of the defects may require the seller to deliver new things or the missing part or quality of the thing where the forced performance of the contract may be demanded. In the sense of this article, requiring new things or the missing part or quality of the thing is taken to amount to the forced performance of the contract. As we proceed, we are going to see that this article contained important elements like the duty to regularly give notice (about the intent for forced performance) and the requirement that the conditions to require forced performance are satisfied.

The background for this Article (2332~~0~~) is Article 1771(1) in Book IV of the Civil Code which states that “where a party does not carry out his obligations under the contract, the other party may according to the circumstances of the case, require the enforcement of the contract..... “. The phrase “ *enforcement of the contract*” is what is described under Article 1776 of the Civil Code as specific performance or forced performance interchangeably. It is the best remedy that may be granted in times of contractual breach where the conditions to grant it are satisfied.

In our law, any contractual breach doesn't give rise to the claim for forced performance. It is a very exceptional remedy but yet the best known remedy. The very common remedy for contractual breach is either requiring the cancellation of the contract through court proceedings or to unilaterally cancel the contract where this is allowed by law or contract.

What makes forced performance an exceptional remedy is the manner in which it is stipulated in the Civil Code and the stringent requirements to be fulfilled in order to grant it under Articles 1776, 2329 and 2330 of the Civil Code. Article 1776 of the Civil Code provides that specific performance of a contract shall not be ordered unless it is of special interest to the party requiring it and the contract can be enforced without affecting the personal liberty of the debtor. The word “*unless*” in this article makes forced performance not a rule but an exceptional remedy for breach of contract. The article doesn’t provide for forced performance as a general rule but provides only the conditions under which it may be granted as a remedy.

Moreover, the party requiring the forced performance of the contract (usually the creditor) has to prove to the satisfaction of courts that he has a special necessity in the performance of the contract and that the contract can forcibly be performed without affecting the personal liberty of the debtor. Proof of the existence of special interest alone doesn’t suffice; the court must be satisfied that such forced performance of the contract will not prejudice the personal liberty of the debtor. Of course, in a contract of sale, we don’t have the fear that the personal liberty of the debtor will be affected owing to the forced performance of the contract. Because, the very subject matter of sale itself relates to an existing or future corporeal things and not to the personal obligation of the parties. Personal liberty may only be affected in contracts relating to services rendered in person.

In contracts which do not relate to sales, it would be very difficult to prove the existence of special interest, as there are no parameters under Art. 1776 of the Civil Code to determine what constitutes special interest. So the better approach to detect special interest would be a case-by-case analysis.

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Article 2332 (1) of our Civil Code provides that the buyer upon breach of warranty, may require the seller to deliver new things or the missing part or quality of the thing where the forced performance of the contract may be demanded. (Emphasis added). It is only where the forced performance of the contract may be demanded that it becomes a remedy in case of defect and non-conformity. Our Civil Code doesn't state that the buyer may require the court to order the forced restitution of the thing in case he is dispossessed by third parties exercising their right at the time of the contract. This may be because the dispossession which Article 2282 of the Civil Code talks about is accomplished only through the order of courts not by the acts of usurpers. \*

Article 2332 governs also cases of non-conformity. According to the spirit of this article, the buyer may not only demand the forced performance of the contract but also the replacement of the missing part or quality of the thing sold. The phrase "missing part" may refer to non-conformity of the thing sold provided that the part delivered is not under use. Because, it would be difficult to talk of non-conformity if the thing is already under use. "Missing part" shows that there is partial delivery, which is one typical case of non-conformity. Under Article 2288(a) of the civil code it is provided that the thing shall not be deemed to conform to the contract where the seller delivered to the buyer part only of the thing sold or a greater or lesser quantity than he undertaken in the contract to deliver. Therefore, non-conformity should be readable into Article 2332 of the Civil Code.

Moreover, the applicability of Article 2332 is limited only to cases where there is warranty against defect and non-conformity. If there is exclusion or restriction of the warranty to certain qualities or the good working condition of the thing, then the buyer cannot avail himself of the defect and non-conformity and hence no forced performance. Thus article 2332 of the civil code presupposes the existence of a warranty arising from the law.

Now when we turn to the main element of article 2332(1) of the Civil Code, the main question to be answered is under what circumstances would the forced performance of the contract be demanded by the buyer in cases of defect and non-conformity. The answer for this is where the requirements of Article 2329 and 2330 are satisfied. As a matter of principle according to Article 2329 of the Civil Code, the buyer may demand the forced performance of the contract where the seller has not regularly (according to their agreement) delivered the thing to him. Unlike Article 1776 of the Civil Code, what constitutes particular interest in a contract of sale is clearly enumerated under Article 2330 of the civil code.

Firstly, is there the possibility of purchase in replacement of the thing by the buyer? The answer for this question would show whether or not the buyer has particular interest in the forced performance of the contract under Article 2332. That means can't the buyer purchase the thing sold to him from another seller? Is it the seller only who deals in the kind of the thing sold to the buyer? If the answer to this question is yes, then the buyer cannot purchase the thing in replacement from another seller and hence the buyer can be said to have particular interest in the forced performance of the contract in the meaning of Article 2329 of the civil code. But if the buyer can find substitutes in replacement for the defective thing delivered to him, the court will not have any ground to grant the specific performance of the contract. That means the buyer cannot require the seller to make good the defects or to deliver the missing part of the thing. Rather the buyer may require the cancellation of the contract and claim any damages he has sustained. For the purposes of Art 2329, Article 2330 interprets the phrase "**Particular interest**" by stating that the "buyer may demand the forced performance of the contract where the sale relates to a thing in respect of which a purchase in replacement conforms to commercial practice."

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Secondly, although it may be established that purchase in substitute may be carried out, if the buyer is going to suffer a lot of inconvenience to carry out the purchase in replacement, then the buyer has particular interest and may be granted the forced performance remedy<sup>1</sup>. The inconvenience could be timewise or

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moneywise or otherwise. But if the buyer can effect the purchase in replacement without inconvenience (smoothly) it cannot be said there is particular interest on the part of the buyer since he has no problem to purchase the thing.

Thirdly again, even if it is possible to accomplish purchase in replacement without inconvenience, if the buyer has to pay a lot by way of price to perform the purchase in replacement, then it may be considered that the buyer has special interest in the forced performance of the contract. If the purchase in replacement costs the buyer some additional considerable expense in form of price or otherwise, the buyer has particular interest in the thing and the court may grant the forced performance of the contract<sup>2</sup>. The considerable expense may be because the price of the thing has increased or the thing is found in another locality or for any other ground. Under such circumstances the buyer may require the seller to deliver new things or the missing part or quality of the thing in cases of defect and non-conformity.

The buyer may also require the seller that the defects in the thing be made good within a reasonable time<sup>3</sup>. Making the defect good may be either making the defective part of the thing good or replacing the defective thing as a whole with a non-defective one. But before granting this remedy to the buyer, courts must ascertain the fulfillment of the following two conditions. Firstly, the sale must relate to a thing which the seller has to make or produce on the specifications given by the buyer<sup>4</sup>. Where the thing is the one which is produced by the seller according to the specifications made by the buyer, and if the seller did not comply with the specifications, then the buyer may demand the forced performance of the contract i.e. to make the defect in the thing good. Here, in my opinion, the buyer may not be required to show particular interest in making good the defect because of the specific nature of the contract, That means, as the thing is the one to be produced or made by the seller and he has promised to produce the thing in accordance with

the specifications given by the buyer, the express specification made by the buyer by itself shows that the buyer has particular interest in the thing. Therefore, the question of particular interest, possibility of purchase in replacement, purchase without inconvenience and /or considerable expense may not be raised against the buyer. The reason, again, is if the buyer had no particular interest in the thing, he wouldn't have ordered the seller to make or produce the thing according to his own specifications.

Secondly, even if the thing is produced by the seller, the seller may not be in a situation where he can make the defect good. Thus the seller is required to make the defect good only where such defects can be made good<sup>5</sup>. But, strictly speaking, one cannot say it is impossible for the seller to make the defect good as it is in fact within the reach of the seller to make good the defect in the thing which has been produced by him.

According to Article 2332 (1) of the civil code, only the buyer who has regularly given notice of the defects in the thing to the seller that may require the forced performance of the contract in case of defect and non-conformity. In order to hold the seller liable on his warranty, the buyer must identify the nature of the defect and notify the seller as to the defect or non-conformity which he has come across by examination of the thing. The background for this is Article 2293 (1) of the Civil Code, which states that the buyer who has not notified the seller of the defects or non-conformity may not avail himself of the defect or non-conformity unless the seller admitted their existence. This is a procedural requirement for the buyer in order to require forced performance. Therefore, the buyer should regularly and without delay give notice to the seller about the defect and non-conformity.

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What is more, the buyer should also give notice to the seller within ashort period of time after he has ascertained the defect and non-conformity that he is going to seek the forced performance of the contract. This is a very special and essential notice as the failure to do it results in the loss of one's right to demand the remedy of forced performance. It is not a default notice for the non-performance of the contract but that the buyer intends to require the forced performance of the warranty obligation. The seller should be aware that he is going to be forced to comply with his warranty obligation. Because, even if he is late, he may be able to perform his obligation. If so, there would be no need for the buyer go to court in order to demand the forced performance of the warranty.

The time to give notice under Article 2331 is not defined but it should be as soon as the buyer has ascertained that the seller has failed to perform his contractual obligation. The word "delay" in the opinion of this writer is not limited only to the time of performance; but it should denote also failure to perform the contractual obligation. Thus as soon as the buyer understands that the seller has failed to perform his warranty obligation, he must notify the seller that he (*the buyer*) is going to require the forced performance of the contract. The short period of time to give notice is an extinctive prescription after which the buyer may not demand the forced performance of the contract. And it is calculated strictly particularly where there exists affixed compulsory date for the performance of the contract. Therefore, in such a case, the buyer should strictly follow the compulsory date of performance in giving notice to the seller.

### 3.2 Cancellation ✓

One of the most important remedies to which the agrieved party resorts when the other party fails to perform his contractual obligations is cancellation of the

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contract. To this effect, Article 1784 of the Civil Code provides that “a party may move the court to cancel the contract where the other party has not or not fully and adequately performed his obligations within the agreed period of time” Forced performance being an exceptional remedy cancellation is an early common place remedy.

Similarly, Article 2336 of the civil code in sales law repeats the same thing when it refers to Articles 1784 – 1789 by stating that the buyer may require the court to order the cancellation of the contract or may declare the cancellation of the contract in accordance with the provisions of Articles 1789 of the civil code. Pursuant to this article, therefore, cancellation could be unilateral (by the aggrieved party) or through the medium of the court. Unilateral cancellation is the exceptional remedy provided for the buyer where right to this effect is reserved in the contract and when the conditions to implement this right are fulfilled<sup>1786</sup>. In order to cancel the contract unilaterally, there must be a provision in the contract permitting the parties to unilaterally cancel the contract in case there is delay or failure to perform one's contractual obligations.

As a matter of rule, however, a contract has to be cancelled by the order of courts. The aggrieved party should move the court in order to declare the cancellation of the contract when the contract is not performed fully and adequately and where there is delay in performance. However, in canceling the contract, courts should take into account the interests of the parties and the requirements of good faith as per Art. 1785 of the Civil Code. Also, cancellation should not take place unless the essence of the contract is affected by non-performance. It is the non-performance of an essential term on the contract which affects the essence of the contract and that leads to the cancellation of the contract. It must also be established that the party requiring the cancellation of the contract wouldn't have entered into the

contract without the term, which the other party has failed to perform being included.

*Fundamentality is from absolute ground*

Moreover, a contract shall not be cancelled unless there is breach of fundamental provision of the contract<sup>1205(2)</sup>. The fundamentality of a term may be proved by the fact that had the aggrieved party known of the breach he wouldn't have entered in to the contract. Thus breach of a fundamental term of the contract may include breach of warranty because this amounts to breach of the law, as under Ethiopian law, warranty is a creation of the law than the agreement of the parties.

Hence, it follows that, if there is a breach of warranty of the thing sold to the buyer, he is entitled to bring an action for the cancellation of the contract as a whole seeking the avoidance of the sale contract and the return of all or part of the purchase price or a reduction of the price because of the defects or non-conformity in the thing<sup>8</sup>. The defects or non-conformity in the thing sold may be the one, which renders the thing absolutely useless or its usability so inconvenient that the buyer wouldn't have bought it had he known of the defect and non-conformity thus constituting breach of warranty.

⊗ Sometimes, however, even where there is no defect or non-conformity in the thing sold, the buyer may request the cancellation of the contract where the seller declared in good faith to the buyer that the thing sold has some quality at the time of the contract but which is later on found not to exist<sup>9</sup>. This is, however, provided that this quality was the principal motive to induce the buyer to purchase the thing. The Ethiopian legal system also under Article 2344(1) of the Civil Code points out that the contract may be cancelled where the thing is affected by a defect against which the seller warranted the buyer. The buyer is not entitled to the cancellation of the contract for all and any kind of defect appearing in the thing but only for those warrantable defects against which the seller has warranted the buyer<sup>10</sup>. Thus

if at all defect leads to the cancellation of the contract it has to be warrantable defect within the meaning of Article 2289 of the Civil Code. The acontrario reasoning would be if the thing is affected by a non-warrantable defect within the meaning of this article, then the buyer may not require the cancellation of the contract.

④ The following case between W/ro Shewanesh Assefa Vs Ato Muluneh Amare illustrate the above idea<sup>11</sup>. In this case the plaintiff, on a sale contract concluded on August 9, 1988 EC bought a Taxi from the defendant (seller) for \$6,000 Eth Birr. On the very date of the contract the plaintiff paid Birr 5,000 out of the purchase price and took possession of the car on the same date.

The plaintiff in her allegation stated that she has caused the Taxi-cub to be examined after delivery and found it to be defective and that it doesn't serve the purpose for which it was bought. She contended that she has notified this fact to the defendant and required him to either return to her the money she has paid in form of price or put right the defects in the car and deliver it to her. But, she said that the defendant refused to make good the defect in the Taxi nor to refund her the money she paid.

The plaintiff now sued the defendant to either put right the defects in the Taxi or refund her the money she paid for the price. The defendant, however, in his response replied that he has not promised under the terms of their contract to make good the defects in the car and deliver it to the plaintiff. He said he delivered the car to the plaintiff as it was.

The court, after analyzing the following two issues, reached at the conclusion that the sale contract between the two parties shall be cancelled and the defendant

as it was

should refund the money paid by the plaintiff together with its interest and take back the Taxi from the plaintiff.

1. Is the defendant (seller) legally bound to guarantee to the plaintiff (buyer) that the Taxi he sold is not affected by defects and serves the purpose for which it was bought or not?
2. Should the contract be performed or cancelled?

Concerning the first issue, the court analyzed it in light of Art 2287 and 2289(1) of the Civil Code. The court held that pursuant to Art 2287 of the civil code, the seller shall guarantee to the buyer that the thing sold ~~is not affected by defects.~~ And per Art. 2289(1) of the code, the warranty shall become effective where the thing does not possess the quality required for its normal use or commercial exploitation.

In the case at hand, the court said, it is clear that the plaintiff bought the Taxi for commercial exploitation and it is also ascertained by witness to be so. Witnesses have testified also that the Taxi was not in a working condition. And the defendant on his part did not prove to the satisfaction of the court that the Taxi can serve the purpose for which <sup>it</sup> was ~~is~~ bought. Therefore, the court held that, even if the defendant did not promise in the contract to put right the defects in the car, this is a legal duty and hence the defendant is duty bound by law to warrant to the plaintiff that the Taxi is not affected by defects and serves the commercial purpose for which it was bought.


The court analyzed the second issue in the light of Arts 2330 and 2344 of the civil code. The court held that in accordance with Art 2330 of the Civil Code, the buyer may not demand the forced performance of the contract where the sale relates to a thing in respect of which a purchase in replacement conforms to commercial

practice or such purchase can be effected by him without inconvenience or considerable expense. In the case under discussion, the court held that the plaintiff can buy another Taxi in replacement for the former one. On the other hand, the plaintiff did not prove to the satisfaction of the court that she cannot buy another Taxi without inconvenience or considerable expenses. Therefore, the court rejected the claim of the plaintiff that the defendant should make good the defects in the car and deliver it to her.

On the issue of cancellation the court held that pursuant to Art. 2344 (1) of the civil code, the contract may be cancelled where the thing is affected by a defect against which the seller warranted the buyer. In the present case, it is proved that the car sold to the plaintiff is affected by defects and cannot serve the commercial purpose for which it was bought. Also, it is proved that the defendant is duty bound by law to guarantee to the plaintiff that the car he sold is not affected by defects and can serve the purpose for which it was bought. Therefore, the court held that the contract between the two parties should be cancelled for the above mentioned reasons.

noble

The court, ordered the defendant to repay to the plaintiff the price she paid and Take back the taxi from her. In the opinion of this writer too, the judgment given by the court is correct and in accordance with the law.



Non – warrantable defects, as discussed in chapter two, are defects of small importance where the defect doesn't affect the utility or usability of the thing such that the thing could be put to use notwithstanding the defects<sup>12</sup>. Thus the contract may not be cancelled where the defect is of small importance and it appears that the buyer would have bought the thing had he known of the defects. If it is established that the buyer wouldn't have refused to buy the thing even knowing the defect in the thing then the defect is of small importance and would not result

in the cancellation of the contract. But this does not mean that the right to claim damages is not due.

In the case between Ato Zergaw Hailemariam and Getachew Manaye V.s. Ato Tewodros Ashenafi<sup>13</sup> the plaintiffs required the court to declare the cancellation of the sale contract concluded between them on Feb. 9, 1992, stating that the car sold to them was affected by defect. The plaintiffs did not examine the car at the time it was delivered to them. According to their agreement, the defendant (seller) promised to carry out the examination of the car by himself a later time other than the date of delivery. But the defendant did not examine the car according to the terms of their agreement. Up on an examination of the car carried out by the plaintiffs themselves three months after the time of the contract, they discovered that about Ten important parts of the car were heavily affected by defects. And the car was then out of use. Therefore, the plaintiffs required the cancellation of the contract pursuant to Article 1784 of the Civil Code and sought the return of the purchase price in whole.

The court started its argument by saying that the plaintiffs have the duty to prove that the defect in the car can result in the cancellation of the contract. But before the court reached its final decision, the plaintiffs withdrew their suit and the case was dismissed by the court.

In the opinion of this writer, as per Art. 2293 (1) of the civil code only the buyer who has examined the thing at the time of delivery and who has given notice of the defect to the seller without delay has the right to avail himself of the defects in the thing. That means unless the buyer examines the thing within as short period of time and give notice to the seller, he may not require the cancellation of the contract based on the defect in the thing. The examination should be at the time risk is transferred to the buyer and once the risk is transferred to the buyer, he may

not complain of the defects in the thing. Thus in the case at hand, the plaintiffs should not be granted the cancellation of the contract as they did not examine the car at the time of delivery and they did not notify the seller as to the defect in due time.

Where the sale relates to sale of several countable things and only some of them are found to be defective, the contract may <sup>be</sup> cancelled only with regard to such defective things<sup>14</sup>. The rule in such a case is partial cancellation of the contract with regard to the defective part of the things. However, the contract may also be cancelled totally depending on the nature of the things sold where the defective thing or article can not be separated from those which are free from defects unless it be with considerable inconvenience to the buyer or the seller. If the cancellation relates to that part of the contract with regard to the principal thing it shall also extend to the accessories even if they have bought under a separate sale contracts<sup>15</sup>. This is because if the main thing is to be returned to the seller because of cancellation, the accessories would bring no use to the buyer. It is because of utility that the accessories will be returned.

*Average quality*

According to Art 1747 (1) of the Civil Code, in a sale relating to fungible things, unless there is a contrary agreement in the contract, the seller may choose as to the thing he has to deliver. If there is an express agreement as to what to be delivered by the seller, the seller has to comply with the agreement. But, in the absence of such an agreement, the seller may deliver a thing he wanted. Even if choice is given to the seller, however, there is guideline called "average quality" which should not be violated by the seller<sup>16</sup>. The seller may not deliver a thing which is below average quality. Average quality is a question of defect. So it has to be understood in the light of Art. 2289 of the civil code. If the thing delivered by the seller conforms to the average quality of the thing, the buyer cannot refuse it because of minor defects. The thing may have minor defects of negligible

*Accessories would bring*

importance but the thing may still possess the average quality required to put it to use. The buyer therefore may not refuse the fungible things simply on the ground that the quality offered to him does not exactly conform to the contract. But the buyer may require the partial cancellation of the contract pursuant to Article 2345 (1) of the civil code, where part of the things delivered to him is below the required average quality.

\* In one case<sup>17</sup> between W/ro Giday Kinfu Vs Ato Kahsay Haile Giorgis, the plaintiff (buyer) sued the defendant (seller) for the cancellation of the sale contract concluded between them on June 14, 1989 E.C. In that case, the plaintiff bought a "cooking machine" (የዳቦና የኩክ መጋገርያ ማሽን) from the defendant for \$30,000 Eth Birr. On the very date of the conclusion of the sale contract the plaintiff paid \$25,000 Eth Birr out of the purchase price and took possession of the said Machine. According to their agreement the remaining purchase price Birr \$5,000 was to be paid by the time when the defendant (seller) checks the working condition of the machine and ascertains that it is free from defects. The plaintiff took possession of the machine at the time of the contract without examination. The parties have agreed in the contract that the defendant (seller) goes to the plaintiff's home in the Adwa Town from his residence in Addis Ababa and carries out the examination of the machine when the plaintiff (buyer) calls the defendant by Telephone.

The plaintiff instituted an action to court on August 13, 1990 E.C. 3(three) years after she took possession of the machine requiring the court to cancel the sale contract alleging that the machine she bought was defective starting before the conclusion of the contract.

She alleged that the machine doesn't work and as a result she couldn't use it for the normal purpose for which she bought it. She also said that she has notified the

defendant by letter so that he performs the examination of the machine. The defendant, however, responded that he has delivered the machine to the plaintiff free from defects having ascertained its working conditions. He also produced witnesses who can testify that the plaintiff took possession of the machine free from defects. Also, he (the defendant) argued that the plaintiff cannot institute an action for the cancellation of the contract 3years after she took possession of the machine. Since the period or limitation has already lapsed.

The plaintiff did not examine the machine at the time of delivery. Neither did she identify and notify the defendant the nature of the defect in the machine at the time of the contract or even after she has instituted an action for the cancellation of the contract. She alleged that she notified the defendant to carry out the examination of the machine but the defendant did not examine the machine according to his promise. The defendant on his side responded that the plaintiff did not call notify him to examine the thing.

All in all the plaintiff argued that she has sustained a great loss for three(3) years after she took possession of the machine as it was defective and not in a working condition for three ✕

The court considered three issues in the case.

1. Whether or not the machine sold to the plaintiff was defective
2. Whether or not the contract should be cancelled because of defect
3. If the contract is to be cancelled, should the plaintiff entitled to the damage she claimed

On the first issue the court held that it is difficult to say that the buyer (Plaintiff) bought defective machine at the time of the contract. The court said, as it was the plaintiff who alleged that the machine was defective, the burden of indicating and

proving to the satisfaction of the court the kind and nature of the defect in the machine was on the plaintiff. However, the plaintiff did not identify any defect in the machine,

In the opinion of this writer too, one cannot say that there was a warrantable defect in the machine within the meaning of Article 2289 of the civil code. But the court should have considered one issue whether the plaintiff performed his duty of examining the machine pursuant to Art. 2290 & 2291 of the civil code in order to ascertain that the machine was free from defects. As it can be seen from the case the plaintiff did not examine the machine at the time of the transfer of risk. She left the examination of the machine to the defendant to be carried out later on. This implies that the plaintiff did not fulfill her duty of examining the machine at the time of delivery as provided by Art 2291 of the civil code. Moreover, the plaintiff did not notify the seller as to the kind and nature of the defect in the machine within as short period of time as possible. This failure of the plaintiff resulted from her failure to examine the machine at the time of delivery.

Handwritten note in green ink:   
"The plaintiff is not liable for the defect in the machine as she did not examine it at the time of delivery and did not notify the seller of the defect in the machine within a reasonable period of time as possible." (Note: The text is a rough transcription of the handwritten note.)

On the other hand, As per Article 2293 (1) of the civil code, the plaintiff may only avail herself of the defect in the machine if and only if she had examined the machine and notified the defendant as to the kind and nature of the defect in the machine. The exception to this is only if the defendant has admitted the existence of defect in the machine. But in the case at hand the defendant did not admit the defect in the machine. Instead he stated that the plaintiff took possession of the machine free from any defects and produced witnesses whom he believes would testify to this effect.

From the above analysis of the case, therefore, one cannot say, as it is also held by the court, that there was a warrantable defect in the machine sold to the plaintiff.

As regards the second issue whether or not the contract is susceptible to cancellation because of defect or not, the court held that the contract should remain in force as it is not proved that the machine was affected by warrantable defect in light of Art 2289 of the Civil Code. The claim of the plaintiff on the cancellation of the contract was based on the statement that the machine was defective at the time of delivery. But she did not show that there was defect in the machine, which may affect the normal use of the machine. Therefore, pursuant to Article 2296 (1) of the Civil Code, the defendant (seller) should not be held liable on his warranty for defects, which are not identified and communicated to him unless the defects are latent defects, which could not have been discovered by a preliminary examination of the thing. In the case at hand, it cannot be said that the defect in the machine was a latent one because the plaintiff did not even carry out an ordinary examination of the machine in order to overlook obvious defects in it.

Under Art 2344 of the Civil Code, the contract is cancelled only where the thing is affected by warrantable defects coming under Art. 2289 for which the seller warranted the buyer. The contract may not be cancelled for minor defects the nature and kind of which are not known. In order to require the cancellation of the contract under Art 2344 of the Civil Code, the defects should be proved to be the one coming under Art 2289 of the Civil Code and should be known and notified to the seller. Breach of warranty by the seller is said to exist only if the seller is notified of the defects in the thing and failed to put right the defects. Thus, in the case under analysis, the cancellation of the contract doesn't seem appropriate.

Also, Article 2343 (1) of the Civil Code allows the buyer to cancel or require the cancellation of the contract in cases of non-conformity where part only of the thing sold is delivered to the buyer or part of the thing doesn't conform to the contract. This is one situation of warrantable non-conformity. Because, Article 2288 (2) of the Civil Code states that the thing sold shall not be deemed to conform to the

contract where the seller delivered to the buyer part only of the thing sold or a greater or lesser quantity than a <sup>~y</sup>geed in the contract.

The other case of warrantable non-conformity in which the buyer is entitled to cancel or require the cancellation of the contract is where the thing sold is wholly delivered to the buyer but part only conforms to the contract and part not. In both cases, the rule is partial cancellation of the contract because the law says that in such cases the buyer may not cancel the contract for the whole. What is allowed is partial cancellation of the contract for the part not delivered and for the part not in conformity with the contract.

The buyer may cancel or require the cancellation of the contract for part of the thing or quantity of the thing not delivered, Part which is delivered is said to be in conformity with the contract. In cases where part of the thing sold only conforms to the contract too, the law is interested in the partial cancellation of the contract only for part which does not conform to the contract.

Total cancellation incases of non-conformity is permitted only by way of exception. It comes into operation only under two circumstances: Firstly, when it is very essential to the buyer to cancel the contract totally; and secondly where the date fixed in the contract for delivery of the totality of the thing sold constituted a compulsory date for the delivery of the whole thing <sup>2343</sup>\*18. Essentiality in the total cancellation of the contract exists where it is proved that the buyer wouldn't have entered into the contract had he known how the seller would execute the contract. Thus, partial delivery leads to the total cancellation of the contract where it is shown that the buyer wouldn't have entered in to the contract had he known that the seller is going to deliver part only of the thing sold. Likewise, partial non-conformity to the contract results in the total cancellation of the contract where the

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buyer proves that he wouldn't have contracted with the seller had he known that there would be non-conformity of the thing sold with the contract.

The other situation where total cancellation of the contract is allowed in case of partial delivery is where the date fixed for delivery of the thing sold constitutes a compulsory date for the delivery of the whole thing but the seller delivered only part of the thing on that date<sup>19. 1327 121</sup>. Even if the seller delivered the undelivered part subsequently, the contract can be cancelled totally including the delivered part where the date agreed upon for delivery is a compulsory date for delivery of the whole. So, what matters is whether the compulsory date fixed is for delivery of the whole or for part only of the thing sold. If the date of delivery does not constitute a compulsory date for the whole, then no total cancellation but the contract may be partly cancelled for the undelivered part.

As regards to dispossession we have said that pursuant to Article 2281 and 2282 of the Civil Code the seller shall transfer to the buyer an unassailable rights over the thing sold and warrant the buyer against any total or partial dispossession which he might suffer in consequence of third parties exercising their right at the time of the contract. This is a law emanating warranty not contractual warranty. <sup>homonary</sup> <sub>= 27</sub> Therefore, the seller is duty bound by law to warrant the buyer against dispossession by third parties who have right over the thing sold.

By virtue of Article 2342 (1) of the Civil Code, if the buyer is totally dispossessed from the thing he bought which the seller has warranted him against dispossession, he may cancel the contract as of right. This Article talks about warrantable dispossession and per supposes dispossession made through the order of court as a result of a third party exercising his right over the thing. In such situation the buyer may cancel the contract unilaterally without giving notice to the seller.

The only remedy the buyer may resort to in case of dispossession is to cancel the contract and claim the compensation for any damage he has sustained. The buyer may not reclaim the thing from third parties who dispossessed him i.e. he cannot require the forced performance of the contract. This is because the dispossession which Article 2342 (1) talks about is the one which is made through judicial proceedings not the one made through unlawful means like usurpers. Therefore, logically, the court which ordered the dispossession of the thing from the buyer will not order the restitution of the thing itself to the same buyer in another proceeding. *logically ελπηδα αω*

In case the buyer is partially ousted from the thing the contract may or may not be cancelled depending on the will of the buyer<sup>20 2342(2)</sup>. The contract may not be cancelled where the part dispossessed from the buyer is of small importance and it appears that the buyer would have bought the thing had he known that he would be dispossessed of such part. The buyer may be able to put the thing to use irrespective of the dispossessed part.

Pursuant to Article 2341 (1) of the Civil Code, the buyer may also cancel the contract where as a result of a defect affecting his title the seller has not transferred the whole ownership of the thing to the buyer. This Article refers to the situation where the ownership of the thing is not transferred to the buyer because of third parties who have encumbrance over it. Here possession is not transferred to the buyer and hence dispossession is not yet materialized. Even in such situation, in light of this Article, the buyer may require the cancellation of the contract for fear of future dispossession. Because, he/she will not be able to exercise unassailable right of ownership over the thing due to third parties who have right over the thing.

The contract may, however, not be cancelled where the buyer on buying the thing knew of the encumbrance over the thing<sup>21</sup>. That means awareness on the part of the buyer lifts the liability from the seller. In such a case the buyer is going to bear the risk of dispossession himself. Also, the contract may not be cancelled where the right of third parties with which the thing sold is encumbered is of small importance and it appears that the buyer would have bought the thing even knowing the encumbrance over it. If the right of third parties affects only a minor right of the buyer, then he is not entitled to cancel the contract.

Let us consider the case<sup>22</sup> between Woizero Wegayehu Tesfaye Vs W/ro Haregwoin G/Meskel against the above-discussed background about cancellation. In that case the appellant bought a car (plate N<sup>o</sup> 2-10999) from the respondent for \$ 15,000 Eth Birr by a sale contract concluded on April 5, 1983 E.C. On the very date of the conclusion of the contract the appellant paid \$ 7,000 Birr out of the purchase price and took possession of the said Volkswagen car on the said date of the contract. According to the agreement of the parties the appellant was to pay the remaining \$8,000 purchase price by the time when the ownership of the car is registered in the name of the appellant (buyer) by the concerned authority. Accordingly, the car was registered in the name of the appellant and she paid Birr \$ 1,400 out of the remaining \$8,000 purchase price and failed to pay the remaining \$6,600 Birr.

The present appellant was sued in the lower court by the present respondent (seller) to pay the remaining purchase price and the court rendered its judgment in favour of the present respondent ordering the present appellant to pay the remaining 6,600 purchase price together with any damages and interests on the money.

105,000 109 15 10,000



Now the present appellant appealed to the Supreme Court to have the decision of the High court reversed and she required the Supreme Court to order the cancellation of the said contract on the ground that the car she bought was defective at the time of the contract. She also said that the respondent (seller) sold to her a defective car at the time of the contract without disclosing the defect in the car. Furthermore, she contended that she has made the car to be examined as soon as she took possession of the car and discovered that it was affected by lots of defects. Among the defect in the car, the appellant said that its engine was damaged “ሞተሩ የተፋቀና የተመታ” She notified as to the defects in the car to the respondent (seller) and the seller promised to reduce \$2,000 Birr from the purchase price. Thus, the appellant prayed the court to declare the cancellation of the contract and repayment of the money she paid for the price together with any damages she has sustained in repairing the car.

The appellate court refused to order the cancellation of the contract for arbitrary reasons at least to the understanding of this author. The court made reference only to the terms of the contract in rendering its judgment. It did not make reference to the law in determining the legal obligations of the parties. The court held that the respondent did not bind himself by the terms of the contract to be responsible for the defects in the car. Because, the contract doesn't say that the respondent is responsible for defects affecting the car. The respondent (seller) is obliged only to transfer ownership title to the appellant free from encumbrances. The court continued to argue that the obligation of the respondent (seller) in the contract was not to put right defects in the thing <sup>but</sup> and transfer its ownership to the appellant. Therefore, the court said, the request of the appellant for the cancellation of the sale contract due to the defects in the car is not in accordance with the terms of the contract. It held that there is no statement in the contract to the effect that the contract shall be cancelled incase the car is found to be defective. For the above

*“reasons”* the court, decided that the claim of the appellant is wrong and not in accordance with the contract.

The main issue to be questioned in the judgment of the court is whether the responsibility of the seller for defects affecting the thing he sold is an obligation to be included in the terms of the contract or a duty independently imposed by law. According to Article 2287 of the Civil Code, this is not contractual obligation rather it is the duty imposed by law because of the very existence of the contract. Seller guarantees to the buyer that the thing he sells is not affected by defects. Unless the parties have excluded or restricted this warranty by their agreement, the warranty is always there by virtue of the law irrespective of the intention of the parties. Therefore, in the opinion of this writer, the refusal of the appellate court to grant the cancellation of the contract for the reason that the terms of the contract doesn't allow is not in accordance with the law. Because, pursuant to Article 2344 of the civil code, the buyer may require the cancellation of the contract where the thing sold to him/her is affected by warrantable defect against which the seller warranted the buyer.

Moreover, the court in its argument stated that the appellant did not notify the seller of the defect in the car. But the appellant contended that she has examined the car as soon as she has possessed the car and notified the respondent as to the defect in the car. And no evidence is produced by the opponent party to disprove this fact. The court simply rejected this fact and rendered its judgment in favor of the respondent without considering the fact that the car was defective.

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*10/11/19*

## Conclusions and Recommendations

In every contract of sale, the primary purpose is to transfer title to personal property for a price. The seller in a contract of sale undertakes to deliver a thing and transfer its ownership to the buyer in consideration of a price expressed in monetary terms. If the seller does not have the title, then there is no sale contract because all that is transferred through a contract of sale is possession. That means the seller transfers to another only a title belonging to himself. However, there are exceptional situations where a thing belonging to another person may be sold.

At the time of the contract of sale, the parties to the contract tend to make all kinds of statements, which constitute terms of the contract. One of the most important terms that may be incorporated into a contract of sale is the term "warranty". While the contract to sell is the primary concern of the parties, warranties, however, are collateral undertakings that are given collateral to the contract of sale. They are dependent upon a contract of sale and their very existence necessarily presupposes the existence of a valid sale contract. They cannot exist without a contract of sale as an independent primary obligation since their very object is to guarantee to the buyer that certain matters relating to the thing sold are truly as they are uttered by the seller.

In some legal systems, warranties are simply considered as contractual terms of the sellers express or implied promises which doesn't have the force of law. The seller upon his own free will promises to be answerable for certain indicated matters related to the goods sold. However, in our legal system warranties in a contract of sale have a force of law. They are obligations which are independently imposed upon the seller by law than an agreement to be determined by the <sup>will</sup>whim of the parties. In each case, however, the seller warrants the buyer that the title he conveyed shall be good and its transfer rightful; and that the goods shall be delivered free from any security interests or encumbrances of which the buyer has no knowledge at the time of the contract.

Warranties are classified as express or implied. Express warranties are created when the seller makes any affirmation of fact to the buyer with respect to the thing to be sold that it shall conform to the contract and is not affected by defects. Any description concerning the thing sold made by the seller which constitutes part of the principal obligation of the contract will also create an express warranty that the thing shall conform to the description. Implied warranties, on the other hand, are created by operation of the law and they do not arise from any agreement of the parties. They are not one of the contractual elements of an agreement of sale i.e. they are created independently of the actual contract. But once they are implied into a contract of sale, the law conceives of such warranty as being a term of the contract.

In Ethiopian legal system the seller is under an obligation to make the buyer owner of the thing sold to him, The seller must take all the necessary steps to transfer to the buyer unassailable right of ownership over the thing he bought. One of such steps to be taken by the seller to transfer a perfect ownership title to the buyer is to warrant the buyer against any total or partial dispossession which he might suffer as a result of third parties who claim the right they have over the thing sold at the time of the contract. The seller is legally bound to warrant the buyer from being dispossessed. This obligation of the seller is imposed upon him by law and is always there by virtue of a contract of sale.

The seller shall also guarantee to the buyer that the thing sold and delivered to the buyer is not affected by defects. The thing which the buyer bought should, in all respects, possess the necessary qualities required for which the buyer wants to put it to use. The thing must possess the inherent quality required for its ordinary or normal use or particular use as agreed or implied in the contract. It must also possess the required qualities for its commercial exploitation or the specifications provided expressly or impliedly in the contract. The seller has the duty to ensure that the thing he sold possesses all these qualities. If the thing sold to the buyer doesn't possess such qualities required for its normal, particular or commercial exploitation, then the thing is said to

be defective and the seller shall be held liable for breach of warranty. So the seller must deliver a defect free thing.

Furthermore, the seller is under a legal duty to guarantee to the buyer that the thing he sold and delivered to the buyer exactly conforms to the one agreed on in the contract of sale. The thing shall not be deemed to conform to the contract where the seller delivered to the buyer part only of the thing sold or a greater or lesser quantity than he had undertaken in the contract to deliver; or where he delivered a thing different to that provided in the contract or a thing of a different specie. Consequently, the seller shall be held liable on warranty for the non-conformity of the thing to the contract.

But the seller may break his legal obligations of warranting the buyer against dispossession, defect and non-conformity. The buyer may suffer the risk of dispossession by third parties who come and claim their right over the thing sold. Or else, the seller may deliver a defective thing or a thing which does not conform to the contract. That means he may deliver a thing which does not possess the necessary qualities required for its normal use or commercial exploitation or particular use as provided expressly or impliedly in the contract. In such circumstances, the buyer has remedial mechanisms to which it may resort to. Among the remedies available to the buyer upon breach of warranty are: specific performance (Article 2329 and following), cancellation of the contract (Arts. 2342-2346), claim for damages (Art. 2360) and price reduction.

Specific performance of the contract upon breach of warranty is granted only by courts when it is of particular interest to the buyer. By specific performance the buyer demands the seller to deliver new things or the missing part of the thing where the thing is affected by defects and non-conformity. The prerequisite for this is however the impossibility of purchase in replacement. Where it is practically possible for the buyer to effects purchase in replacement for the defective thing without inconvenience or considerable expenses, he may not demand the forced performance of the contract. That means the buyer may not require the seller to replace the defective thing with a new one or to deliver the missing part of the thing incase of non-conformity. Conversely, however, if it is

impossible for the buyer to carry out purchase in replacement or if it cannot be done unless it is with much inconvenience or expenses, then the buyer has the right to demand the specific performance of the contract. He may require the seller to put right the defects in the thing or replace the thing as a whole with a non-defective one.

Cancellation, as a rule, is also a judicial declaration but it may also be exercised unilaterally by the parties when the discretion to this effect is reserved in the contract or when the law permits to do so. Cancellation of the contract is demanded by one party to a contract of sale where the other party has not or not fully and adequately performed his obligation within the agreed period of time. Thus, in a contract of sale, the buyer may demand the court to cancel the contract or may himself cancel the contract where he is dispossessed from the thing he bought by third parties who have encumbrance over the thing or where the thing is affected by defects or doesn't conform to the contract.

The buyer may also claim damages separately or in addition to the other two remedies in case of breach warranty by the seller. The buyer may suffer losses and damages where he is dispossessed of the thing sold to him or where the thing is affected by defects or non-conformity. In such a case the buyer may require the seller to compensate him for the damages. Or he may also claim price reduction in proportion to the extent of damage he has suffered by the defect affecting the thing.

Finally, the writer recommends that a seminar should be conducted in order to solve the problems which are come across in this paper. For example, should the non-conformity or defect in the thing be raised by the buyer against the seller of goods for non-performance of his contractual obligation or not? Should dispossession of the buyer by third parties be raised against the seller as a defence for his contractual non-performance or not? In the opinion of this writer, the buyer should be authorized to raise these matters as a defence against the seller when he (the buyer) is in breach of his contractual obligations towards the seller.

### Foot Notes to Chapter Three

1. Civil Code of the Empire of Ethiopia. (Proc. No. 165 Negarit Gazeta Extraordinary, 1960) Art. 2330.
2. Ibid
3. Id, Art 2332(2)
4. Ibid.
5. Ibid
6. Id, Art. 1786
7. Id, Art. 1785 (2)
8. Corpus Juris Secundum Acomplete Restatement of the Entire American Law. by F.J LUDES and H.J. GILBERT. West publishing Co. Vol. 78, 1952, pp. 154-155.
9. Ibid
10. Civil Code, Supra note 1, Art. 2344(1)
11. shewanesh Assefa Vs Muluneh Amare (Federal 1<sup>st</sup> Instance Court, Civil Case File No. 517/90 unpublished)
12. Civil Code, Supra note 1, Art 2344 (2)
13. Zergaw Haile Mariam Vs Getachew Manaye (Federal 1<sup>st</sup> Instance Court, Civil Case File No. 342/92, unpublished).
14. Civil Code, Supra note 1, Art. 2345 (1)
15. Id, Art. 2345(2)
16. Id, Art. 1747(2)
17. Wro Giday Kinfе Vs Ato Kahsay Haile Giorgis (Federal High Court A.A. Civil Case Fil No. 148/90, unpublished)
18. Civil Code, Supra not 1, Atr. 2343.
19. Ibid
20. Id, 2342 (2)
21. Id, Art. 2342 (3)
22. W/ro Wegayehu Tesfaye Vs Haregwoin G/Meskel (Supreme Court A.A. Civil Appeal file No. 32/85, unpublished).

# Appendix

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ሕዳር 13 ቀን 1993

ዳኛ ፈተላወርቅ ሙሉጌታ

ከሣሽ ወ/ር ገደይ ከገፋ ፡ ጠበቃ ፍጹም አስፋው ቀረቡ::

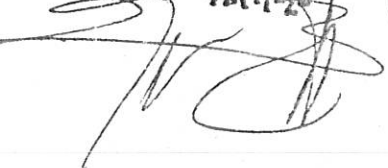
ተከሣሽ አቶ ከሀሣይ ኃ/ጊዮርጊስ ፡ አልቀረቡም ከተባለ በኋላ ቀረቡ::

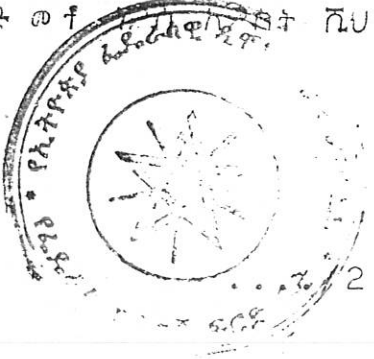
አወልካቸ ወ/ር አልጫዘ ክፍሉ ፡ አልቀረቡም::

ወዘገቡ የተቀጠረው ለምርመራ በጣል ሲሆን ተጠቅሞ የሚከተለው ውሳኔ ተሰጥቶአል::

## ው ሳ ኔ

ከሰኞ ነሐሴ 13 ቀን 1990 ዓ.ም ጸፈው ባቀረቡት የክስ ጭልከቻ ከሣሽ ከመቀሌ ልማት ባንክ በተበደሩት ገንዘብ ከተከሣሽ ጋር ሰኔ 14 ቀን 1987 ዓ.ም በተጻፈ የግዥ ጠያፍና የግዥ ተከላ ውል ስምምነት በብር 30,000/ሠላሣ ሺህ ብር የጻፉና የክስ መገገሪያ ግዥ ሽጠውልኑ ሰኔ 15 ቀን 1987 ዓ.ም በቀጥር 0386 በተጻፈ ደረጃ ብር 28,000/ ሃያ ስምንት ሺህ ብር /ተቀበለዋል:: የሽጠላ ሹጥ ግዥ ውሉ በተደረገው በ5 ቀን ጊዜ ውስጥ አደዋ ከተጣ ድረስ ሃይው ግዥ ነገጠው እና መሰራተን አረጋገጠው ሥራውን አስጀምረው ሲያስረክቡአቸው እና ቀሪውን 5,000/አምስት ሺህ ብር /ደገፍ ሊቀበሉ ከከሰኞ ጋር ተከሰሽ ተዋላዋል ይህንን ገዳታ ባለፈጸጠ ደገፍ ብር 10,000/አስር ሺህ/ገደብ ሊከፍሉ በውሉ ላይ ተከሰሽ ተሰማምተዋል:: ከሰኞ ይህን ግዥ ብር 5000/ አምስት ሺህ ብር/ለተራገሰገርት ከፍለው ከተከሰሽ ቤት አዲስ አበባ ወደ አደዋ ሲወስዱትም ተከሰሽ በውላቸው መሠረት በተባለው ጊዜና በታ ግዥ ነገ አልተከለም ስራ ወጀወሩንም አሳረገገጠም ግዥ ነገ ተከላ መሰረት ጀምሮ ሲሆን ኖሮ በቀን 10 ኩንታል ቶቂት ዳቦና ከክ የሚገኘው ሲሆን የስያገንን ኩንታል ብር 1000/ አንድ ሺህ ብር /በወር 30,000 ብር የ38. ወር 15 ቀን ሲባዛ 1,155,000/ አንድ ሚሊዮን አንድ መቶ ስምንት ሺህ ብር /በሌላም ተከሰሽ የመክፈል ገዳታ አለባቸው::

BA  
 ስለ ትክክል ግልጽ  




8/1  
 1993  


ሰለዚህም ለዕቃ ማሰጫ የተከፈለውን ብር 5000/አምስት ሺህ ብር/ የከፈለኩትን ተከላኝ ሊክፍሉኝ ይገባል በደምረ ብር 1,195,000/ አንድ ሚሊዮን አንድ መቶ ዘመና አምስት ሺህ ብር/ ሰለሚህን ተከላኝ ይህንኑ ክስ የቀረበበትን ገንዘብ እንዲከፍሉኝ በማለት ጠይቀዋል::

በማሰረጃነትም ሰኔ 14 ቀን 1987 ዓ.ም የተጻፈ የሚሾን ሽያጭ ውል ሰኔ 15 ቀን 1987 ዓ.ም የተጻፈ ተከላኝ ብር 28,000 /ገንዘብ ስምንት ሺህ ብር/ፈርመው የተቀበሉትን ደረሰኝ - ለከላኝ የተጻፈ የማሰጠን ቀደም ደብዳቤ እና የሽያጭ ውሉን መደረገ ሊያሰረዱልኝ ይቸላሉ የአሉኩ ሹውን የሰው ምስክርቸ ቀጥረው አቅርበዋል::

የከላኝ ማዕልከቻ ለተከላኝ ደርሶአ ሹው በ29/08/91 ዓ.ም በሰጡት መልስ ከከላኝ ጋር የካቲት 5 ቀን 1987 ዓ.ም በመሠረትነው ውል መሠረት የዳቦና ኪክ መሣሪያ ሠር ቸላ ሹው ሰኔ 14 ቀን 1987 ደገጦን በተፈራረምነው ውል መሠረት ማሽኑ ተሠርቶ ጸታረከበው ወሰደዋል በመሆኑም ከወሰዱት ከሶስት ዓመት በላይ ነው:: ሰለዚህ ፣ ክስለመመሰረት በፍ/ብ/ሕ/ቁ/ 2422/1/2/መሠረት ሦስት ዓመት ከሦስት ወር ከሃያ ዘመኝ ቀን የሆነው ሰለሆነ ክሱ በደርጋ ሕግ ውድቅ ይሆናል መክሰሰም አይቸሉም ኪሣራና መቀጫ ይከፈላሉ የሚሉትንም ሕግ አይፈቀድላቸውም ማሽኑን ለመውሰድ ወደ አድዋማለት ነው /ብር 5000/አምስት ሺህ ብር/ከፈለኩኝ ቢሉም ለመክፈላቸው ገን ያቀረቡት ማሰረጃ የለም:: ለጠይቀው አይቸሉም:: ማሽኑን አልገጠመልኝም ለሚሉትም እኔ ተጠርቼ እምቢ አላልኩም በፖስታ ማሰጠን ቀደም ከላኝ ጸፈው አልቀበልም አላልኩም በመሆኑም በውሉ መሠረት ተክክለኛ ማሽን (አወሰዱ በኋላ አሁን ያቀረቡኝ ክስ ያለ አገባብ ሰለሆነና የክሱ ገምትም የተገነኘሰሆነ ከበቂ ኪሣራ ጋር በነፃ እንዲያ ሠናበተኝ በማለት ፍ/ቤተን ጠይቀዋል::

በማሰረጃነትም ተከላኝና ከላኝ ቢዋዋሉም ሆነ ማሽኑን ያለረዱለት ሲረከቡ እንዲሁም ሰለጠቅሳላቸው ሁኔታ የሚያውቀው ያሏቸውን የሠው ምስክርቸ ጠቀሰዋል::

የተከላኝም መልስ ለከላኝ ደርሶአ ሹው በ9/11/91 ዓ.ም. በተጻፈ የመልስ መልስ ክላ ሹውን አጠናክረው በማሰጠት ተከፈክረዋል::

የተከላኝና የተከላኝ ጠቅላይ ስርዓት ለሰጡት በተገለጸው መልኩ የቀረበ ሲሆን ፍ/ቤተን በቀደም ያቀረቡትን ሰጠው ሰርገን ሰጠው ሰጠው ሰጠው ያደረገውን የመጀመሪያ ደረጃ

*B.D*  
ሰለ *ገልገሎት*



*Handwritten signature and scribbles*

ወቃወሚያ ወርዎርአል፡፡ይኸም የተከሰሽ የይርጋ ወከራከሪያ ተቀባይ ነትገያገኛል ወይስ አያገገም የሚለውን ነገብ በወያዝ ፍ/ቤተ ጉዳዩን ወርዎርታል፡፡

ተከሰሽ የከሰሽ ክስ በፍ/ብ/ሕ/ቀ/2422/1/42/ ወሠረተ በይርጋ ቀሪ ነው በማለት የሚከራከሩ ሲሆን በዚህ የሕግ ድንጋጌ ወሠረተ፡፡

“ አንድ ሰው የተለየ አይነት ያሏቸው ዕቃዎች ባሰፈለጉት ጊዜ በዎርቧ ከአንድ ዕቃ አቅራቢ ብቻ ለመውሰድ ገዳታ የሚገባበት ውል ከሦስት ዓመት የበለጠ ጊዜ ሊጸና አይችልም በሚል የተቀመጠ ሲሆን ይህም ድንጋጌ ተፈጻሚ የሚሆነው የተለየ ዕይነት ያሏቸው ዕቃዎች ለምሳሌ የተዘጋጁ ልብሶችን ወይም የዚህን ወሠል ዕቃዎችን በተመለከተ ሲሆን በዕቃ አቅራቢው እና ተረካቢው ይህንን ዕቃ በተመለከተ ቀጠር የሆነ የአቅርቦት እና የመረከብ ስራ የሚሠሩ ሲሆን ነው ወደተያዘው ጉዳይ ስንመጣ ገንገራ ቀጥ ያቋቋሙት የሽያጭ ውል አንድ ማሽንን የሚመለከት ሲሆን ይህም ማሽን የተለየ ጭይነት ዕቃ ችሎታው የተገለጸውን የገር ስለሌለ እና በገራ ቀጥመካከል ያለው ሽያጭ ውል ለሌሎች ተጠባባይ ማሻገር በቀባይነት ተፈጻሚ እንደሚሆን ያልተሰማው ስለሆነ እና ገንገሪነታቸው ቀባይ ስላሉሆነ ተጠቃሾች የሕግ ድንጋጌ በከሰሽ በኩል በቀረበው ክስ ተፈጻሚ የሚሆን ሆኖ ፍ/ቤተ አሳገገው፡፡

በዚህ ሌላ የከሰሽ ጥያቄ ተከሰሽ በውሉ ወሠረተ የገባውን ገዳታ በአለመፈጸም ኪሣራ ይክፈላል በማለት የቀረበሲሆን በፍ/ብ/ሕ/ቀ/ 1845 ወሠረተ ደገፀ ውልን ካላመፈጸም የተነሳ ስለሚደርስ ጉዳት የመጠየቅ መብት በዐሥር ዓመት ይርጋ ቀሪ ይሆናል ስለሚል የከሰሽ በስም መታየት ያለበት ውልን አስመልክቶ በተቀመጠው የይርጋ ጊዜ መሆን ስላለበት ተከሰሽ ባቀረበው የይርጋ መነሻ የከሰሽ ክስ ተቀባይ ነትገ አያገገም ማለት ስለማይቻል በዚህ ምክንያት ፍ/ቤተ በተከሰሽ በኩል የቀረበውን የይርጋ ወከራከሪያ ሳይቀበለው ቀርቶአል፡፡

በወቀጠልም ፍ/ቤተ በገራ ቀጥ መካከል በፍ/ረ ጉዳይ ላይ የተደረገውን ክርክር ወርዎርአል፡፡ ከሰሽ በገራ ቀጥ መካከል የሚሆን ሽያጭና ተከላቃሽ ተፈጻሚነት የተከሰሽ ገን በውሉ ወሠረተ ገዳታው አልተጠቀመም ስለዚህም ገዳታውን ባለው ወጣት ምክንያት የደረሰበትን ኪሣራ ተከላቃሽ ይክፈላል በማለት የጠየቀ ሲሆን ተከሰሽ ደገፀ በገራ ቀጥ መካከል ውል ገን መሆኑን ሳይከፋ በውሉ በተቀረበው

Handwritten signature and scribbles on the left side of the page.



Handwritten notes and a date stamp (8/3) on the bottom right corner.

ገዳታ መሠረት ፈጽሞ አለሁ በማለት ተከራክረዋል። ፍ/ቤቱ የሚከተሉትን ነገሮች በጭብጥነት በመያዝ ጉዳዩን አገባብነት ባሳገደው የሕግ ድንጋጌዎች አኳያ እና ገራ ቀጥቶ ባቋቋሙት ውል አኳያ መርዎርታል ጭብጠኛዎች።

1. ተከሳሽ ለተከሳሽ በውል የሸጡት ማሽን አገልግሎት የሚሰጥ ነው ወይስ አይደለም?
2. ውሉን ከሰጠ በጠየቀት መሠረት ቀሪ ሊሆን ይገባል አይገባም?
3. ውሉ ቀሪ ሊሆን አይገባውም ከተባለስ ከሰጠ ይከፈለኝ በማለት የጠየቀትን የኪሣራ ገንዘብ ተከሳሽ ሊከፍል ይገባል አይገባም? ይክፈል ከተባለስ ምን ያህል መክፈል አለበት? የሚሉት ናቸው።

በመጀመሪያ በተራ ቀጥሮ 1 ላይ የተቀመጠውን ጭብጥ ፍ/ቤት መርዎርታል።

ከሰጠ በክስ ማመልከቻቸው ላይ ተከሳሽ የሸጡት ማሽን የተሰጠውን አገልግሎት የሚያሰጥ ነው በማለት የገለጹ ሲሆን ተከሳሽ ደገዎ ማሽኑ አገልግሎት ጭሰላ በማለት ተከራክረዋል። በዚህ ሁኔታ የተሸጠው ማሽን የተሰጠው ነው በማለት የጠየቀት ከሰጠ ማሽኑ የማይሠራ ስለመሆኑ የሚያስረዳት ሽክም ያለባቸው ሲሆን ከሰጠ ገን በክሳቸው እና በውል ስለሰጡ ላይ ማሽኑ አይሠራም የማይሠራውን ማሽን ነው ተከሳሽ ያስረክቡኝ ባለው ውጭ ይህን ሁኔታ ለማስረዳት ገን ያቀረቡት ምንም ዓይነት ማስረጃ የለም። የቀረበውን ክስ ተከሳሽ ያስተባብሉ ሲሆን ማሽኑ ላለመሰራት ማስረዳት ያለባቸው ከሰጠ ሲሆንም ይህን ሁኔታ በምንም ዓይነት መልኩልፍ/ቤት ስላሳሰረዱ ከሰጠ የማይሠራ ማሽን ነው ተከሳሽ ያስረክቡኝ በሚል ያቀረቡትን ፍ/ቤት አልተቀበለውም።

በመቀጠል በሁለተኛ ተራ ቀጥሮ የተቀመጠውን ጭብጥ ፍ/ቤት መርዎርታል ከሰጠ ውሉ ቀሪ ሊሆን ይገባዋል በማለት ዳኝነት የሚጠይቀት ተከሳሽ የማይሠራ ማሽን አስረክበውኛል በሚል ሲሆን ነገር ገን በመጀመሪያው ጭብጥ ላይ እንደተመለከተው ከሰጠ ማሽኑ አለመሰራትን በማስረጃ አስደገፈው ያሳቀረቡ ስለሆነ እና ፍ/ቤቱ ማሽኑ አይሰራም የሚል መደምደሚያ ላይ ባለመደረሱ ውሉ ቀሪ ሊሆን ይገባዋል በሚል በተከሳሽ በኩል የቀረበው አቤተታ በዚህ ምክንያት ተቀባይነት ያለው ሆኖ ፍ/ቤት ላይ ላገገውም።

ሦስተኛው ጭብጥ ከሰጠ በኋላ የተቀመጠውን የኪሣራ ገንዘብ የሚመለከት ነው ተከሳሽ ከተከሳሽ ጋር የሚያደርገውን የሕግ ጉዳይ የሚሰጥ ገሳ ውል ማድረጋቸውን አልባቸውም

*Handwritten signature and scribbles*



*Handwritten notes and stamps at the bottom right*

እስከ አልተካደ ድረስ ደገዎ ከከሰሽ ጋር ያቋቋሙት ይህ ውል በፍ/ብ/ሐ/ቀ/ 1731/ህ/ መሠረት በገራ ቀኙ መካከል ስንደ ሕግ ሆኖ ያገለገላል። በገራ ቀኙ ላይም ገዳታ የሚጥል ይሆናል።

ከሰሽ በክል ማዕከላዊ ላይ ስንደጠቀሱት ተከሰሽ የሽጠውን ማሸን ውሉ ከተደረገ ቀን ጀምሮ በ5 ቀናት ውስጥ አድዋ ድረስ ሃይው ተክለውና ሰራ አባ ጀምረው መሰራተን አረጋገጠው ሊያሰረክቡን በተዋዋልነው መሠረት በሽማግሌ ከመ ጠየቀም በኋላ ማሰጠን ቀደም በሪታ ቤት በኩል ተልክለት ለመቀበል ፈቃደኛ ሳይ ሆን ቀርቶአል በዚህም መሠረት ተከሰሽ በውሉ ላይ በተቀመጠለት ገዳታ ስላልፈ ጸመ ኪሣራውን ሊከፍል ይገባል ብለዋል።

እንገዳህ ለዚህ ጭብጥ እልባት ለመስጠት ውሉን መወሰን አገባብ ይሆናል። ገራ ቀኙ በ14/10/87 በአደረጉት የሽያጭ ውል ውስጥ የሚከተለው ነገር ተቀምጧል። " አድዋ ከተማ የኤሌክትሪክ ሥራዎችን ከመቻቻ በኋላ በሰላክ ወይም በመልዕክት ለአቶ ከሀሣይ ሀበተ ጊዮርጊስ እንደተነገራቸው ሰፍራው ድረስ በመሃድ ይሆንኑ የኤሌክትሪክ ሥራዎችን ማሽኑን ገጥመው የማሽኑን ሥራ ሁኔታ ምክር ለማሰረክብ ለዚህም 5 ቀን የሚያስፈጸመው መሆኑን... " ውሉ ይጠቅሳል በዚህ የውል ቃል መሠረት ይኸው ማሸን ተኖኖ አድዋ ከተወሰደ እና አስፈላጊው ዘገፎት ከተጠናቀቀ በኋላ ከሰሽ ተከሰሽን እንደሚጠሩና ተከሰሽም ማሽኑን እንደሚገጥሙ የሚያመለክት ሲሆን በውሉ ላይ የተገለጸው 5 ቀናትም ተከሰሽ መልዕክት እንደደረሰባቸው ሥፍራው ከደረሱ በኋላ ሥራቸውን አጠናቀው የሚያሰረክቡት ለገጁ ውሉ ከተደረገ ጀምሮ በ5 ቀናት ውስጥ ተከሰሽ አድዋ ከተማ ተገኘተው ገዳታቸውን ለገዳላቸው የሚያስገድዱት አይ ደለም።

በዚህ ውል መሠረት ተከሰሽ ገዳታቸውን አልተወጡም በሚለት ከሰሽ በክሳ ጭ ላይ ቢገልጹም በፍ/ቤተ ገንዘብ ገን ተከሰሽ ገዳታቸውን አልተወጡም የሚሉው ክሰሽ በውሉ ጭ መሠረት በሰላክ ወይም በመልዕክት ገዳታቸውን እንዲጠሩ ለተከሰሽ ነገረዋቸው ሲሆን ኖሮ ነበር። ክሰሽ ተከሰሽ በውሉ መሠረት እንዲፈጸም ሽማግሌ ልክ ነበር ቢሉም ይህን ሽማግሌ ለማድረግ ገን የቀረበ ማሰረጃ



Handwritten signatures and scribbles on the left side of the page.

Handwritten notes and scribbles on the bottom right side of the page.

የለም ። ከዚህ ሌላ ደገፍ ለተከሰቡ መልእክተ በፖስታ ቤት በኩል የተላከ መሆኑን የሚያሳይ ማሰረጃ ያቀረቡ ሲሆን ፖስታው ተቀባይ በማጣት ተመላሽ ተደርጎአል። ይህም የሚያሳየው ተከሰብ የፖስታውን መልዕክት አለማገኘታቸውን ሲሆን መልዕክተ ደርሶአቸዋል ሊያሰጠል አይቻልም።

ከላይ በተዘረዘረው ሁኔታ መልእክተ ለተከሰብ ሳይደርስ ተከሰብ በውሉ መሠረት ገዳታቸውን አልተወጡም ለማለት ስለማይቻል ይህ ሳይረጋገጥ ደገፍ ከሰብ ደረሰበት ለሚሉት ከህረ ተጠያቂ መሆን ስለማይገባቸው ፍ/ቤተ ተከሰብ ይህንኑ የከህረ ገን ዘበሊክፍሉ አይገባቸውም ሲል ወስኖአል።

በዚህ መዘገብ በተከሰብ በኩል የቀረበውን ክስ ከላይ አንደተገለጸው ፍ/ቤተ ያልተቀበለው ስለሆነ ተከሰብ በዚህ ክስ ምክንያት ደረሰበት ለሚሉት ወጭ ዘርዘር የማቀረብ መብታቸውን ጠብቆ መዘገቡን ዘገብታል።

ተጨማሪ ተዕዛዝ

በገራ ቀኙ መካከል በአለው የፍ/ብ/ክርክር ምክንያት በወረዳ 20 ቀበሌ 43 ክልል በሚገኘው የቤተ ቀጥር 535 በሆነው መኖሪያ ቤት ላይ የተሰጠውን የዕ ገደ-ተዕዛዝ ፍ/ቤተ አንስቶታል ዕገዳም ለመሰላት አንዲያውቁት አገዱ ለተላለፈላቸው አካላት የዚህ ተዕዛዝ ገልገፎ ይደረሰው።

(ፎታ አካላት የዚህ ተዕዛዝ ገልገፎ ይደረሰው።)

*ጸ/ወ*  
በፍ/ብ/ክርክር  
2-4-93

የዳኛ ፊርማ  
ፈታለወርቅ መሉጌታ



*በሰጠው ገልገፎ*  
*02/04/93*  
*መ/ወ*

*የደ/ቤተ ገልገፎ*  
*በሰጠው ገልገፎ*  
*02/04/93*



















21/9/1992 ዓ.ም.

ለረገገው የግብርና ጽ/ቤት ፍርድ ቤት

35 ፍ/1/ፍ/ሥ/አ  
አዲስ አበባ

- ከሚከተሉት . . . . .
1. ለ ተዘጋጅ ጋራ ለግብር ጽ/ቤት  
ለግብር ለ.አ.ወ.ረ.ፍ 25 ነጠላ 05 የቤተ  
ግብር 354
  2. ለ ተዘጋጅ ግብር ጽ/ቤት ለግብር  
ለግብር ለ.አ.ወ.ረ.ፍ 2 ነጠላ 10 የቤተ  
ግብር 730

= በ =

ከሚከተሉት . . . . . ለ ተዘጋጅ ግብር ጽ/ቤት ለግብር  
ለግብር ለ.አ.ወ.ረ.ፍ 9 ነጠላ 20 የቤተ ግብር 659

የቤተ ግብር ጽ/ቤት

በፍ.ሥ.ሥ.አ.ገ ግብር 222 ይገኝ መሠረት የሚከተሉት የግብር ስጦታዎች ነው፡

1. የቤተ ግብር ጽ/ቤት - የክ.ተ. 9 ነጠላ 1992 ዓ.ም. የተገኘው የግብር ጽ/ቤት ስጦታ ስለ  
አገልግሎት ለግብር ጽ/ቤት በግብር ጽ/ቤት 50,000-  
ገንዘብ ግብር ቢ.ቢ.090109 እና ቢ.ቢ.090108 ለግብር  
ለግብር ጽ/ቤት ለግብር ጽ/ቤት ለግብር ጽ/ቤት ለግብር ጽ/ቤት  
መለሰው ለግብር ጽ/ቤት ለግብር ጽ/ቤት ነው፡

2. ፍርድ ቤት በክ.ተ. ግብር 25/1988 ዓ.ም. ለግብር 14 ይገኝ መሠረት ገ  
ግብር ስጦታ ለግብር ጽ/ቤት ለግብር ጽ/ቤት ነው፡

3. ከሌሎች ግብር ጽ/ቤት ነው፡ ከፍርድ ቤት የሚከተሉት ግብር ጽ/ቤት ከሚከተሉት ለ ተ  
ከሚከተሉት ግብር ጽ/ቤት ነው፡

4. ከሚከተሉት የግብር ጽ/ቤት ግብር ጽ/ቤት ለግብር ጽ/ቤት ለግብር ጽ/ቤት ለግብር ጽ/ቤት  
ከፍ ገንዘብ ለግብር ጽ/ቤት ነው፡

5. የቤተ ግብር ጽ/ቤት

5.1. ከሚከተሉት ለ ተ ከሚከተሉት ግብር ጽ/ቤት ግብር ጽ/ቤት 9 ነጠላ 1992 ዓ.ም. የተገኘው  
የግብር ጽ/ቤት ስጦታ ስለ ግብር ጽ/ቤት ስጦታ ነው፡

















የ \_\_\_\_\_ 517/90  
ፍ/ብ/4/ወ/ 1992 ዓ.ም.

ትዩኦያ ረደራላዊ ዲሞክራሲያዊ ሪፑብሊክ  
ጌዴራል መጀመሪያ ደረጃ ፍርድ ቤት

ኛሉት

ዳኛ ህገደም ገታሁን

ከሃሽ ወ/ር ሽግግር አሰፋ

ተከሃሽ አቶ ወ.ኤ.ህ አማረ

ወዘገቡ የተቀበረው ለምርመራ ሲሆን ፍ/ቤቱ ወርቆ የሚከተለውን ውሳኔ ሰጥቷል::  
= ውሳኔ =

ከሃሽ ሕጻር 1 ቀን 1990 ዓ.ም ጸፈው ባቀረቡት አቤቱታ ተከሃሽ  
ሠ. ቁ 1.00026 የሻገሳ ቁጥር 025478 የቆተር ቁጥር 133869 ፊያት  
ዳላ 1500 የሆነ ታክሲ ወኪና ነጠሴ 9 ቀን 1988 ዓ.ም በተፈፈ ይል በብር  
5000/ሰደስት ሽሀ ብር/ ሽጠውልን ብር 5000/አምስት ሽሀ ብር/ ስሰደው  
ኪና ዋን አሰረክበውን ወኪና ዋን አንደም ቀን ሃትን ቀሃቀሰና ማትሰራ በወቅረቷ ገን  
ቤን አንዲወለሱልን ወይም ወኪና ዋን አስተካክለው አንዲያሰረክቡን በሰጡ ባሰጠዎቻ  
ው ራሴም በጠይቃቸው ፊያደና ሰላላህኔና ወኪና ዋን ባረጠረጠረት ጥቅም የሌላት  
ሆኗን ሰላሰረዋች ተከሃሽ የማትሠራ ወኪና ያለአገገብ ሰለሸጠውን የሰደደትን ገን  
ቤን አንዲወለሱልን ይህ የሚይሆን ከሆነ ወኪና ዋን ጭረጭረትና አስተካክለው  
አንዲያሰረክቡንና በከፍ ምክንያት ያወጣሉትን ስጦታ ከሃራ አንዲከፍሉን ይወሰንባቸው  
ማለት አወልክተዋል::

ከሃሽ ለማሰረኝ ነት ከተከሃሽ ጋር ነጠሴ 9 ቀን 1988 ዓ.ም ያደረጉትን  
ወኪና ሽግግር ይል እና በጌሉ ላይ የነበረትን እግናቸው በጠዘርጠር አቅርበዋል::

የከሃሽ ክስና ማሰረኝ ልተከሃሽ ደርሷቸው የካቲት 10 ቀን 1991 ዓ.ም  
ፊታ ባቀረቡት ወልሰ በጌሉ ስምምነት ወሠረት ወኪና ዋን ያሰረክቡሉት ባለቸበት  
ነታ ነው:: በጌሉ ኃይለቃላ ላይ ወኪና አሰር ፍ ለማሰረኝ ገንዲታ አላገባሁም::  
ለ በተቀዋይ ወገኖቻቸው ወኪና ዋን ያለው ሰላህኔ ዳኛ ርተዐን ምክንያት በማደረግ  
ሉን ለማቀዳለም ሆነ ለመለጠጥ አይቻሉም በሌሁም ከሃሽ ያቀረቡት ክስ ሕገና ሰርዓትን  
ለተከተለ በመሆኑ ፍ/ቤቱ ከሃራ አስከፍሎ ፋይሉን ዘገታ ያሰናብተን በማለት አቀይ  
ባለዋል::

ከሃሽ ወጋቢት 6 ቀን 1991 ዓ.ም ጸፈው ባቀረቡት የወልሰ ወልሰ ከሃሽ ጌን  
ክስና ክረፍ አቅርበዋል::

ፍ/ቤቱ የገራ ቀጥን ክርክርና ማሰረኝ ክስ ጋር ሲያገናኝብ የተነሱትን  
አነዛሁም ፍ  
ከሃሽ የገጠተ ወኪና ዋን ያደረጉትን የሌላትና የተገካቸውን አገገገላት የምትሰጥ  
ለከሃሽ ወኪና ዋን ያደረጉትን ሕገግ ኃላፊ ነት አለባቸውን ይደሰ የሌላቸውን? እና  
ከሃሽ የተከሃሽ ጋር ያደረጉት ይል የሚፈፀም ነው ይደሰ የሚሰረዝ ነው? የሚሉ  
ዋል::



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ፍ/ቤቱ እነዚህን ጥበቆች እገባብነት ካላቸው ሕገ ጋር በግንኙነት መርምሯቸዋል።  
 ፍ/ቤቱ በመጀመሪያ የመረመረው ተከላኝ ለከላኝ የሽጧት መኪና ጉዳይት የሌለባትና የተ  
 ቸበትን አገልግሎት የምትሰጥ ለመሆኗ ቀጠ ያመሆን ሕገ ጋር ገዲታ ስለላባቸው? የሚለውን  
 ጠቅላይ ነው። በፍ/ቤ/ገ/ቁ/ 2287 መሠረት ሽጧት ያስረከቡ ነገር ጉዳይት የሌለበት  
 ሆኖ ለገዢው መደን /ኃላፊ/ ነው። በፍ/ቤ/ገ/ቁ/ 2289/ሀ/ መሠረት ሽጧት በሕገ  
 ገቢው መደን ተፈጻሚ የሚሆነው የሽጧት ንብረት ለተለመደው አገልግሎት ወይም በገንዘብ  
 ለመጠቀም ጥረት ያልሆነ ሲሆን ነው። ለሁን በተያዘው ጉዳይም ተከላኝ ለከላኝ  
 ሽጧት መኪና ታክሲ እንደመሆኗ መጠን ከላኝ መኪና ጋር የገዢ ለገንዘብ ለማዋል ብለው  
 ለሕገ መረጃት ባያገኙትም ታክሲን ለገንዘብ መገዛቸው ባቀረቧቸው ምስክርታዎች ተረ  
 ጠቅላይ። እንዲሁም ደገፍ ከላኝ በከላኝ ላይ መኪና ጋር አንድም ቀን ሳትሠራ መቀጠል ይቻላል።  
 ለሌላ ሲሆን ምስክርታዎችም ይህን አረጋገጠዋል። በአንዳንድ ደገፍ ተከላኝ መኪና ጋር  
 ተገዛቸውን አገልግሎት መስጠት የምትችል ለመሆኗ አሳስረዋል። ተከላኝ መኪና ጋር  
 ላይን አስርተው ለማስረከብ በጭሉ ባይሰጡም የሽጧት መኪና ጉዳይት የሌለባትና የተ  
 ቸበትን አገልግሎት የምትሰጥ ለመሆኗ ለከላኝ መደን የመስጠት ሕገ ጋር ኃላፊነት ስላለ  
 ጭ መኪና ጋር ለማሠይት የጭሉ ገዲታን ስላልገባሁ ፋይሉ ይዘጋጃል ሲሉ ያቀረቡትን  
 ምክር ፍ/ቤቱ አልተቀበለውም።

ፍ/ቤቱ በግሰብተል የተሰጠው ጥበብ ከላኝ ከተከላኝ ጋር ያደረጉት ጭ  
 ጭ ይህ ወይስ የሚሰረዝ ነው? የሚለውን ጥበብ ነው።

በፍ/ቤ/ገ/ቁ/ 2332 መሠረት ገዢው የተሽጧት ዐቃ ጉዳይት ያለበት መሆኑን  
 ሽጧት በሚገባ ያስታወቀው እንደሆነው ለሕገ መንግሥት ገዲታ ለማሰፈጫ በሚታደሰት ገዢ ሽጧት  
 ዐቃዎች የጉዳይትን እንዲያስረክቡ ለመጠየቅ ይቻላል።

ከላኝ ከተከላኝ የገዢ መኪና ጉዳይት ያለባት የሚተሠራ መሆኑን በሰጠው  
 ጭሉ ለተከላኝ ጭሰታዎች ገለጻል የተከረከረ ሲሆን ተከላኝ ይህን ክርክር  
 ላስተባባሰዋል። በመሆኑም ከላኝ የገዢ መኪና ጉዳይት ያለባት መሆኑን ለተከላኝ እን  
 ሰታወቁት እንገንዘባለን።

ከላኝም ተከላኝ ያደረጉት ጭሰ የሚፈጸም ነው ወይስ አይደለም? የሚለውን ጥበብ  
 በፍ/ቤ/ገ/ቁ/ 2330 ጋር በግንኙነት እና ያለን። በዚህ የሕገ መንግሥት መሠረት ገዢው  
 ስጦታውን ዐቃ በምትክ ወይም ከፍ ያለ ወጪ ሳይኖረው ለገዢ የሚቻለው ከሆነ ሽጧት  
 ስጦታን እንዲያስረክቡ ማስገደድ አይቻልም። ለሁን በያዘው ጉዳይ ከላኝ የገዢ  
 መኪና ታክሲ እንደመሆኗ መጠን በፍ/ቤቱ ገንዘብ ከላኝ ለላ ታክሲ መገዛት ይቻላል።  
 ለሌላ በኩል ደገፍ ከላኝ መኪና ጋር ተገኝቶ ከፍ ያለ ወጪ ለጭተኛ ካልሆነ በቀር  
 እንደሚቻሉ ለፍ/ቤቱ አሳስረዋል።

በሌላ ጉዳይም ከላኝ ተከላኝ መኪና ጋር ለሚሰጡ ለስተባባሪዎች ያስረክቡ ሲሉ  
 ያቀረቡትን ክርክር ፍ/ቤቱ አልተቀበለውም።

ቀጥሎን ከላኝ ከተከላኝ ጋር ያደረጉት የመኪና ሽጧት ጭሰ የሚሰረዝ ነው ወይስ  
 አይደለም? የሚለውን ጥበብ ለመለከታለን።

በፍ/ቤ/ገ/ቁ/ 234 መሠረት ያደረጉት ሕገ መንግሥት የሚፈጸም ካልሆነ በቀር  
 የተሽጧት ሽጧት ለገዢው ለሆነበት የሚገባው ጉዳይት የተገኘበት እንደሆነ

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የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፑብሊክ  
የፌዴራል መጀመሪያ ደረጃ ፍርድ ቤት

የ \_\_\_\_\_ ተ.

የ \_\_\_\_\_ ችሎት  
= 3 =

ውሉን ለማፍረስ ይቻላል። ለሁን በተያዘው ጉዳይ ተከላኝ ለከላኝ የሸጧት መኪና ጉዳይ ያለባት መሆኗንና ለተገዛቸበት የገንዘብ ለገልገሉት የማተራረብ መሆኗን ከላይ ተመልክተናል እንዲሁም ደገፍ ተከላኝ የሸጧት መኪና ተገባውን ለገልገሏት የምትሰጡ ለመሆኗ መደን የመሰጠት ወይም ላይ የመሆን ሕጋዊ ገዳታ እንዳለባቸውም ከላይ አይተናል።

እንገዳህ ተከላኝ ለከላኝ በሸጧት መኪና ላይ ራሃቸው ተገባ መሆን የሚገባቸው ጉዳይት ስላለባቸው በሁለቱ መካከል የተደረገው የመኪና ሽያጭ ውል ፊርማ ይሆናል ማለት ነው።

በከላኝና ተከላኝ መካከል የተደረገው ውል ፊርማ ከሆነ ውጤቱ ምንድን ነው? የሚለው እዚህ ላይ መታየት ያለበት ነጥብ በመሆኑ ለገመልክተዋለን።

በፍ/ብ/ሐ/ቁ 2355/1/ ላይ ለገደተደነገገው ውሉ በፊርማ ገዢ ተዋዋዩ ለገቡባቸው ገዳታቸው ነፃ ይሆናሉ ይህ ማለት ተዋዋይ ወገኖቹ ለመሬፀም የገቡትን የውል ገዳታ እንዲፈጽሙ አይገደዱም ማለት ነው።

በዚህ ለንቀጽ ገዕዥ ቁጥር /2/ መሠረት ደገፍ ለገደቡ የውሉን ያል በሙሉ ወይም በከፊል ፈጽሞ ለገደህህ የሰጠው/ የከፈለው/ ነገር እንዲመለስለትና ያወጣው ከሃራም እንዲከፈለው ለመጠየቅ ይቻላል።

ለሁን በተያዘው ክርክርም ከሃሽ ለተከላኝ ብር 5000/አምስት ሺህ ብር/ መክፈላቸውን በከላኝ ላይ ከመገለፅ በላይ በምስክርታቸው የተረጋገጠ ሲሆን በሌላ ደገፍ ተከላኝ ገንዘቡን ላለመቀበላቸውም ሆነ በሕገ መደን መሰጠት የሚጠበቁባቸውን ጉዳይት ማስተካከላቸውን አልገለጹም፤ ለሳሰረደም።

:- ስለሆነም ተከላኝ የቆመ መኪና ቸውን ተረክበው ከከላኝ የተቀበሉትን ብር 5000/አምስት ሺህ ብር/ እና በፍ/ብ/ሐ/ቁ 2356/1/ መሠረት ገንዘቡን ከወሰዱበት ቀን ጀምሮ ተከፍሎ ለስክላለቀ ደረሰ ሕጋዊ ወለድ ዘጠኙ በመተ

ለከላኝ እንዲከፍሉ ፍጆቤቱ ወሰኗል። ወጪና ከሃራ ገራ ቀጥ ይቻላል።

መዘገቡ ወደ መዘገብ ቤት ተመለሷል።

ሰር ማ

የጻፈ ፊርማ ወገድም ገታሁን



የጻፈ ፊርማ ወገድም ገታሁን

በክልል 14 መስተዳደር  
የክልል ፍ/ቤት

ፍ/ቦ/መ/ቁ/32/85  
የካቲት 9 ቀን 1985 ዓ.ም

ዳኞች፤ ሉሉ ወልዴ  
ተስፋዬ ሀጎስ  
ዘለቀ ዲሬሳ

ይግባኝ ባይ፤ ወ/ር ወጋየሁ ተስፋዬ ጎ (ጠጋ)  
መልስ ሰጪ፤ ወ/ር ሐረገወይን ገ/መስቀል ጎ (ጠጋ)

መዝገቡን መርምረን የሚከታውን ውሳኔ ሰጥተናል።

ው ሳ ኔ

ይግባኝ ባይ ህዳር 9 ቀን 1985 ዓ.ም በተፃፈ የይግባኝ ማመልከቻ የአሁኑ መልስ ሰጭ በይግባኝ ባይ ባቀረቡት ክስ ሚያዝያ 5 ቀን 1983 ዓ.ም በተፃፈ ውል የሰሌዳ ቁ.2-10999 አ.አ ቮልቦግን መኪና በብር 15,000 ገዝተው ብር 7,000 ከፍለው መኪናውንና ሊብሬውን ተረክበው ወሰደዋል። ቀረውን ብር 8,000 የመኪናው ሊብሬ በሰማቸው ሲዛወር ለመክፈል ተሰማምተናል። ከሚፈለግባቸው ቀሪ ገንዘብ ብር 8,000 ውስጥ ብር 1400 ከፍለው ከራሳቸው ብር 6600 ለመክፈል ፈቃደኛ ሆነው ባለመገኘታቸው ከገንቦት 1983 እስከ ሚያዝያ 1 ቀን 1984 ዓ.ም ድረስ ወለድ ብር 544.50 መቀጫ ብር 1000 ለትራንስፖርት ብር 1000 በድምሩ ብር 9144.50 ወጪና ኪሳራ እንዲሁም ከሚያዝያ 2 ቀን 1984 ዓ.ም 1984 ዓ.ም ወለድ 9/ እየታሰበ ጨምረው እንዲከፍሉ በማለት በቀረበው ክስ የከፍተኛው ፍ/ቤት 1ኛ/ ቀረውን ብር 6600 2ኛ/ በክሱ ላይ የተመለከተውን ወለድ ብር 544.5 3ኛ/ ውሉን ለመፍረስ በቀጥታም ሆነ በተዘዋዋሪ መንገድ የሞከረ ብር 1000 ለመክፈል ሃላፊነት እንዳለበት ውሉ ስለሚገልጸው ይህንን ለወደፊት ገንዘብ ተከፍሎ እስከሚያልቅ ድረስ ወለድ 9/ ወጪና ኪሳራ ይግባኝ ባይ ለመልስ ሰጭ እንዲከፍሉ በማለት የሰጠውን ውሳኔ በመቃወም መልስ ሰጭ የሰሌዳ ቁ.2-10999 አ.አ. የተመዘገበችውን ቮልቦግን መኪና የሸጡልኝ በመኪናዋ ላይ ያለውን ጉድለት ሳያሳውቁ በመሆኑ መኪናዋን ከመልስ ሰጪ እንደተረከብኩ በጋራ እንድትመረመር አድርጌ ብዙ ጉድለቶች የተገኙባትና ሞተሯ የተፋቀና የተመታ መሆኑን ለመልስ ሰጭዋ አስታውቆ መልስ ሰጭዋ ጉድለት ለማሟላት የተሰማም ስለሆነና ቀረውን የመኪና ሽያጭ ገንዘብ ለመቀበል የሚችሉት በውሉ መሰረት የመኪናዋን ጉድለት አሟልተውና የሚፈለግበትን አዳ ከፍለው የመኪና ባለቤትነት መታወቂያ ሊብሬ በይግባኝ ስም ተዛውሮ እንዲመዘገብ ከተደረገ በኋላ ስለሆነ መልስ ሰጭ በቅድሚያ በውሉ የገቡትን ግዴታ ሳይወጡ ቅር ገንዘብ የከፈላቸው በማለት የተወሰነው ክውል ውጭ በመሆኑ በውላችን መሰረት ለመልስ ሰጪ ወለድ አከፍላለሁ የሚል ግዴታ ሳልገባና ሳልሰማማ ወለድና ኪሳራ እንደከፍል የወሰነው የማይገባ በመሆኑ የከፍተኛው ፍ/ቤት ውሳኔ ተሸርልኝ የመኪናው ሞተር የተፋቀና የተመታ ለመሆኑ በፍ/ሥ/ሕ/ቁ/132/135/136 መሰረት በኤክስፐርት ምርመራ ተደርጎ ሁኔታው ከተረጋገጠ በኋላ መልስ ሰጪ መኪናውን የሸጡት የመኪናውን ልዩ ልዩ አክሱሮችና የሞተሩን ጉድለት ሰውረው ለመሆኑ ተረጋግጦ ይግባኝ ባይና መልስ ሰጪ በፍ/ብ/ሕ/ቁ/1784/1815 መሰረት ከውል በፊት ወደነበርንበት ሁኔታ እንድንማስ/መልስ ሰጭ/ውሳኔ ተሰጥቶልኝ በቀብድ የተቀበልኩትን ገንዘብና በመኪናም ጉድለት ምክንያት

ያወጣሁትን ልዩ ልዩ ኞች እንዲከፍሉኝ የመጠቅ መብቴ ተጠብቆ መልስ ሰጥቶ ያቀረቡት ክእንዲለቁ ውሳኔ እንዲሰጥልኝ በማለት አመልክተዋል።

ይግባኝ ሰሚው ፍ/ቤት መዝገቡን ከመመርመሩም በላይ ይግባኝ ባይን አቅርቦ በቃል አነጋግሯል። በዚህም መሰረት ይግባኝ ባይ ሲያሰረዱ መኪናዎን ከመልስ ሰጥ እንደገዛሁ አስምቁኝ ጉድለት ስለተገኘበት ይህንኑን ለመልስ ሰጭ በቃል ነግሬ በተገኘው ጉድለት ተማው ከዋጋው ብር 2000 እቀንሳለሁ በማለት ቃል ገብተው ነበር ብለዋል።

መዝገቡን እንደመረመርነው ሚያዝያ 5 ቀን 1983 ዓ.ም በተደረገ የመኪና ሸያጭ ውል መልስ ሰጭ ለይግባኝ ባይዋ የሰሌዳ ቁ.2-10999 የሻንሲ ቁ.111242413 የሞተር ቁ.ኤቪ 133399 ኢ.አ አውቶሞቢል ሾልሰዋገን መኪናቸውን ብር 15,000 መሸጣቸውንና ውሉ በተፈጸመ ጊዜ ብር 7000 መልስ ሰጪ በመረከብ የመኪናውን የባሌቤትነት መታወቂያ ሊብሬና መኪናዎን ባለችበት ሁኔታ ለይግባኝ ባይ በማሰረክብ ቀሪውን ብር 8000 በመኪናዋ ላይ ያልተከፈለ ግብር ቢኖር ሰጪ በማጠናቀቅ ክፍለው የባሌቤትነት ሊብሬ በይግባኝ ባይ ስም ሲዛወር ለመቀበል በመኪናዋ ላይ የትራፊክ ክስ፤አዳ አገዳጅ የመንግስትም ሆነ የግለሰብ አዳ ቢኖር መልስ ሰጭ ኃላፊ መሆናቸውን መሰማማታቸውንና ይግባኝ ባይም በውሉ መሰረት ቀሪውን ብር 8000 ከላይ በተጠቀሰው መሰረት ለመክፈል ተስማምተዋል። መልስ ሰጥ የካቲት 5 ቀን 1984 ዓ.ም እና መጋቢት 5 ቀን 1984 ዓ.ም በተደጋጋሚ መስጠንቀቂያ በመስጠት ይግባኝ ባይ ከነበረባቸው ብር 8000 ውስጥ ብር 1400 ከፍለው ቀሪው ብር 6600 ያልከፈሉአቸው መሆኑን ገልጸው ይህንኑ አንዲከፍሉአቸው አስጠንቅቀዋል።

ይግባኝ ባይ መልስ ሰጪ የሸጡልኝ መኪና ጉድለት እንዳለበት ወዲያውኑ ደርሸቤት ለመልስ ሰጭ ይህንኑ ገልጬ ከገንዘቡ ውስጥ ብር 2000 እቀንሳለሁ በማለት ቃል ገብተውልኛል የበሉ እንጂ መልስ ሰጭ ይህንን ለመቀበላቸው በበታች ፍ/ቤት ያቀረቡት ማሰረጃ ካለመኖሩም የመኪና ሸያጭ ሰሚያዝያ 5 ቀን 1983 ዓ.ም ተደርጎ መኪናዎንና ሊብሬውን ተረክበው በአጃቸው ከቆዮች በኋላም በነሀሴ 12 ቀን 1983 ዓ.ም ከነበረባቸው ገንዘብ ውስጥ ብር 1400 መክፈላቸው ታውቋል።

ይግባኝ ባይ መኪናዎም እንደተረከቡ ጉድለት ሲያገኙባት ይህንኑን በመግለፅ መልስ ሰጭን ያሰጠነቀቁበት ሁኔታ ካለመታየቱም ሸያጩ ከተደረገ በኋላ ክፍያቸውን ከላይ በገለፅነው ጊዜ መክፈላቸው በውላቸው መሰረት እንደቀጠሉ ሲያሳይ በውላቸው መሰረት በመኪናዋ ላይ የሚፈለግ አዳ መልስ ሰጪ ክፍለው የመኪናውን ሊብሬ በይግባኝ ባይ ስም አዛውረውቀጊውን ገንዘብ ለመቀበል እንጂ በመኪናዋ ላይ ጉድለት ቢኖር መልስ ሰጪ አሟልተው ስም ለማዛወር አይደለም። መልስ ሰጪ በውሉ ግዴታው መሰረት መኪናዎን በይግባኝ ባይ ስም ለመዛወር መዘጋጀታቸውን በሰጡት ማስጠንቀቂያ የገለጹ ሲሆን-ይግባኝ ባይ ግን ከውሉ ውጭ በመኪናዋ ላይ ጉድለት ስለአለባት ውሉ ፈርሶ ወደ ነበርንበት እንመለስ ብለዋል። ይግባኝ ባይ በውላቸው መሰረት መኪናዎን ከተረከቡ በኋላ ጉድለት ተገኝቶባት የተለያዩ ወጭዎች ያወጡ ቢሆንም መኪናዋ ጉድለት ቢኖራት ውሉ ፈርሷል ወይም መልስ ሰጪ ጉድለቱን ይተካሉ የሚል ባለመኖሩ የይግባኝ ባይ ጥያቄ ተቀባይነት አይኖረውም፤ በመሆኑም ይግባኝ ባይ በውሉ መሰረት መፈጸም አለባቸው በማለት የክፍተኛው ፍ/ቤት የሰጠው ውሳኔ የሚነቀፍበት ነጥብ ስለሌለው ውሳኔውን ብደገፍ መልስ ሰጪውን ስናስቀርብ የይግባኝን መዝገብ ዘግተናል። የክፍተኛው ፍ/ቤት ውሳኔ አለመለወጡን እንዲያውቀው የዚህ ውሳኔ ግልጭ ይድረሰው ብለናል። መዝገቡ ወደ መዝገብ ቤት የመለስ ብለናል። ይህ ውሳኔ የካቲት 9 ቀን 1985 ዓ.ም ተሰጠ።

የዳኞች ፊርማ፤ ሉሉ ወልዴ  
ተሰፈዬ ሀጎስ  
ዘለቀ ዴሬሳ

ደቦች ፣ የገበ ዘውገ  
አሸቱ ደምሴ  
ራሄል ዓስግሮሁ

1. በመዝገብ ቁጥር 504/80  
ይገባላቸው ደቦች ፣- 1ኛ. ኮሎኒል ሙላት ጃስታ  
2ኛ. አቶ በላይ አሰጊ

መልስ ሰጭዎች- 1ኛ. አቶ ቅጣው መሸዛ  
2ኛ. አቶ አያሌው ተገኝ

2. በመዝገብ ቁጥር 705/80  
ይገባላቸው ደቦች ፣- እነ ኮሎኒል ሙላት ጃስታ  
መልስ ሰጭዎች- 1ኛ. ሙሉጊታ ጫቃ  
2ኛ. አያሌው ተገኝ

3. በመዝገብ ቁጥር 1198/80  
ይገባላቸው ደቦች ፣- እነ ኮሎኒል ሙላት ጃስታ  
መልስ ሰጭዎች- 1ኛ. አቶ ፀሀይ ሀብተሚካኤል  
2ኛ. አቶ አያሌው ተገኝ

ዚህ በላይ በሲ.ባ.ቲ. መዝገብ የቀረበው ይገባላቸው ተመርምር ቀጥሎ  
የተመለከተው ተወስኗል።

ው ሳ ኔ

ዚህ ይገባላቸው መቅረብ የዘገየት የሆነው የከፍተኛ ፍ/ቤት በፍ.ብ. ይ.መ ቁጥር  
659/79፣ 320/79 እና 860/79 በሰጠው ውሳኔ ይገባላቸው ደቦች ቅር ተሰኝተው በሀዳር 18  
ቀን 1980 ዓ.ም፣ በግንባር 13 ቀን 1980 ዓ.ም እና በጥር 19 ቀን 1980 ዓ.ም በመዝገብ  
የተገፈ የይገባላቸው ግመልዘኛ ስለአቀረቡ ነው።

ከርክሩ በአረጋገጥ ጊዜ የተሰጠ ሲሆን በፍ.ብ.ይ.መ. ቁጥር 504/80 ቀርቦው አቶ  
ቅጣው መሸዛ አቶ ሙሉጊታ ጫቃ አቶ ፀሀይ ሀ/ሚካኤል በተለያዩ መዝገቦች የፍርድ  
ባለሙያዎች አቶ አያሌው ተገኝ የፍርድ ባለሙያ ሲሆኑ ኮሎኒል ሙላት ጃስታና አቶ  
ዩላይ አሰጊ ተቃዋሚዎች ነበሩ። የከርክሩ ታሪክ ጥያቄ እንደሚከተለው ነው።

አቶ ቅጣው መሸዛ በአቶ አያሌው ተገኝ ላይ ብር 15,000 ለሰፈርዶ አረጋገጠውን  
ይቀጥላል። በአረጋገጠውም በጥሰትና የያዘሉት የሰሌዳ ቁጥር 471 አ.አ. የሆነች መኪና  
ሰላሳ ስህራጅ ተሸጦ ገንዘብ ይከፈላል በግብት ያመለከታል። ፍ/ቤቱ የሰሌዳ ቁጥር  
471 አ.አ. የሆነችው መኪና ስህራጅ ተሸጦ ለአዳው እንዲከፈል ያዛል። እንዲሁም አቶ  
ሙሉጊታ ጫቃ በአቶ አያሌው ተገኝ ላይ ብር 14500 ያሰፈርዳል። አረጋገጠውን ቀጥሎ

የሰሌዳ ቁጥር 471 የሆነች መኪና በሀፊቿ እንድትሸጥለት ያመለክታል። ፍ/ቤቱ የተጠቀሰችው መኪና በሀፊቿ ተሸግ ለአዳው እንዲከፈል ያሳል። አቶ ፀሀይ ሀብተ ጊካኤል በአቶ አያሌው ተገኝ ላይ ከሰ አቅርቦ ብር 5710 እንዲከፍል ያስፈርደበታል። አፈጻጸሙን ቀጥሎ የሰሌዳ ቁጥር 00471 የሆነችው መኪና በሀፊቿ እንድትሸጥለት ያመለክትና ፍ/ቤቱ በሀፊቿ እንዲሸጥ እና ለአዳው እንዲከፈል ያሳል።

ይህ ከሆነ በኋላ የአሁን ይገባኝ ባዮች በተለያዩት መዛገቦች ላይ ቀጥሎ የተመለከተውን አቤቱታ ያቅርባሉ። መጋቢት 19 ቀን 1978 ዓ.ም በተደረገው ውል የመኪናው ጠቅላላ የጥጋ ገምት ብር 120,000 ሆኖ የዚሁት እኩሌታ ጥጋ ብር 80,000 ለአቶ አያሌው ተገኝ ከፍለገ ገዝተነዋል። በዚህ ዓይነት ለስክ ጥር 5 ቀን 1979 ዓ.ም ከሰራገበት በኋላ ጥር 5 ቀን 1979 ዓ.ም በተደረገ ውል ከመኪናው ጥጋ 2/3 ሸጠው አቶ አያሌው በመኪናው ላይ 1/3 ብቻ ያላቸው መሆኑን በመገለጫ የገዢ ውል አድርገዋል። ይህንኑ ብር 30,000 በድጋሚ ከተቃዋሚዎች ላይ ተቀብለው ሄደዋል ከዚያም ተቃዋሚዎች የፍርድ ባለአዳ የመኪናዋን ስም ለሰለጠኑት ለአሁኑኛው ፍ/ቤት መዝገብ ቁጥር 1267/79 የሰም ይዛወርለን አቤቱታ አቅርበን ሚያዝያ 10 ቀን 1979 ዓ.ም በእርቅ ጩባን መኪናው ከአዳ አገዳ ነገ መሆኑ በሚጠራበት ጊዜ 1ኛ ተጠሪ ከሁለተኛ ተጠሪ ላይ በሚፈልጉት የብድር ገዝብ በዚህ ፍ/ቤት ከሰ አቅርበው በግሰፈረዳቸው ያክንደት መጋቢት 22 ቀን 1979 ፣ ሚያዝያ 12 ቀን 1979 በመዝገብ ቁጥር 206/79 እና 1134/79 ገዢት 6 ቀን 1979 ዓ.ም በቁጥር 2267/79 መኪናዋ መከፈርን የመንገድ ትራን ስፖርት ለአሁኑኛ ፍ/ቤት ገለጻል ስለይዘታ መብት ቢሆን መኪናዋ በጫረታ የተገዛች እንደመሆንዋ መጠን ውዜፍ ከፍያዎቿን ላይ ላይ ፎርግሊቶችን ለስክ ያጠናቅቅ ድረስ ስም ሳይዛወር መቶቱ ካልሆነ በቀር መኪናዋን ተረክበን በእጃችን አድርገናል። ስለዚህ የቅድሚያ መብት ስለአለን በመኪናዋ ላይ የተሰጠው ግሰክበሪያ ትእዛዝ ይነሳልን በግሰት ያመለክታል። ከአቤቱታው ጋር በግሰፈረዳችን መጋቢት 19 ቀን 1978 ዓ.ም የተደረገ ሸያጭ ውል ጥር 5 ቀን 1979 ዓ.ም በድጋሚ የተደረገ ሸያጭ ውል ሚያዝያ 10 ቀን 1979 ዓ.ም የተደረገ እርቅ ስምምነት አቅርበዋል።

በዚህ አቤቱታ የፍርድ ባለመብቶችና የፍርድ ባለአዳው በየረዳቸው መልስ ሰጥተዋል። ሁለቱ የፍርድ ባለመብቶች የመንደር ውል ሊፀና አይገባውም ከግሰታቸው በላይ ፀሀይ ሀ/ጊካኤል መኪናዋን ቀድሞ ግሰክበሪን ጠቀሟል። አንደኛው የፍርድ ባለመብት ደገም ተቃዋሚዎቹ ይዘታ አለን የኛ ናት የሚሏት መኪና በአዳ የተደረገና ገና በሰጥቸው ያልተዛወረች በመሆንዋ የፍርድ ባለአዳው ዲክሎራሲያን አሳይተው ቀደም ብለው ለመኪና ግሰፈሪያ ብለው ብር 15,000 ተበድረውበታል። ይህ ሆኖ እያለ ተቃዋሚዎች በመንደር ውል መኪና ገዝተዋል ባሉ በግንኛውም የመንገስት መ/ቤት ያልተመዘገበ ውል በመሆኑ ተቀባይነት ሊኖረው አይገባም በግሰት ይከራከራሉ።

የፍርድ ባለአዳውም ሆኖ 24 ቀን 1979 ዓ.ም በተገፈ ግመለክቻ የሸያጭ ውሎች መደረጋቸውን አምኖ አቤቱታው ገን ተቀባይነት ሊኖረው አይገባም በግሰት ተከራክሯል። ተቃዋሚዎችም ከርክራቸው በመልስ መልሳቸው ላይ አጠናክረዋል።

የከፍተኛ ፍ/ቤትም የተቃዋሚዎቹን የፍርድ ባለመብቱንና የፍርድ ባለአዳው አቤቱታ ከሰግ በኋላ ውሳኔ ሰጥቶአል። በውሳኔውም የተቃዋሚዎቹ ከርክር የተመረኮዘው የመኪናው ባለሀብት ሆነዋል በሚል ነው። ይህ ከሆነ በገድ ለመኪና ባለሀብትነት ቅድመ ሁኔታዎች በፍለገ. ቁጥር 1186/2/ የተመለከተው የተጠባቀ ነው። መኪናና ሊብሬብ በይዘታ በግድረገ ብቻ ባለሀብት ለመሆን አይችልም ተቃዋሚዎች መኪናና ሊብሬ

በእዳችን አለ ከሚሉ በቀር ስም አላዛወሩም። ቢያንስ እንኳን የአደረጉት ሽያጭ ውል በውል ከፍላ አልፎም ይህን ሳያደርጉ ባለገብረችኝ ነገ ግለታቸው ህገን የተመተሰ ስለአልሆነ አቤቱታቸው ተቀባይነት የለውም በግለት ካገሩ በኋላ መኪናዎ በሀረጅ ተሸግ ለአዳው ይከፈል በግለት በይፍአል። በአቶ ፀሀይ ሀ/ሚካኤልና በአቶ ሙሉጌታ ጫካ በቀረበው መዝገብ ደገፍ ፍ/ቤቶች ቀደም ሲል በከፍተኛ ፍ/ቤት አረገፀም መዝገብ ቁጥር 659/79 የመጨረሻ ውሳኔ ያገኘ ስለሆነ በዚህ መልክ ይፈፀም በግለት ወሰኖአል። ይገባኝ ተብሎ ስዚህ ፍ/ቤት የቀረበው ውሳኔ ለማሰለጠፍ ነው።

የይገባኝ ጥያቄ ሁለተኛ መልስ ሰጦ መጋቢት 19 ቀን 1978 ዓ.ም በተደረገ ውል የመኪናዎን አጋጣሽ ጥር 5 ቀን 1979 ዓ.ም በተደረገ ውል የመኪናው 2/3 ገዝተናል። ይህም ለመሆኑ የሽያጭ ውል ሰነድ ግሰረጃ አለን የከፍተኛ ፍ/ቤት መኪናው በይዘታችን ሊብረው በእዳችን አያለ ገብረታችን የሆነውን መኪና በሀረጅ ይሸፍና ለአዳው ይከፈል ያለው ያለአገባብ ነው የሚል ነው።

የገራ ቀጽ ክርክርና የበታች ፍ/ቤቶች ውሳኔ ከጣይ እንደተገለፀው ሲሆን በኛ በኩል መዝገቡን መርምረን ገራ ቀጽን በቃል በማገገገር ስለተዳዩ በቂ ገንዘብ አገኝተናል።

በዚህ ጉዳይ ለገይዘው የሚገባን ጭብጥ የሰሌዳ ቁጥር 471 የሆነች መኪና በአቶ አያሌው ተገኝ አዳ ምክንያት ለተሸጥ ይገባታል አይገባትም የሚለው ነው።

በዚህች መኪና ላይ በአቶ አያሌው ተገኝ ላይ አሰረርደናልና መኪናዎን በአዳ ለፍሽግላን የሚሉ የፍርድ ባለመብቶች 3 ናቸው። አቶ ቅጣው መሸሻ ብድሩን በማስደርሰት ጊዜ ጥቅምት 4 ቀን 1979 ዓ.ም በተገፈው ውል መኪናዎን በመያዣነት ይዣታለሁ ባይ ሲሆን አቶ ፀሀይ ሀ/ሚካኤል ደገፍ አን ስለፍላ ሙሉጌታ ጫካ መኪናዎን ገዝን የሚሉት መጋቢት 19 ቀን 1978 ዓ.ም ሲሆን እኔ ደገፍ በጥናው ጉዳይ ከሰ እንደቀረብኩ ታህሳስ 25 ቀን 1978 ዓ.ም መኪናዎ እንዳትሸጥ እንዳትለጠፍ በመን ገድ ትረጎሰጋርት በፍ/ቤት በኩል እንድትከበር አድርጊአለሁ ባይ ነው። አቶ ሙሉጌታ ጫካ ደገፍ መጋቢት 14 ቀን 1979 ዓ.ም መኪናዎን አሰራሰሁ ባይ ከመሆናቸውም በላይ የፍርድ ባለመብቶች የገ ከሎኒል ሙሉጌታ ጫካ የመኪና ሽያጭ ውል የመንደር ውል ከመሆኑም በላይ በማናቸውም የመንገስት መሰሪያ ቤት ስለአልተመዘገበ ተቀባይነት ሊኖረው አይገባም ጥያቄ ናቸው። በመሰረቱ ይገባኝ ጥያቄ መኪናው አጋጣሽ ገዝን የሚሉት መጋቢት 19 ቀን 1978 ዓ.ም በተደረገው ውል ነው። ይህ ውል በገራ ቀጽ መካከል ከተደረገ በኋላ በማናቸውም በሚመለከተው መንገስት መ/ቤት አልተመዘገበም። ከዚያም ሲሆን በመኪናው ላይ ያላቸውን መብት ከፍ በማድረግ ተዋዋለን የሚሉት ጥር 5 ቀን 1979 ዓ.ም የተደረገው ውልም እንዲሁ በገራ ቀጽ መካከል ተደርጎ እንዲሆን እንጂ በሚመለከተው መንገስት መ/ቤት ተመዝገቦ አልተገኘም። ይገባኝ ጥያቄ መኪናውን ገዝተናል በግለት ስም እንዲዛወርላቸው በፍ/ቤት ያመለከቱት ህዳር 10 ቀን 1979 ዓ.ም ነው። ለስዚህ ጊዜ ድረስ ገን ምንም የወሰዱት እርምጃ አልነበረም። እንዲያውም አቶ ቅጣው መሸሻ የተባለውን መኪና በጥሰትና ይሸጥሉ ባይ ሲሆን ይህንም በፍ.ሀ.ሀገ ቁጥር 2829 መሰረት የያዘት መኪና የተሸጠበት ዲክራሲዮን ሲሆን ይህም ተቀባይነት አለው። አቶ ፀሀይ ሀ/ሚካኤል የእን ስለፍላ ሙሉጌታ ጫካ ውል ተቀባይነት አለው አልተባለም እንጂ ቢባል እንኳን ለሰቀደም መኪናዎን ተሸገጥን ባይሉ መኪናዎ እንዳትሸጥ እንዳትለጠፍ አስከፊረዎት ለመቆየቱ ከመዝገብ ተረድተናል። ሲሆንም ገን ይገባኝ ጥያቄ የሽያጭን ውል አደረገኩት

የግለሰብ ቀን አገግኝነት ያለው ስለአለሁ የፍርድ ቤቅ-ባቶች መኪናዎን ከግለሰብነት በፊት ገዝተዋል ለግለሰብ አይችሉም። ይህ ሲሆን ይቻል የነበረውና መኪና ሽያጭ ውል ቀንም አገግኛ ይህን የነበረው ገዥዎች የሽያጭን ውል በግራም ለከተው መ/ቤትም ሆነ በፍ/ቤት በወትሮ አሰመዘገበው ወይም አቤቱታ አቅርበው ሲሆን ነበር። በዚህ ሁሉ የከገኙትም ይገባሉ ገዥዎች ከአዳ ነፃ የሆነች መኪና ገዝተዋል ለግለሰብ አይችሉም።

ስለዚህ ከላይ በተዘረዘሩት የከገኙት ሁሉ በፍተኛ ፍ/ቤት በሰብአዊ የአረጋጭ መዝገቦች ላይ የሰጠው ውሳኔና ትእዛዝ የሚነቀፍበት የከገኙት ስለሌለ በፍብረር በጎ ሰርአት ህግ ቁጥር 348/1/ መሰረት ይገባል። በዚህ ይገባሉ የከገኙት የደረሰውን ቢሳራና ወጭ ገራ ቀጥ ይቻላል። እገድ ካለ ተነሳሽ። ይኖሩ።

የዳኞች ሪርግ፣ ሞረሰ ዘውገ  
አሸቱ ደምሴ  
ራሂል ዓለማየሁ



## Foot Notes for Chapter One.

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