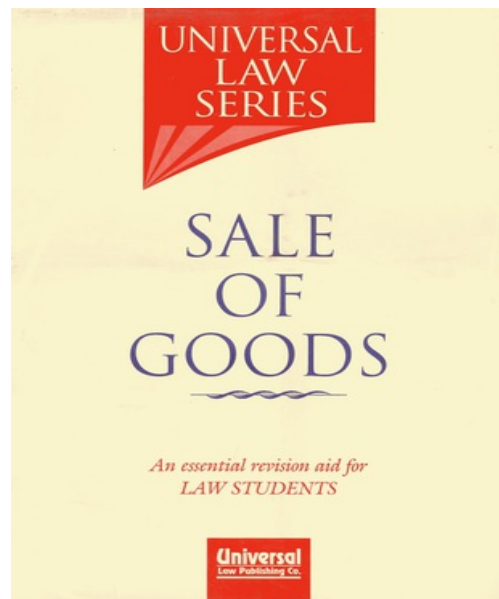
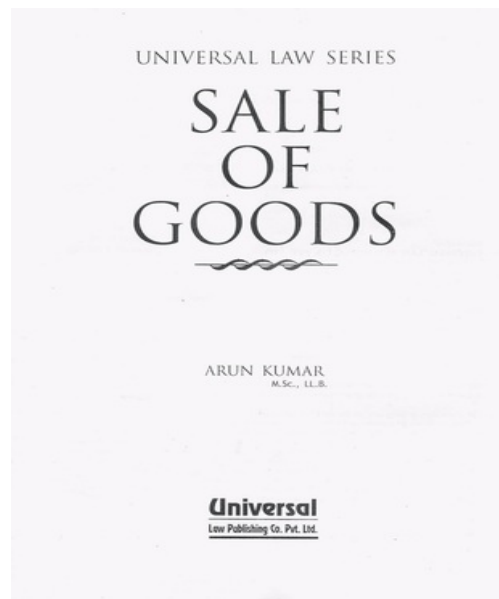


Toc



Authors Details

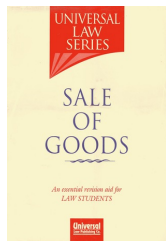
Toc



Contents

CHAPTER 1

THE SALE OF GOODS ACT, 1930



Introduction	1
Statement of Objects and Reasons	1
Charts	6

CHAPTER 2

DEFINITIONS AND ESSENTIALS OF SALE

1. Short title, extent and commencement	8
2. Definitions	8
2(i) Buyer and Seller	9
2(ii) Delivery	10
2(iii) Documents of Title to Goods	10
2(iv) Bill of Lading	10
2(v) Dock Warrant	10
2(vi) Warehouse- Keeper's Certificate	10
2(vii) Delivery Order	11
2(viii) Railway Receipts	11
2(ix) Multimodal Transport Document	11
2(x) Goods	11

CHAPTER 3

FORMATION OF THE CONTRACT

1. Essentials of Sale	13
2. Bilateral Contract	13
Q. Define sale with the help of relevant cases	14
3. Money consideration	15
Q. What do you mean by money consideration?	15
4. Sale and Contract for Work and Material	15
5. Goods	15
Q. Write note on 'goods'	15
6. Sale and Agreement to Sell	16
Q. Distinguish between sale and agreement to sale	16
7. Sale and Hire Purchase	16
Q. What is the difference between sale and hire purchase?	16

8. Formalities of the Contract	17
9. Subject-matter of Contract	18
10. Effect of Damage	18
Q. What do you mean by effect of damage? Discuss it in light of the provision given in section 7 of the Act.	18
Q. What are the effects on contract if goods perish before making the contract?	18
11. Goods perishing before Sale but after Agreement to Sell	19
12. Price	19
Q. Discuss the determination of price with the help of relevant case.	20
13. Agreement to Sell at Valuation	20

CHAPTER 4

CONDITIONS AND WARRANTIES

1. Stipulations as to Time	23
Q . "Time stipulation for the payment is not essence of the contract" substantiate with relevant example.	23
1.1 Stipulations as to Time of Payment	23
1.2 Stipulation as to Time of Performance of other Terms	23
Q. In which cases time is considered as essence of the contract? Explain.	24
2. Condition and Warranty	24
Q. Discuss conditions or warranties of a contract of sale as given in section 12 of the Sale of Goods Act, 1930.	24
2.1 Baldry v. Marshall, (1925) 1 KB 260: (1924) All ER Rep 515	25
2.2 We can find the illustration of Warranty in the case; Harrison v. Knowles and Foster, (1917) 2 KB 606: (1918-19) All ER Rep 306	25
3. Condition to be Treated as Warranty	26
3.1 Waiver by Buyer	26
3.2 Acceptance of Goods by Buyer	26
4. Implied undertaking as to title etc.	26
Q . Can a buyer claim the price of goods if it was found on possession that it was stolen and seller sold it knowingly?	27
5. Sale by Description	28
Q . Under the provision of section 15 of the Sale of Goods Act discuss the sale by description. Cite relevant cases also.	28

6. Sale by Sample	30
Q . Discuss the provision of section 15 of the Sale of Goods Act, which deals with 'Sale by Sample'.	30
7. Conditions implied by way of Exceptions to Rule of Caveat Emptor	30
Q. What is the significance of the exceptions of the rule 'caveat emptor' in contract?	31
8. Division of section 16	32
8.1 Fitness for Buyer's Purpose	32
Q. What do you mean by fitness for buyer's purpose under section 16(1).	32
8.1(i) Sale under Trade Name	33
8.1(ii) Sale to consumer statutory changes	34
8.1(iii) Sale by Agent	35
8.2 Merchantable Quality [Section 16(2)]	35
Q. What is merchantable quality of goods.	35
8.2(i) Purchase by Description	35
Q. Write note on "Purchase by Description".	35
8.2(ii) Marketability	35
8.2(iii) Sale of Pictures: A General Observation	36
8.2(iv) Packing	36
8.2(v) Goods should not violate Applicable Statutes	36
8.2(vi) Test of Merchantable Quality	37
Q. Define and discuss the test of Merchantable Quality".	37
8.2(vii) Statutory Definition of Merchantability	37
8.3 Conditions Implied by Trade Usage [Section 16(3)]	38
8.4 Express Warranty [Section 16(4)]	38
9. Sale by Sample	38
Q. Discuss 'Sale by Sample' with the help of relevant cases.	39
9.1 Bulk to Correspond with Sample	39
9.2 Opportunity to compare Bulk with Sample	39
9.3 Goods free from any defect, rendering them unmerchantable	39
Q . Discuss under section 17 the requirement of goods to be merchantable.	39
9.4 Buyer's State of Knowledge about Goods	40

Q . Upto what extent a buyer is responsible regarding his knowledge about the goods? Explain it with the help of relevant cases. 41

CHAPTER 5

EFFECTS OF THE CONTRACT

1. Introduction 44

Q . Define 'ascertained goods' and differentiate it with 'unascertained goods'. 44

2. Importance of transfer of property 45

3. Property passes when intended to pass 45

Q. What are the circumstances in which it can be said that the goods have been passed? 45

4. Sale of Specific Goods 47

5. Meanings of terms 48

5.1 Specific Goods 48

5.1(i) Shankar Das v. Bhanna Ram, AIR 1926 Lah 606 48

5.1(ii) Kursell v. Timber Operators and Contractors Ltd., (1926) 135 LT 223 49

5.1(iii) Aluminium Industries Ltd. v. Minerals and Metals Trading Corporation of India Ltd., MANU/TN/0836/1997 : AIR 1998 Mad 239 49

5.2 Deliverable State 49

Q. What do you mean by 'deliverable state' of goods? Discuss it in the light of provision of section 2(3). 50

5.3 Unconditional Contract 50

6. Goods to be put in Deliverable State 51

Q . What do you mean by "to put the goods in deliverable state". Discuss it with the help of relevant cases. 51

7. Goods to be Weighed or Measured 51

(a) Zagury v. Furnell, (1809) 2 Camp 240: 11 RR 704 52

(b) Sanwick v. Sothorn, (1839) 48 RR 740 52

(c) Shoshi Mohun Pal Chowdhry v. Nobo Kristo Poddar, (1878) 4 ILR Cal 801 52

8. Sale of Unascertained Goods and Appropriation (Section 23) 52

8.1 Some more points on Appropriation 53

Q. Why it is mandatory on part of seller to sort out the goods for appropriation of goods. 53

8.2 Appropriation without Buyer's Assent	54
8.3 Buyer's Assent may be Express or Implied	54
8.4 Appropriation _ Unconditional and Goods of Contract Quality	54
9. Delivery to a Carrier	55
• Acknowledgement by Bailee	55
10. Goods Sent on Approval or 'On Sale or Return _ Section 24 of the Act says as	56
10.1 Delivery of Goods on Sale or Return	56
Q. Is it essential on the part of buyer to approve or 'on sale or return' before the goods passes to the buyer?	56
10.2 Risk of Loss or Damage	56
10.3 Delivery on Sale or Return and Conditional Sale	57
11. Reservation of right of disposal	57
Q. Explain the provision of section 25 of the Sale of Goods Act as- "Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the term of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled."	57
12. Transfer of Risk	58
Q. When it is decided that risk of goods has been transferred to buyer? Discuss it with the help of relevant cases.	58
12.1 Separation of Risk from Property	58
12.2 Delay in Delivery of Goods	58
12.3 Express Agreement	59

CHAPTER 6

TRANSFER OF TITLE

1. Introduction	61
2. Buyer is without Title when Sale is by a Person who is not the Owner of the Title	62
Q. Explain the meaning of- Buyer is without title when sale is by a person who is not the owner of the title."	62
3. Nemo Dat Quod Non Habet	63
Q. Explain the maxim nemo dat quod non habet	63
4. Estoppel	63
Q. What do you mean by estoppel in the sale of goods? Explain with the help of relevant cases.	64

• Estoppel by Negligence	64
5. Sale by Mercantile Agent	65
5.1 Mercantile Agent	65
Q. Define 'mercantile agent'.	65
5.2 In Possession as Mercantile Agent	66
5.3 With Owner's Consent	66
5.4 Must sell while acting as Mercantile Agent	66
5.5 Good faith and without Notice	67
6. Sale by one of Joint Owners	67
7. Sale by Person in Possession under Voidable Contract	67
7.1 Seller under Voidable Title	68
Q. What do you mean by sale by person who is in possession of goods under voidable contract?	68
7.2 Goods must be Obtained in Pursuance of a Contract	70
8. Seller or Buyer in Possession after Sale	71
8.1 Seller in Possession after Sale [Section 30(1)]	72
Q. Explain the conditions as mentioned under section 30(1).	72
8.2 Buyer in Possession before Sale [Section 30(2)]	73

CHAPTER 7

PERFORMANCE OF THE CONTRACT

1. Introduction	76
2. Duties of Seller and Buyer	77
3. Payment and Delivery, two Concurrent Conditions (Section 32)	77
Q. Do you agree with the facts that payment and delivery in sale of goods are two concurrent conditions, to be fulfilled in sale?	78
• Readiness and Willingness	78
4. Delivery	78
4.1 Delivery of Goods	78
Q. What is symbolic delivery? Explain it with the help of relevant cases.	79
4.2 Acceptance and Receipt	79
4.3 Symbolic Delivery	79
4.4 Constructive Delivery	79
Q. What is constructive delivery? Discuss it with the help of some cases.	80

5. Effect of Part Delivery (Section 34)	81
Q. Explain the effect of part delivery with relevant case laws.	81
6. Buyer to apply for Delivery	81
• Buyer's Duty to Apply for Delivery	81
7. Rules to Delivery [Section 36]	82
Q. Define the rules of delivery.	82
7.1 Place of Delivery	83
Q. What are the rules of delivery of goods? Under provisions of section 36 of the Sale of Goods Act?	83
7.2 Time for Delivery	83
7.3 Duty of Seller to Dispatch	83
7.4 Delivery 'as required'	84
7.5 Attornment of Bailee	84
7.6 Expenses of Delivery	84
8. Delivery of Wrong Quantity	84
8.1 Delivery of less Quantity of Goods	85
8.2 Delivery in Excess of Contract Quantity	85
8.3 Delivery of contractual goods together with others	86
9. Instalment Deliveries	86
9.1 Instalment Deliveries	86
9.2 Entire Contracts	87
9.3 Severable Contracts	87
9.4 Failure in paying an Instalment	87
Q. What would be the effect of non-payment of an instalment on contract? Discuss with case laws.	87
10. Delivery to Carrier or Wharfinger	87
10.1 Delivery to Wharfinger or Carrier	88
10.2 Duty of Seller on Delivering Goods in a Carrier	88
10.3 Transit by Sea	89
11. Risk where Goods are delivered at a Distant Place	89
12. Buyer's Right of Examining the Goods	90
Q. Can a buyer reject the goods after delivery if he finds that the supplied goods do not commensurate with the quality agreed at the time of contract? Explain it.	90

13. Acceptance	91
Q. When it can be said that the goods have been accepted by the buyer? Explain it with the help of relevant cases.	91
• Time for Rejection	92
14. Buyer not bound to return Rejected Goods	93
Q. Is buyer bound to return the rejected goods?	93
15. Liability of Buyer for Neglecting or Refusing Delivery of Goods	93

CHAPTER 8

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

1. Introduction	97
2. 'Unpaid seller' defined	97
2.1 Unpaid Seller	97
2.2 Payment by Bill _ Conditional Payment	98
2.3 Payment by Credit Card	98
3. Unpaid Seller's Rights	99
Q. What are the rights of unpaid seller?	99
• Rights where Property Remains in the Seller	99
4. Seller's Lien	100
4.1 Seller's lien	100
4.2 When lien exists	100
5. Part Delivery	100
5.1 Lien Available though Seller has Parted with Possession of Part of the Goods	100
5.2 Instalment Deliveries	100
6. Termination of Lien	101
6.1 Loss of Lien	101
6.2 Buyer Tortiously obtaining Possession	101
6.3 Waiver of lien	101
6.4 Waiver of lien by Wrongful Acts	102
7. Right of Stoppage in Transit	102
Q. What are the grounds to invoke the provisions of section 50 if the seller wants to stop the goods in transit?	102
8. Duration of Transit	102
Q. When a transit deemed to be at an end. Explain in the light of provisions of section 51.	103

8.1 Delivery to the Buyer [Section 51(1)]	103
8.2 End of Transit before its Destination [Section 51(2)]	104
8.3 Acknowledgement to the Buyer [Section 51(3)]	104
8.4 Rejection of Goods by Buyer [Section 51(4)]	104
8.5 Delivery to a Ship Chartered by a Buyer [Section 51(5)]	105
8.6 Wrongful refusal to deliver the Goods [Section 51(6)]	105
8.7 Part Delivery [Section 51(7)]	105
9. How Stoppage in Transit is Effected (Section 52)	106
9.1 Notice to Principal	106
Q. What are the ways by which the unpaid seller stops the goods in transit?	106
9.2 Duties of the Carrier and the Seller	107
10. Effect of Sub-sale or Pledge by Buyer [Section 53]	107
10.1 Seller's rights do not get affected by the Buyer's dealing with the goods	107
10.2 Transfer of the Bill of Lading	108
Q. Discuss 'transfer' of the bill of lading with the help of relevant cases.	108
10.3 Good Faith	109
11. Sale not Generally Rescinded by Lien or Stoppage in Transit (Section 54)	109
11.1 Further rights of the Unpaid Seller against the Goods	109
11.2 Contract not Rescinded by the Buyer's Default in Payment	110
11.3 The Seller's Right to Resale	110
11.4 Lawful Resale by the Seller	110

CHAPTER 9

SUITS FOR BREACH OF CONTRACT

1. Introduction	112
2. Suit for Price (Section 55)	112
3. Damages for non-acceptance [Section 56]	113
• Damages for Breach of Contract	114
Q. Discuss 'damages for breach of contract' and cite some cases relevant to it.	114
4. Damages for non-delivery (Section 57)	114

Q. What are the remedies available for a buyer if he doesn't get

delivery of goods from the seller.	115
• Duty of Mitigation	115
5. Specific Performance (Section 58)	116
Q. What is specific performance? Describe it under the provision of section 58 of the Sale of Goods Act.	116
6. Remedy for Breach of Warranty (Section 59)	116
6.1 Notice to Seller of Defective Condition	117
6.2 Resale by Buyer	118
6.3 Acceptance of Goods without Inspection	118
7. Repudiation of Contract before Due date (Section 60)	118
7.1 Measure of Damages	118
7.2 Measure of Damages when Goods are to be Delivered by Instalments	119
8. Interest by way of Damages and Special Damages (Section 61)	119

CHAPTER 10

MISCELLANEOUS

1. Exclusion of Implied Terms and Conditions (Section 62)	122
1.1 By Express Contract	122
1.2 Course of Dealing	123
1.3 Trade Usage	124
2. Section 63 of the Act speaks about the Reasonable time	124
3. Auction Sale	124
3.1 Aim	125
3.2 'Ring' or 'knock-out'	126
3.3 Bidder's Right to Withdraw Bid	126
3.4 Auctioneer's Right not to Accept any Bid	126
4. In Contracts of Sale, Amount of Increased or Decreased Taxes to be Added or Deducted (Section 64A)	126
5. Repeal	127
6. Savings	128

CHAPTER 11

QUESTIONS AND ANSWERS

• Table of Cases	138
• Section Index	145

CHAPTER 1

THE SALE OF GOODS ACT, 1930

Introduction

The Indian Contract Act was passed in 1872. Before that, law relating to the sale of goods was outside the limits of the Original Jurisdiction of the High Courts and was extremely uncertain in its application. The English law relating to the sale of goods which was the basis of Chapter VII of the Indian Contract Act, 1872 had undergone sea changes and was finally codified in 1893. Considering all the facts and pros and cons of the Chapter VII of the Contract Act, a draft Bill was prepared on the lines of the English Sale of Goods Act, 1893, embodying the provisions of law relating to sale of goods in a separate enactment.

In order to ensure general approval for a measure of such a highly technical character the Government of India in 1929 appointed a committee to consider generally the question of amending the law relating to sale of goods contained in Chapter VII of the Indian Contract Act, 1872 and in particular to examine the draft Bill.

This committee agreed to the proposal that the law relating to the sale of goods should be embodied in a separate enactment and considered the draft Bill referred to it. In September, 1929 the Indian Sale of Goods Bill was introduced in the Legislative Assembly.

Statement of Objects and Reasons

The Bill has been explained in the Report of the Special Committee as given below:

(i)The Committee assembled at Simla on the 29th April, 1929, when its first meeting was held and continued its deliberations daily until the 9th May, 1929. A Bill to amend and define the law relating to the Sale of Goods, with the notes setting forth the reasons for the proposed amendment which had already been prepared in the Legislative Department of the Government of India was placed before us, and formed the basis of our discussions.

(ii)As mentioned in the introductory part, the law relating to the sale of goods or movables was not uniform and also outside the limits of the original jurisdiction of the High Courts, extremely uncertain in its application. Within the limits of the Presidency-towns the rules of English law, including those in the statute of frauds, were applied, whilst in the mofussil it was doubtful whether the statute of frauds was applicable and as observed by the Indian Law Commissioners in their Second Report, the Judge was to a great extent without the guidance of any positive law beyond the rule that his decision should be such as he deemed to be in accordance with "justice, equity and good conscience". To remedy their unsatisfactory State of Affairs the Indian Law Commissioners framed in their Second Report, dated the 28th July, 1866, a set of rules relating to the general law of contracts including therein provisions relating to the sale of movables. The draft of Law Commissioners underwent several changes at the hands of the then Law Members, Sir Henry Maine and Sir James Stephen, and also in the Select Committee of the Indian Legislature. But, as stated by Sir James Stephen himself while presenting the Report of the Select Committee on the Indian Contract Bill, the Chapter on the Sale of Goods, except in regard to the rule as to market overt represented generally the English Law on the subject as it then stood.

(iii)Rules of English law were, however, largely dominated by the provisions of the statute of frauds which was passed in the reign of Charles the second. The Law Commissioners, as well as those who were ultimately responsible for framing the Indian Contract Act, at once realised that the provisions of the statute of frauds, although followed in the Presidency towns, were not suitable to the conditions prevailing in this country, and that "any law relating to this important subject must at any rate be free from the inexpressible confusion and intricacy which is thrown over every part of the statute in consequence of its vague language".

(iv)In 1870, various branches of law were being codified in British India. The main object in view was, in the words of Sir James Stephen, "that of providing a body of law to the Government of the country so expressed that it might be readily understood both by English and Native Government servants without extrinsic help from the English law libraries". What was urgently needed was a guide for the judge or magistrate who had but little legal training, derived little or no assistance from the Bar and worked at a distance from any law library.

(v)The law relating to the sale of goods appertains mainly to mercantile transactions. There can be no doubt that during the last half-century conditions in this country relating to trade and business have undergone material changes. Methods of business, have largely altered and new relations have arisen between man and man. In dealing with these relations, it has been necessary to give recognition to new principles and the Indian Courts have found that a law enacted more than fifty years ago is entirely inadequate to enable them to deal with these new regulations or give effect to the new principles. The result has been that on various occasions the Courts have had to hold that Chapter VII of the Indian Contract Act is not exhaustive, and to import therein analogies from the decision of the English Courts.

(vi)The English law relating to the sale of goods which was admittedly the basis of Chapter VII of the Indian Contract

Act has itself since 1872 undergone drastic changes and was finally codified in 1893 by the present Sale of Goods Act (56 and 57 Vict., C 71) which discards many of the old common law rules upon which Chapter VII of the Indian Act was based in favour of provisions more suited to modern conditions or more convenient in actual practice.

(vii) By the Bill referred to our consideration, the law relating particularly to the sale of goods is embodied in a separate enactment, although many of the general principles contained in the Indian Contract Act will continue to be applicable thereto. When Sir James Stephen moved the Indian Contract Bill, he admitted that it was not and could not pretend to be, a complete code upon the branch of law to which it related. He, however, expressed a hope that in later years it would be easy to enact supplementary chapters relating to the several branches of the law of contract which the Bill did not touch. This hope has never been fulfilled. In later years it was found more convenient to have separate enactments for the several branches of the law of contract, e.g. the Transfer of Property Act, the Negotiable Instruments Act, and the Merchant Shipping Act. In our opinion in view of the complexity of modern conditions, the time has now come when this process should be accelerated by embodying the different branches of law relating to contract in separate self-contained enactments; and we hope that the Bill which we attach to our Report may be passed into law at an early date and may be but the first of the series required to complete the task which we have outlined above.

(viii) The Bill referred to us was mainly based on the English Sale of Goods Act, 1893. This Act has stood the test of nearly thirty-five years of practical application and in the words of Lord Parker in *re Parchim*, (1918) AC 157 at pages 160-161 "is a very successful and correct codification of this branch of the mercantile law." As is shown in Appendix B to our Report, most of the Colonies and Overseas Dominions have adopted and re-enacted the Act with only such small variations as have been found necessary to adopt its provisions to local circumstances. It is also remarkable, that the Uniform Sales Act passed in 1906 in the USA and adopted in twenty out of fifty-three States and territories is based very largely on the English Act. These facts constitute striking evidence of the completeness and the universal suitability of its provisions.

(ix) In mercantile transactions a conflict of laws should, as far as possible, be avoided. Uniformity of law in various countries, particularly in those which have business or trade dealings with one another, is highly convenient and desirable. We, therefore, approve of the proposal to adopt the provision of the English Sale of Goods Acts so far as they are suitable to Indian conditions as the basis for the present Bill and thus to make the Indian Law relating to the sale of goods, as nearly as possible, uniform with the law in force in other parts of the British Empire.

(x) The provisions of the English Act are far more elaborate and comprehensive than those of Chapter VII of the Indian Contract Act, and in their arrangement the English Act is more logical and methodical. As we have already observed, it has revised and brought up to the date rules of the English Common Law. Moreover, the adoption of the English Act as the basis of present Bill will enable Indian Courts to interpret its provisions in the light of the decisions of the English Courts.

(xi) In adopting the provisions of the English Act, we have not been unmindful of the needs and exigencies of this country. Wherever it has been found that a rule obtaining in England, such as that relating to market overt is not suitable to Indian conditions, the rule has been rejected. We, have, moreover, carefully scrutinised the provisions of the English Act in the light of the decisions of English Courts since 1893, and where those decisions have shown the provisions of the English Act to be defective or ambiguous, we have attempted to improve upon them. We have also retained several of the provisions of the Indian Contract Act, which we consider necessary or useful to meet special conditions existing in India. The Bill as revised by us on the above lines.

Further, following points were also discussed:

(a) The present Bill embodies the principles that the question whether a contract for the sale of goods does or does not pass the property in the goods from the buyer to the seller must in all cases be determined by the intention of the parties to the contract. The provisions of Chapter VII of the Indian Contract Act are vague and conflicting on this point. The Bill codifies the rules by which that intention may be ascertained, but the operation of these rules will be displaced by any terms of the contract defining the intention or by any attendant circumstances, including the conduct of the parties, rendering it ascertainable. In following this principles, we have to borne in mind that in mercantile matters the certainty of the rule is often of more importance than the substance. If the parties know before-hand what their legal position is, they can provide for their particular wants by express stipulation. Sale, after all, is a consensual contract, and the Bill does not prevent the parties from making any bargain they please. Its object is to lay down clear rules for the cases where the parties have either framed no intention or failed to express it.

(b) The distinction between a sale and an agreement to sell which was not clear in Chapter VII of the Indian Contract Act, has been clearly brought out. This distinction is very necessary to determine the rights and liabilities of the parties to the contract.

(c) It is made clear that a contract of sale can be made by mere offer and acceptance. Neither payment nor delivery is necessary for the purpose.

(d) Before 1893 the law in England relating to warranties and conditions was in a very confused state. In the Indian Contract Act the word "warranty" has been used in a very vague sense. In some provisions it denotes a condition which would enable a party aggrieved by its breach to repudiate the contract while in others it enables him to claim damages only. In the Bill, this ambiguity has been removed.

(e) There is much conflict of decisions in India regarding the meaning of section 108 of the Indian Contract Act, which relates to sales by ostensible owners. This is to a certain extent due to the obscure phraseology of the section itself. We have tried to remove this obscurity in clauses 27 to 30 of the Bill to simplify the law on the subject.

(f) We have elaborated the rules relating to delivery to carriers, stoppage in transit and auction sales.

(g) We have anxiously considered the question of the retention of the Illustrations appearing in Chapter VII of the Indian Contract Act and of the insertion of Illustrations to new provisions. Our decision is that the better policy is to forego all Illustrations, leaving the courts to continue the sections as they stand.

Act 3 of 1930

The Indian Sale of Goods Bill having been passed by the Legislative Assembly received its assent on 15th March, 1930. It came into force on the 1st day of July, 1930 as the Indian Sale of Goods Act, 1930. By section 2 of the Indian Sale of Goods (Amendment) Act, 1963 (33 of 1963) the word 'Indian' has been omitted and now it has been termed as the Sale of Goods Act, 1930 (3 of 1930).

The Sale of Goods Act consists 7 Chapters and has 66 Sections in all.

The Sale of Goods Act, 1930

Sale of Goods

CHAPTER I	CHAPTER II	CHAPTER III	CHAPTER IV
PRELIMINARY	FORMATION OF THE	EFFECTS OF THE	PERFORMANCE OF THE
(1) Short title, extent and commencement	CONTRACT	CONTRACT	CONTRACT
(2) Definitions	(4) Sale and agreement to sell	(18) Goods must be ascertained	(31) Duties of seller and buyer
(3) Application of provisions of Act 9 of 1872	(5) Contract of sale how made	(19) Property passes when intended to pass	(32) Payment and delivery are concurrent conditions
	(6) Existing or future goods	(20) Specific goods in a deliverable state	(33) Delivery
	(7) Goods perishing before making of contract	(21) Specific goods to be put into a deliverable state	(34) Effect of part delivery
	(8) Goods perishing before sale but after agreement to sell	(22) Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price	(35) Buyer to apply for delivery
	(9) Ascertainment of price	(23) Sale of unascertained goods and appropriation	(36) Rules as to delivery
	(10) Agreement to sell at valuation	(24) Goods sent on approval or "on sale or return"	(37) Delivery of wrong quantity
	(11) Stipulations as to time	(25) Reservation of right of disposal	(38) Instalment deliveries
	(12) Condition and warranty	(26) Risk prima facie	(39) Delivery to carrier or wharfinger
	(13) When condition to be treated as warranty		(40) Risk where goods are delivered at distant place
	(14) Implied		(41) Buyer's right of examining the goods
			(42) Acceptance

undertaking as to title, etc.	passes with property	(43) Buyer not bound to return rejected goods
(15) Sale by description	(27) Sale by person not the owner	(44) Liability of buyer for neglecting or refusing delivery of goods
(16) Implied conditions as to quality or fitness	(28) Sale by one of joint owners	
(17) Sale by sample	(29) Sale by person in possession under voidable contract	
	(30) Seller or buyer in possession after sale	

The Sale of Goods Act, 1930

The Sale of Goods Act, 1930

CHAPTER V	CHAPTER VI	CHAPTER VII
RIGHTS OF UNPAID SELLER AGAINST THE GOODS	SUITS FOR BREACH OF THE CONTRACT	MISCELLANEOUS
(45) "Unpaid seller" defined	(55) Suit for price	(62) Exclusion of implied terms and conditions
(46) Unpaid seller's rights	(56) Damages for non-acceptance	(63) Reasonable time a question of fact
(47) Seller's lien	(57) Damages for non-delivery	(64) Auction sale
(48) Part delivery	(58) Specific performance	(64A) In contracts
(49) Termination of lien	(59) Remedy for breach of warranty	(65) Repealed
(50) Right of stoppage in transit	(60) Repudiation of contract before due date	(66) Savings
(51) Duration of transit	(61) Interest by way of damages and special damages	
(52) How stoppage in transit is effected		
(53) Effect of sub-sale or pledge by buyer		
(54) Sale not generally rescinded by lien or stoppage in transit		

© Universal law Publishing Co.

CHAPTER 2

DEFINITIONS AND ESSENTIALS OF SALE

In this Chapter

1. Short title, extent and commencement [S. 1]
2. Definitions of-[S. 2]
 - (i) Buyer and Seller
 - (ii) Delivery
 - (iii) Documents of Title to Goods
 - (iv) Bill of Lading
 - (v) Dock Warrant
 - (vi) Warehouse Keeper's Certificate
 - (vii) Delivery Order
 - (viii) Railway Receipts
 - (ix) Multimodal Transport Document
 - (x) Goods

Relevant Cases

1. Tata Iron & Steel Co. Ltd., Bombay v. S.R. Sarkar, MANU/SC/0270/1960 : AIR 1961 SC 65.
2. JV Gokal & Co. v. Assistant Collector of Sales Tax, MANU/SC/0269/1960 : AIR 1960 SC 595.
3. Morvi Mercantile Bank Ltd. v. Union of India, MANU/SC/0064/1965 : AIR 1965 SC 1954.

Section 1 of the Act gives short title, extent and commencement of the Act as follows:-

1. Short title, extent and commencement.-

- (1) This Act may be called the Sale of Goods Act, 1930.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) It shall come into force on the 1st day of July, 1930.

Section 2 gives definitions of different terms which would be used in coming chapters of this book-

2. Definitions.-

In this Act, unless there is anything repugnant in the subject or context,-

- (1) "buyer" means a person who buys or agrees to buy goods;
- (2) "delivery" means voluntary transfer of possession from one person to another;
- (3) goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them;
- (4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, multimodal transport document, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;
- (5) "fault" means wrongful act or default;
- (6) "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale;
- (7) "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be

severed before sale or under the contract of sale;

(8) a person is said to be "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not;

(9) "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods;

(10) "price" means the money consideration for a sale of goods;

(11) "property" means the general property in goods, and not merely a special property;

(12) "quality of goods" includes their state or condition;

(13) "seller" means a person who sells or agrees to sell goods;

(14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made; and

(15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872 (9 of 1872), have the meanings assigned to them in that Act.

Now, here we can explain the terms what constitute section 2 of the Act-

2(i) Buyer and Seller

When there is a deal to sell something then the existence of two parties i.e. buyer and seller can't be denied. Both the terms i.e., buyer and seller are complementary to each other representing two parties to a contract of sale.

2(ii) Delivery

In the section 'delivery' has been defined as 'voluntary transfer of possession from one person to another'. Sir Frederick Pollock¹ says that "in all cases the essence of delivery is that the deliverer, by some apt and manifest act, puts the deliverer in the same position of control over the thing, either directly or through a custodian, which he held himself immediately before that act."

2(iii) Documents of Title to Goods

In the case *Tata Iron & Steel Co. Ltd., Bombay v. S.R. Sarkar*, MANU/SC/0270/1960 : AIR 1961 SC 65, it was observed that the test to determine whether a document is document of title in question is used in the ordinary course of business as proof of possession or control of goods or authorising or purporting to authorize either by endorsement or delivery of the document to the possessor to receive the goods thereby represented.

2(iv) Bill of Lading

Bill of Lading has been defined in *Scrutton on Charterparties*² as a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship. The editor has further added that-'It is not the contract, for that has been made before the Bill of Lading was signed and delivered, but it is, excellent evidence of title terms of the contract. In another case *JV Gokal & Co. v. Assistant Collector of Sales Tax*, MANU/SC/0269/1960 : AIR 1960 SC 595, it was said that a bill of lading is a writing, signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage subject to such conditions as may be mentioned in the bill of lading. It is well-settled in commercial world that a bill of lading represents the goods and a transfer of it operates as a transfer of the goods."

2(v) Dock Warrant

A dock or wharf owner issues a dock warrant (a document) on merchant's request in which details are given regarding weights or measurements of a specific parcel of goods. The dock warrant also certifies that the goods are held to the order of the person named.

2(vi) Warehouse-Keeper's Certificate

A certificate in which certain goods are specified, is known as warehouse-keeper's or a wharfinger's certificate. It is issued by the warehouse-keeper or wharfinger.

A warehouse-keeper or a wharfinger is a person who owns a wharf for the purpose of receiving

merchandise with a view for its shipping and transactions in exchange of a rate of payment.

2(vii) Delivery Order

When a person who is the owner of goods gives an order to another person who is in possession of goods, orders to deliver it to a person whose name is given in the order. It must, however, be a document which represents the goods. It is a fact that without delivery of goods, a contract cannot be completed, use of term 'delivery order' has different sense depending upon construction of each case. It may be used to refer to an order directing a person in possession to deliver the goods to a person whose name has figured in orders and also to refer to an order addressed to a person who is not in possession of goods but expecting to get possession or control over them.

2(viii) Railway Receipts

The Railway company issues a receipt i.e. a document containing the details of goods that it has to be given by the consignee at the destination of the goods in return of delivery of goods named therein. In the case *Morvi Mercantile Bank Ltd. v. Union of India*, MANU/SC/0064/1965 : AIR 1965 SC 1954, it was observed that a valid pledge can be made by the owner by transferring the railway receipt representing the said goods.

If a consignor is unable to take the delivery himself then he must endorse on the receipt a request for delivery to the person to whom he intends it to be delivered.

2(ix) Multimodal Transport Document

'Multimodal Transport Document' was inserted by the Act 28 of 1993. Section 31 and Schedule, Part III. The Act came into force on 2nd April, 1993. The Act empowered to regulate the multimodal transportation of goods, from any place in India to a place outside India, on the basis of a multi-modal transport contract and for matter incidental thereto. In the section 2(k), multi-modal transportation defined as-'carriage of goods by two or more modes of transport from the place of acceptance of the goods in India to a place of delivery of the goods outside India'.

2(x) Goods

In the Sale of Goods Act, 1979, section 61 and section 18 of the Supply of Goods and Services Act, 1982 defines goods as-"all personal chattels other than things in action and money". The term goods is of very general and indefinite import, and primarily derives its meaning from the context in which it is used.

Section 3: Application of provisions of Act IX of 1872.-The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods.

© Universal law Publishing Co.

CHAPTER 3

FORMATION OF THE CONTRACT

In this Chapter

1. Essentials of Sale [Section 3]
2. Bilateral Contract
3. Money Consideration
4. Sale and Contract for Work and Material
5. Goods
6. Sale and Agreement to Sell
7. Sale and Hire Purchase
8. Formalities of the Contract [Section 5]
9. Subject-matter of Contract [Section 6]
10. Effect of Damage [Section 7]
11. Goods perishing before Sale but after Agreement to Sell [Section 8]
12. Price [Section 9]
13. Agreement to Sell at Valuation

Relevant Cases

1. State of Andhra Pradesh v. Kone Elevators (India) Ltd., MANU/SC/0118/2005 : (2005) 3 SCC 389.
2. Agricultural Market Committee v. Shalimar Chemical Works Ltd., MANU/SC/0644/1997 : (1997) 5 SCC 516: AIR 1997 SC 2502.
3. CIT v. Hind Construction Ltd., MANU/SC/0265/1971 : (1972) 4 SCC 460.
4. R. v. England, (1864) 4 B&S 782: 33 LJQB 195.
5. Pfizer Corpn. v. Ministry of Health, (1857) 7 E&B 885: 26 LJQB 296.
6. Aldridge v. Johnson, (1857) 26 LJQB 296.
7. Lee v. Griffin, (1861) 30 LJQB 252.
8. R.D. Goyal v. Reliance Industries Ltd., MANU/SC/1025/2002 : (2003) 1 SCC 81.
9. Williams v. Williams, (1882) 29 Ch D 659 (664-665).
10. Bourne v. Noruich Crematorium Ltd., (1967) 1 WLR 691.
11. Doodeward v. Spence, (1908) 5 CLR 406.
12. Instalment Supply Ltd. v. STO, MANU/SC/0359/1974 : (1974) 4 SCC 739.
13. K.L. Johar & Co. v. Dy. CTO, MANU/SC/0348/1964 : AIR 1965 SC 1082.
14. Lee v. Butler, (1893) 22 QB 318: (1893) 62 LJ QB 591.
15. Barrow Lane and Ballard v. Phillips, (1929) 1 KB 574.

16. Asfar & Co. Ltd. v. Blundell, (1896) 1 QB 123.

17. M.S. Madhusoodhanan v. Kerala Kaumudi (P) Ltd., AIR 2004 SC 909: (2004) 9 SCC 204: (2003) 117 Comp Cas 19.

18. Sudbrook Trading Estates Ltd. v. Eggleton, (1983) 1 AC 444: (1982) 3 WLR 315.

Chapter II of the Act speaks about the formation of the contract. It consists of sections from 4 to 17. Here, we will be discussing various aspects of the contract. Section 4 of the Act tells about sale and agreement to sell. It is as follows:-

"(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

1. Essentials of Sale

In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in "contract for work" is not the transfer of property but it is one for work and labour. In judging whether a contract is for a "sale" or for "work or labour", the essence of contract of the reality of transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provide a guide in deciding whether transaction is a "sale" or a "works contract". It is well-settled law that the substance and not the form of contract is material in determining the nature of transaction; State of Andhra Pradesh v. Kone Elevators (India) Ltd., MANU/SC/0118/2005 : (2005) 3 SCC 389.

2. Bilateral Contract

Q. Define sale with the help of relevant cases

In the case; Agricultural Market Committee v. Shalimar Chemical Works Ltd., (1997) 5 SCC 516: AIR 1997 SC 2502, the Supreme Court observed that a contract of sale, like any other contract, is a consensual act inasmuch as the parties are at liberty to settle for themselves the term of their bargain. A sale has two poles-one buyer and another seller. One has to give and another has to accept. The giver has ofcourse to receive a sum, i.e. negotiated upon, in lieu of the 'goods' given by him or sold by him.

No one can sell his own goods to himself. In; CIT v. Hind Construction Ltd., (1972) 4 SCC 460, it was held that if a person revalues his goods and shows a higher value for them in his books of account then he can't be considered as having sold these goods and made profits therefrom. But, a man can sell his goods to his farm as it was held in; R v. England, (1864) 4 B&S 782: 33 LJQB 145 "where a man's goods are sold under an execution, he may himself buy them".

A sale is considered to be a sale when it is fair and consensual i.e. both the parties should agree with their free consent. When sale is enforced then such procurement is an acquisition and not a sale.

In Benjamin's Sale of Goods,¹ sale has been defined as-

"A sale is always a consensual transaction; even when the word 'sale' is used in the narrower sense of a pure conveyance, there is necessarily an antecedent or contemporaneous agreement to sell. There must be mutual assent, in the objective sense in which this expression is always understood in the law of contract, to all the elements which make up a sale. The seller must agree to transfer the property and the buyer to take it, and they must agree to do so in return for money which is paid and received as the price of goods. Where the consent of the parties does not extend so far, or does not exist at all, there is no sale. Such transactions or events are sometimes termed as quasi-contracts of sale or implied contracts of sale;

but there is no true analogy with a contract of sale properly so called and the Sale of Goods Act is not applicable to them.

In the case; Pfizer Corpn. v. Ministry of Health, (1857) 7 E&B 885: 26 LJ QB 296, drugs and appliances were supplied to a member of the public under the national health service scheme. Lord Reid held that whether it is supplied by a hospital or a pharmacist, and although for a charge, this is not a sale. Lord Reid said as-

".....in my opinion there is no sale in this case. Sale is a consensual contract requiring agreement, express or implied. In the present case there appears to me to be no need for any agreement. The patient has a statutory right to demand the drug on payment of two shillings. The hospital has a statutory obligation to supply it on such payment, and if the prescription is presented to a chemist he appears to be bound by his contract with the appropriate authority to supply the drug on receipt of such payment. There is no need for an agreement between the patient and either the hospital or the chemist and there is certainly no room for bargaining".

1. 4th Edn., 1992, p. 56.

3. Money consideration

Q. What do you mean by money consideration?

The consideration for sale of any goods is always money i.e. price of goods. If there is any other consideration for sale in place of money then it would be called as barter or exchange of goods and not a 'sale'.

But, if some goods are sold with the estimation of its value to be given in terms of some goods and differences (in value) in terms of cash then, it is a sale. Some examples are as follows:-

(i) Aldridge v. Johnson, (1857) 26 LJQB 296.-In this case, fifty two bullocks, fixed at £ 6 a piece, were exchanged for 100 quarters of barley at a different price per quarter, the difference to be made up in cash and this contract was treated as one of sale.

(ii) An old car was returned to the dealer for exchange with a new car and the difference was paid in cash-it was considered as a sale.

Some important points regarding sale-

(i) a gift is not a sale because it is without consideration, and

(ii) a sale is different from an appointment of an agent for sale since appointment of an agent requires no consideration.

4. Sale and Contract for Work and Material

Sale and contract for work and material are different but dividing line between these two are not very distinct. Some of the tests suggested to distinguish these two are as follows:

(i) If the goods to be delivered has its own existence i.e. individuality in its existence before its delivery as the sole property of the party, who is to deliver it, then it is a sale otherwise not;

(ii) If, transfer of property from A to B for a price constitutes the main object of the contract, then it is a contract of sale;

In the case; Lee v. Griffen, (1861) 30 LJ QB 252.-A lady engaged a dentist to make two sets of false teeth "to be fitted into her mouth". Before the work could be completed, the lady died. The doctor brought an action to recover his charges and the contract was held to be one of sale. The rule established in this case was as-'if the contract is intended to result in transferring for a price from B to A, chattel in which A had no previous property, it is a contract for sale of chattel.

5. Goods

Q. Write note on 'goods'

Goods has been defined in section 2(7) of the Act as follows:

"Goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

From this definition, we can say that Goods means every kind of movable property other than actionable claims and money. In the case, *R.D. Goyal v. Reliance Industries Ltd.*, MANU/SC/1025/2002 : (2003) 1 SCC 81, under the category of goods, thing like goodwill, copyright, trademark, patents, motor vehicles, ships, water, oil, air, gas may be considered as goods for a contract of sale.

In Benjamin's Sale of Goods,¹ the position in relation to human body has been stated as follows:

The law recognizes no right of property in a dead body or any part thereof and for this reason human remains cannot be considered "goods" capable of being bought and sold. But it is doubtful whether there is any universal rule to this effect: for in practice skeletons are commonly bought and sold by medical students.

Relevant cases:

1. Williams v. Williams, (1882) 29 Ch D 659 (664-665).

2. Bourne v. Norwich Crematorium Ltd., (1967) 1 WLR 691.

3. Doodeward v. Spence, (1908) 5 CLR 406.

Today medical science has advanced to a stage where it was never before on the horizon of transplantation of different organs in human beings. It has also encouraged illegal trading in human tissues and organs for this purpose. Especially kidney transplant and bodily products e.g. hair, blood, urine and genetic materials e.g. sperm, ovum and embryos related laws have developed.

In an American case, it was held that blood supplied by a blood bank is a contract for the supply of services and there is authority also that blood supplied by a blood bank is a sale of goods.

Although, the sale of human organs and other commercial dealing in such organs is prohibited under the Human Organ Transplants Act, 1989.

6. Sale and Agreement to Sell

Q. Distinguish between sale and agreement to sale

An agreement to sell is a contract which is simple as well as pure whereas a sale is a contract plus conveyance. If, goods have been sold but the buyer makes a default then the seller may sue for the contract price in the court for "goods bargained and sold". But, in case, if a party makes an agreement to buy, but it's broken then the seller has a normal remedy for an action for unliquidated damages.

But, where a seller reverts from his promises by breaking the agreement to sell then the buyer has only a personal remedy against the seller. The buyer has also got proprietary remedies. In agreement for sale, if, somehow the goods get destroyed, the loss as a rule falls on the seller but if there is a sale and the goods are destroyed then the loss as a rule falls on the buyer though the goods have never come into his possession; [*Instalment Supply Ltd. v. STO.*, (1974) 4 SCC 739].

7. Sale and Hire Purchase

Q. What is the difference between sale and hire purchase?

A sale is different from hire purchase as the sale gives complete authority to buyer to use or dispose off the goods on his own will. But, a hirer gets only possession of goods. He cannot pass the title of goods to any buyer. Secondly, sale tax is not leviable on hire purchase unless and until it is converted into a sale.

1. 69 (4th Edn., 1992).

If the hirer does not have the option to return the goods to its owner then it will be an agreement to buy and not a hire purchase.

The hirer cannot be compelled to buy as observed by the Supreme Court in the case; K.L. Johar & Co. v. Dy. CTO, MANU/SC/0348/1964 : AIR 1965 SC 1082, Wanchoo J. said-

The essence of sale is that the property is transferred from the seller to the buyer for a price, whether paid at once or paid later in instalments. On the other hand, a hire purchase agreement has two aspects. There is first an aspect of bailment of goods subject to the hire purchase agreement and there is next an element of sale which fructifies when the option to purchase is exercised by the intending purchaser.

It was further added-

"Coming into being of sale is a question of fact and it takes place when the hirer exercise the option. It cannot be said that merely because the hire purchase agreement stipulates a particular period for the total payment of the consideration and for the purchaser to exercise the option to purchase at the end of the said period, the sale does take place at the end of that period willy-nilly. There may be cases where the hirer may default in paying the amount within the stipulated period, he may ask for extension and the dealer may grant it. In such cases, the sale obviously takes place only when the purchaser exercises the option to purchase after fully paying the agreed amount."

We can take another example of the case; Lee v. Butler, (1893) 2 QB 318: (1893) 62 LJ QB 591, where a lady hired certain furniture from the plaintiff for which the price was to be paid in two instalments. The condition was also there that in case the lady fails to give instalments, the plaintiff had right to take the furniture back. But, before the last instalment was paid, the furniture was sold by the lady to defendant.

The Court held that the defendant had acquired a good title, the lady being in possession of the furniture under an agreement to buy. She did not have the option to return but was compellable to buy.

8. Formalities of the Contract

Section 5 of the Act explains about the formalities which are required to be fulfilled before undergoing a contract. This section lays down the formalities as follows:-

"5. Contract of sale how made.-

(1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties."

9. Subject-matter of Contract

It has been given in section 6 as follows:

"6. Existing or future goods.-

(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."

It says that the subject-matter of a sale under the provision of this Act is 'goods'. It may be existing goods, owned or possessed by the seller or future goods.

Future goods means those goods which have not been yet acquired and its acquisition depends upon certain contingencies. It has also been defined in the Act as "goods to be manufactured or produced or acquired by the seller after the making of the contract of sale".

10. Effect of Damage

Q. What do you mean by effect of damage? Discuss it in light of the provision given in section 7 of the Act.

If the goods without the knowledge of the seller already perished or become so damaged as no longer to answer their description in the contract then such contract for sale of specific goods is void. Section 7 explains it as follows:

Q. What are the effects on contract if goods perish before making the contract?

"7. Goods perishing before making of contract.-

"Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description contract."

Sometimes, it happens that the goods for which contract has been made, has not been destroyed completely but only some part of it, then the such circumstances make the rest of goods useless for the buyer. In the case; Barrow Lane and Ballard v. Phillips, (1929) 1 KB 574, the fact was as-

Facts.-There was a contract for the sale of a parcel of 700 bags of Chinese groundnuts. It was not known to the seller at the time of contract that out of 700, 109 bags have been stolen. The seller tried to deliver remaining 591 bags to the buyer but he refused to take the delivery. On buyer's refusal, the seller brought an action against him for the price.

Observation.-It was observed by the court that the buyer was not liable to take the goods and pay the price. The buyer had contracted to buy a certain quantity of goods and buyer can't be forced to accept the lesser quantity of goods. The contract is void due to loss of goods.

Perishing of goods doesn't include only loss due to theft but also the goods which have lost its commercial value.

In the case; Asfar & Co. Ltd. v. Blundell, (1896) 1 QB 123-

Facts.-A cargo of dates was sold. The dates were not worth consumable since it was contaminated with sewage but they could be used for making spirits.

Observation.-It was held that the contract was void as the goods no longer answered their description in the contract. Lord Esher M.R. said:

"The first point taken on behalf of the defendant is that there has been no total loss of the dates. The ingenuity of the argument might commend itself to a body of chemists, but not to businessmen. We are dealing with dates as a subject-matter of commerce and it is contended that, although these dates were under water for two days, and when brought up were simply a mass of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature and they were still dates. There is a perfectly well-known test which has for many years applied to such cases as the present _ that test is whether, as a matter of business, the nature of the thing has been altered."

11. Goods perishing before Sale but after Agreement to Sell

If, there is no fault of either buyer or seller and the goods get perished or so damaged as no longer to answer their description in the agreement to sell then such agreement becomes void. Section 8 of the Sales of Goods Act says as-

Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

12. Price

Q. Discuss the determination of price with the help of relevant case.

For determination of price there are two principles as given in section 9-

"9. Ascertainment of price.-

(1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

Price can be fixed in terms of money which may be either paid or promised. In the case; M.S. Madhusoodhanan v. Kerala Kaumudi (P) Ltd., AIR 2004 SC 909: (2004) 9 SCC 204: (2003) 117 Comp Cas 19-Certain shares were transferred for a consideration which was left to be determined at a later stage and it was the observation of the Hon'ble Supreme Court that such transfers were not void by reason of any uncertainty. This is permissible under this section. The Court observed-

Discuss the determination of price with the help of relevant case. "The express intention in this case was to effect an immediate transfer of the shares and to agree upon the consideration later. The first stage of the agreement for the immediate transfer of shares was executed. The question as to what would be the reasonable price for the shares, the mode of its determination and whether any consideration has already been paid by the transferee to the transferor were to be considered subsequently and the section 9 of the Act permits it."

As far as reasonable price of any commodity or goods is concerned, it varies, place to place one goods to another and also depends on circumstances. Under contract, if the goods have already been delivered and accepted, reasonable price would be paid. Reasonableness may be at variance with market. In the case; Sudbrook Trading Estates Ltd. v. Eggleton, (1983) 1 AC 444: (1982) 3 WLR 315, it was held that if the price is agreed to be fixed by a valuer and there is either failure to appoint a valuer or valuer has not done his duty then the doctrine of reasonableness will take over the situation.

13. Agreement to Sell at Valuation

If there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party.

Section 10 gives the provision as:

"(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided:

Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault."

CHAPTER 4

CONDITIONS AND WARRANTIES

In this Chapter

1. Stipulations as to Time [Section 11]
 - 1.1 Stipulations as to Time and Payment
 - 1.2 Stipulations as to Time of Performance of other Terms
2. Condition and Warranty [Section 12]
3. Condition to be Treated as Warranty [Section 13]
 - 3.1 Waiver by Buyer
 - 3.2 Acceptance of Goods by Buyer
4. Implied Undertaking as to Title etc. [Section 14]
5. Sale by Description [Section 15]
6. Sale by Sample
7. Conditions Implied by way of exceptions to Rule of Caveat Emptor [Section 16]
8. Division of section 16
 - 8.1 Fitness for Buyer's Purpose
 - 8.2 Merchantable Quality
 - 8.3 Conditions Implied by Trade usage
 - 8.4 Express Warranty
9. Sale by Sample [Section 17]
 - 9.1 Bulk to Correspond with Sample
 - 9.2 Opportunity to compare Bulk with Sample
 - 9.3 Goods free from any Defect
 - 9.4 Buyer's State of Knowledge about Goods

Relevant Cases

1. Martindale v. Smith, (1841) 1 QB 389: 55 RR 285.
2. Hartley v. Hymans, (1920) 3 KB 475 (484).
3. Orissa Textile Mills v. Ganesh Das, MANU/BH/0027/1961 : AIR 1961 Pat 107 (109).
4. Browes v. Shand, (1877) 2 App Cas 455.
5. Baldry v. Marshall, (1925) 1 KB 260: (1924) All ER Rep 155.
6. Harrison v. Knowles and Foster, (1917) 2 KB 606: (1918-19) All ER Rep 306.
7. City & Industrial Development Corpn. of Maharashtra Ltd. v. Nagpur Steel & Alloys Ltd., MANU/MH/0014/1992 : AIR 1992 Bom 55.
8. Rowland v. Divall, (1923) 2 KB 500 CA.
9. Niblett v. Confectioner's Materials Co., (1921) 3 KB 387: (1921) All ER Rep 459 CA.
10. Grant v. Australian Knitting Mills, (1936) AC 100.
11. Varley v. Whipp, (1900) 1 QB 513 (516).
12. Moore & Co. v. Landauer & Co., (1921) 2 KB 519 CA.

13. Harlington Leinster Enterprises Ltd. v. Christopher Hill Fine Art Ltd., (1990) 1 All ER 737 CA.
14. Gill & Duffus S.A. v. Berger & Co. Inc., (1984) 1 All ER 438 (445-446): 1984 AC 382 (394).
15. Azemar v. Casella, (1867) 2 CP 431.
16. Ward v. Hobbs, (1878) 4 App Cas 13.
17. Jones v. Padgett, (1902) 2 IR 585.
18. Wallis v. Russell, (1902) 2 IR 585.
19. Jones v. Bright, (1829) 5 Bing 533.
20. Grant v. Australian Knitting Mills, (1936) AC 85: 105 LJPC 6: 154 LT 18: 52 TLR 38: MANU/PR/0089/1935 : AIR 1936 PC 34.
21. Manchester Liners Ltd. v. Rea Ltd., (1922) 2 AC 74.
22. Baldry v. Marshall, (1925) 1 KB 260.
23. Buchanan Jardine v. Hamlist, (1981) SLT 60.
24. Boyter v. Thomson, (1995) 3 All ER 135 HL.
25. Godley v. Perry, (1960) 1 All ER 36.
26. Morelli v. Fitch & Gibbons, (1928) 2 KB 636.
27. Summer Permain & Co. v. Webb & Co., (1922) 1 KB 55.
28. Aswan Engineering Establishment Co. v. Lupton Ltd., (1987) 1 WLR 1: (1987) 1 All ER 135.
29. Peter Darlington Partners Ltd. v. Gesco Co. Ltd., (1964) 1 Lloyd's Rep 149.
30. Prabhu Dayal v. Bhagwan Sahai, AIR 1955 NUC 4067 (Raj).
31. Behari Lal Baldeo Prasad (in re:), MANU/TN/0137/1955 : AIR 1955 Mad 271.
32. E&S Ruben Ltd. v. Faire Bros., (1949) 1 KB 254.
33. Drummond & Sons v. Van Ingen, (1887) 12 App Cas 284.
34. Champanhac & Co. Ltd. v. Waller & Co. Ltd., (1948) 2 All ER 724.

This Chapter deals with conditions and warranties in relation to contract of sale. In this Chapter we will discuss stipulation of time, warranty, implied undertaking, sale by description and sample etc. from sections 11 to 17.

1. Stipulations as to Time

Q. Time stipulation for the payment is not essence of the contract" substantiate with relevant example.

Section 11 deals with the time stipulation in a contract of sale. It says-

"Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

This section has two rules: first time of payment and second other stipulations as to time.

"Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of a sale-it means time of payment is not a condition of the contract unless the parties make it a condition in their contract. In the case; Martindale v. Smith, (1841) 1 QB 389: 55 RR 285, some stacks of oats were sold by the defendant to plaintiff. The stacks were remained to be on the defendant's (seller's) ground for 12 weeks and the payment was to be made within 12 weeks. But, buyer failed to pay within stipulated time and asked for more time; but the seller did not accede to his request. The buyer later on tendered the price but the seller refused to accept it and resold the stacks. The seller was held liable to the buyer in trover.

1.1 Stipulations as to Time of Payment

Punctual payment does not cover the whole consideration of a sale. It was held in the case Martindale v. Smith, that the failure of payment by the buyer doesn't entitle the seller to treat the contract as repudiated. The seller may stop the delivery of goods until the payment is made to him. He (seller) can resale the goods if the buyer does not pay the price within a reasonable time. But, if before such resale the buyer wishes to make the payment although stipulated

time has elapsed, the seller cannot treat the contract as finished unless in the contract, contrary to the stipulated time something is mentioned.

1.2 Stipulation as to Time of Performance of other Terms

Q. In which cases time is considered as essence of the contract? Explain.

The Act does not deal only with commercial contracts but other kinds of contract also. Mc Cardie, J. in the case; Hartley v. Hymans, (1920) 3 KB 475 (484), observed that in ordinary commercial contracts for the sale of goods the rule clearly is that time is prima facie the essence with respect to delivery. In another case; Orissa Textile Mills v. Ganesh Das, MANU/BH/0027/1961 : AIR 1961 Pat 107 (109), the court said that a mercantile contract is not always an isolated transaction, but a link in a chain transactions, so that punctual performance may go to the whole consideration for the sale.

Time is considered to be as essential as soul in the following types of cases:-

- (i) When the parties of a contract agreed upon to treat time as the essence of the contract;
- (ii) where delay in fulfilment of conditions of contract operates as an injury; and
- (iii) if, nature and necessity of the contract require time to be construed in it.

In view of the above, few examples are given as follows:

(a) In the case; Browes v. Shand, (1877) 2 App Cas 455, there was a contract between seller and buyer to supply Madras rice during the month of March and April by the former to latter. A large quantity of rice was shipped in the month of February and about one-eighth was dispatched during March. It was the observation of the House of Lords that the buyers were entitled to reject the goods. Although, there was no difference in the quality of the goods and the buyer did not suffer any loss due to supply of goods earlier than stipulated time.

(b) In the case; Hartley v. Hymans, (1920) 3 KB 475, the plaintiff and defendant underwent a contract wherein the plaintiff had to sell the defendant 1000 lbs of cotton yarn per week from September. It was mentioned in the contract that failure of supply of goods within a stipulated time would render the contract liable to termination. There was no supply of goods till October, after that average supply was 500 lbs per week. The buyer throughout this period reminded to supply the goods as per the conditions laid down in the agreement but of no avail. In March, the order was cancelled.

It was held that in this contract the time factor was paramount but during all this period, the buyer's request to supplier for better deliveries and his conduct waived his right to cancel the contract.

2. Condition and Warranty

Q. Discuss conditions or warranties of a contract of sale as given in section 12 of the Sale of Goods Act, 1930.

Section 12 of the Sale of Goods Act, 1930 deals with the conditions and warranties. It speaks as-

- "(1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.
- (2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.
- (3) A warranty is a stipulation collateral to the main purpose of the 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.
- (4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

There are number of terms and conditions which may be attached to an agreement of contract viz., nature and quality of goods and their fitness. Although, it may be the possibility that all the terms may not hold the equal importance in carrying on the contract but some may be, in case of non-fulfilment jeopardize the contract.

• such terms are known as conditions of the contract and in case of their breach enables the other party to repudiate the contract.

Section 12(2)

• if the terms given in the contract are not of that vital importance then it is known as warranty.

Section 12(3)

• the breach of warranty gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

Section 12(3)

But, the court doesn't go only by the provisions as laid down the section regarding conditions and warranty but it assess the relative importance of the stipulation in dispute in the light of all the prevailing circumstances from time of entering the contract till its non-fulfilment. Some cases are mentioned below for its elaboration-

2.1 Baldry v. Marshall, (1925) 1 KB 260: (1924) All ER Rep 515

Here, the plaintiff consulted a car dealer, defendant' for a car which should be suitable for touring purposes. The plaintiff purchased the car 'Bugatti' on defendant's suggestion that it would be fit for touring. The car, after its use, it was found that it was not good as told by the defendant. The plaintiff asked for its rejection. But, it was defendant's plea that in the contract, guarantee was there to protect/repair the car against the mechanical defects and excluded every other guarantee or warranty.

But the court did not accept the plea and found that the car which was purchased by the plaintiff for touring purpose could not stand up for the same as ensured by the defendant hence, plaintiff is entitled to reject and get the price refunded.

2.2 We can find the illustration of Warranty in the case; Harrison v. Knowles and Foster, (1917) 2 KB 606: (1918-19) All ER Rep 306

The plaintiff purchased two small ships from the defendants. Plaintiffs relied upon the particulars furnished by the defendants in which all the information pertaining to ships were made available. It was said that the dead weight capacity of each ship was 460 tons but in reality it was only 360 tons.

The plaintiff wanted to reject the ships. It was observed that the representation of capacity was not a condition but a warranty, for which the plaintiff could have sued for damages had liability for warranties not been excluded.

3. Condition to be Treated as Warranty

Section 13 of the Act speaks about the conditions which are to be treated as warranty. It says as-

"(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfillment of which is excused by law by reason of impossibility or otherwise."

In some circumstances, condition turns to be a warranty and in this condition buyer loses his right to reject the goods. He can ask only for damages for the breach of condition.

3.1 Waiver by Buyer

First part of the section says that conditions, express or implied, are for the benefit of the buyer. So, he has got the option to waive the breach of a condition. Here, he is liable for the price, but he can also recover damages for the breach. In the case; City and Industrial Development Corpn. of Maharashtra Ltd. v. Nagpur Steel and Alloys Ltd., MANU/MH/0014/1992 : AIR 1992 Bom 55-the goods supplied were oversized, it was known to the buyer even then instead of rejecting them, consumed the same without giving any opportunity to the seller to replace them and also paid the price of 58 consignments out of 60, all this amounted to waiver disentitling the buyer from the right to insist on the condition and making him liable to pay the balance price.

3.2 Acceptance of Goods by Buyer

Section 13(2) says that once the buyer has accepted the goods or part thereof then the breach of any condition of the term limited the remedy to damages only and loses the right to reject the goods. We will study the condition of acceptance of goods under section 42 of this Act under the Chapter 'Performance of the Contract'.

4. Implied undertaking as to title etc.

Q. Can a buyer claim the price of goods if it was found on possession that it was stolen and seller sold it knowingly?

Section 14 of the Act says-

In a contract of sale, unless the circumstances of the contract are such as to show a different intention there is-

- (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
- (c) an implied warranty that the goods shall be free 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 is made.

In sale, the ownership of goods is transferred from seller to buyer. The law confers the right on seller to sell the goods, and it is an implied condition in every sale that the seller has the right to sell. Buyer may reject the goods if the title of the seller turns out to be defective.

In a case; Rowland v. Divall, (1923) 2 KB 500 CA, the buyer had purchased a second hand car from a dealer and used it but within few months, the car was seized by the police as it was stolen. Here, the buyer may recover the full price from the seller (dealer) although he had used it for few months. Lord Atkin said-

"There can be no sale at all of goods which the seller has no right to sell. The whole object of a sale is to transfer property from one person to another....In fact the buyer has not received any part of that which he contracted to receive-namely, the property and right to possession-and that being so, there has been a total failure of consideration."

Even, when a seller has full ownership of the goods, yet he may commit a breach of this condition.

In Niblett v. Confectioners' Materials Co., (1921) 3 KB 387: (1921) All ER Rep 459 CA, 3000 tins of condensed milk was sold by the defendants. The consignment reached from New York to London and the plaintiff found that 1000 tins were labelled as "Nissly brand". Another manufacturer of condensed milk under the name of 'Nestle brand' claimed that this was an infringement of their trade mark. Then the plaintiff removed the labels and sold it on reduced price. Then the plaintiff sued the sellers for the breach of the condition as to title.

In the case, it was held that the plaintiff had the right to reject the goods or was entitled to recover what he lost due to sale of milk or reduced prices.

Lord Atkin has explained the meaning of the words "right to sell" as follows-

"The seller had not the right to sell these goods having admitted that there being an infringement of the Nestle Company's trade mark they were liable to an injunction restraining the sale. Therefore, they had no right to sell these goods at the time when the property was to pass".

It was the view of their Lordship that the defendants could have passed the property in the goods but for the intervention of the third party, they had nevertheless no right to sell the goods owing to the existence of a title superior to that of the vendor, so that the possession of the vendee may be disturbed. In the words of Scrutton LJ:-

"The defendants impliedly warranted that they had then the right to sell it. In fact they could have been restrained by injunction from selling them, because they were infringing the rights of a third person. If a vendor can be stopped by process of law from selling he has not the right to sell".

5. Sale by Description

Q. Under the provision of section 15 of the Sale of Goods Act discuss the sale by description. Cite relevant cases also.

Section 15 lays down the condition which speaks about the sale which is based on description. It is as-

"Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description."

To invoke the protection under this section, two essentials are to be fulfilled, first-the sale should be through 'description' and secondly-the goods should not correspond with the description.

There are many situations where sale is completed that is based on description

- (a) In the case; Grant v. Australian Knitting Mills, (1936) AC 100, Lord Wright has said about 'sale by description' as-

"It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter merely as the specific thing, but as a thing corresponding to a description,

e.g. woollen undergarments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations."

(b) In the case; *Varley v. Whipp*, (1900) 1 QB 513 (516), there was a sale of a reaping machine. The seller gave its description as a machine which was only one year old and was used to cut only 50 to 60 acres. The buyer purchased it but found that the machine was too old and did not correspond with the specification as given by the seller in the description, hence he returned it. The seller brought the action against the buyer on its return but failed.

(c) In the case; *Moore & Co. v. Landauer & Co.*, (1921) 2 KB 519 CA, packing of goods was considered as description of goods. There was a contract for the purchase of 3000 tins of canned fruits from Australia. The packing was to be done in a pack of 30 tins in one case. But, the sellers tendered only 24 tins in one case. The method of packing the tins was a part of description and therefore, the buyers were entitled to reject the consignment as a whole.

(d) Reliance on description to be in contemplation of parties-

A sale of goods by description takes place only when the buyer is satisfied with the description.

In the case; *Harlington & Leinster Enterprises Ltd. v. Christopher Hill Fine Art Ltd.*, (1990) 1 All ER 737 CA, defendants were a company dealing in art paintings. It was in business for a long time and was carrying it out from a London gallery. There were two paintings which Harlington wanted to sell in 1984. In the 1980 catalogue, it was mentioned that these two paintings were done by Gabriele Munter who belonged to German expressionist school. But Harlington was not specialized to make out whether these paintings were in reality belonged to Gabriele Munter. When the defendant contracted Christie's-a renowned auctioneer who dealt in art, the latter shown interest in one of the paintings and wanted to buy it at a price of Å" 6000 without asking any question about the provenance of the paintings or making any further inquiries about them. The invoice showed that the painting described it as being by Munter. But, the plaintiff found later on that the painting was not a genuine one and sought repayment of price what he had paid for purchasing the painting since the sale was based on description.

It was also observed that a description was applied to goods either in the course of negotiations or in the contract itself did not necessarily make the contract fit for the sale of goods by description. The description had to be influential in the sale to make the description an essential form of the contract. In this case, the plaintiff did not rely on Harlington description what they have given about painting as being by Munter but had purchased the painting as it was, and the sale was not a sale by description.

It was further observed that the sold item was a painting and nothing else, it was still merchantable but might have fetched lower price since it was not the same as it was not painted by the same artist, what the plaintiff had thought of.

(e) In the case; *Gill & Duffus S.A. v. Berger & Co. Inc.*, (1984) 1 All ER 438 (445-446): 1984 AC 382 (394), Lord Diplock has defined 'description' as-

While 'description' itself is an ordinary English word, the Act contains no definition of what it means when it speaks in that section of a contract for the sale of goods being a sale 'by description'. One must look to the contract as a whole to identify the kind of goods that the seller was agreeing to sell and the buyer to buy.....where, as in instant case, the sale is "by sample as well as by description", characteristics of the goods which would be apparent on reasonable examination of the sample are unlikely to have been intended by the parties to form part of the 'description' by which the goods were sold, even though such characteristics are mentioned in references in the contract to the goods that are its subject-matter'.

It would not be out of place to mention here that once it has been proved that the sale is by description then the law implies the condition that the goods must correspond with the description and the description should be accurate.

6. Sale by Sample

Q. Discuss the provision of section 15 of the Sale of Goods Act, which deals with 'Sale by Sample'.

The second part of section 15 speaks about sale by sample as-"if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description". It convey a clear meaning that where a sale has been agreed upon between the two parties then the goods shall not merely agree with the sample, but must also correspond with the description.

In the case; *Azemar v. Casella*, (1867) 2 CP 431, buyer was to get 'long staple salem cotton' from the seller as per the description and sample and it was mentioned that if the goods proved to be inferior in quality, a reasonable allowance would be made to the buyer, but the buyer was held not bound to accept the goods which were turned out to be not long staple cotton, but only Western Madras Cotton. Regarding Allowance clause Montague Smith J. said-

"Suppose a contract were made for the sale of 'one hundred casks of spirits' guaranteed to be equal to a sample produced, and with a stipulation for an allowance should the quality prove inferior to the guarantee, and the sample being brandy, the bulk tendered were to consist of rum, could the allowance clause be applied to such a case?"

7. Conditions implied by way of Exceptions to Rule of Caveat Emptor

Q. What is the significance of the exceptions of the rule 'caveat emptor' in contract?

Section 16 of the Act speaks about the principle of caveat emptor i.e. buyer beware.

The implied conditions and exceptions as given in the above section, the seller is not bound to supply goods which should be fit for any particular purpose or which should possess any particular quality. R.A. Eastwood in 'The Contract of Sale of Goods'¹ said that it was for the buyer to make himself acquainted with qualities and defects of the goods which he contemplated while purchasing:

"Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:-

(1)Where the buyer, expressly or by implication, make known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

1. 2nd Edn., 1946, p. 42.

(2)Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3)An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4)An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

In the case; Ward v. Hobbs, (1878) 4 App Cas 13, the seller sold some pigs by auction and no warranty was given in respect of any fault or error or description. The buyer accordingly paid the price for healthy pigs. But, all the pigs except one died of typhoid fever. They also infected few other pigs of buyer. It was the observation of the House of Lords that sending infected pigs to the market was an offence, but there was no implied condition or warranty that they were sound. Lord O' Hogan said, in this regard as-

"Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet another the general doctrine of caveat emptor, he is not ordinarily bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee."

In the case; Jones v. Padgett, (1902) 2 IR 585, a wool merchant and a tailor purchased indigo cloth for the purpose of making liveries, the purpose being not known to the seller, he was held not liable when, on account of a latent defect the cloth was unfit for that purpose, but it was fit for other usual purposes.

In another case; Wallis v. Russell, (1902) 2 IR 585, the scope of caveat emptor has been explained by Fitzgibbon LJ of the Irish Court of Appeal as-

'Caveat emptor does not mean in law or Latin that the buyer must 'take chance', it means he must 'take care'. It applies to the purchase of specific things, e.g. a horse or a picture, upon which the buyer can, and usually does, exercise his own judgment; it applies also whenever the buyer voluntarily chooses what he buys; it applies also where by usage or otherwise it is a term of the contract, that the buyer shall not rely on the skill or judgment of the seller:

Exceptions

In recent times it has been seen that exceptions to the rule caveat emptor has gained more significance than the rule itself. The rule originated when the buyer and seller used to meet in the open market. The

seller showed the goods and buyer, if he liked, purchased the same. But, in modern times, traders and buyers undergo agreement to sale or purchase from distant places and do all the business through correspondence. Seller on his part does assure the contents and quality of the goods. Thus, the rule of caveat emptor needed to be restricted by few exceptions upon its scope.

Best C.J. in the case; Jones v. Bright, (1829) 5 Bing 533, has stated the essence of the exceptions as-

"It is the duty of the court in administering the law to lay down rules calculated to prevent fraud, to protect persons who are necessarily ignorant of the qualities of a commodity they purchase and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied. I wish to put the case on a broad principle. If a man sells an article he hereby warrants that it is merchantable-that is, fit for some purpose. If he sells it for a particular purpose he thereby warrants it fit for that purpose".

Steve Hedley, in the book 'Quality of Goods, Information and the Death of Contract, (2001) observed the exception of caveat emptor as-

'Caveat emptor is dying, or so it is often supposed. And this death is thought to be no isolated event, but to exemplify the death of freedom of contract generally. Contracting parties are no longer free to set what terms they wish, except in particular, tightly defined markets; sellers can no longer abuse their freedom by selling sub-standard goods and relying on exclusion clauses. The benevolent hand of the law has replaced the harsh rule of the market'.

8. Division of section 16

We can divide section 16 in following parts to study the minutest details of this section

8.1 Fitness for Buyer's Purpose [Section 16(1)]

8.1(i) Sale under Trade Name

8.1(ii) Sale to Consumer Statutory Changes

8.1(iii) Sale by Agent

8.2 Merchantable Quality [Section 16(2)]

8.2(i) Purchase by Description

8.2(ii) Marketability

8.2(iii) Sale of Pictures: A general observation

8.2(iv) Goods should not violate Applicable Statutes

8.2(v) Pack

8.2(vi) Test of Merchantable Quality

8.2(vii) Statutory Definition of Merchantability

8.3 Conditions Implied by Trade Usage [Section 16(3)]

8.4 Express Warranty

8.1 Fitness for Buyer's Purpose

Q. What do you mean by fitness for buyer's purpose under section 16(1).

If, we see the sub-section (1) of Section 16, there is an implied condition that the goods shall be reasonably fit for such purpose. But, for this condition to arise, it is necessary to prove following points:

- (a) The buyer should express the seller's particular purpose for which the goods are required.
- (b) The buyer should rely on the seller's skill or judgment, and
- (c) The goods must be of a description which it is the course of the seller's business to supply.

The above essentials are required in a sale of goods and the same are also fulfilled in routine sale of article or goods. In a case; Grant v. Australian Knitting Mills, (1936) AC 85: 105 LJ PC 6: 154 LT 18: 52 TLR 38: MANU/PR/0089/1935 : AIR 1936 PC 34, the plaintiff (a doctor) purchased two woollen underpants from the defendants. The plaintiff wore a pant and got ill the following day. The illness was diagnosed as dermatitis which was caused by a chemical irritant used by the defendants who had negligently omitted to remove during the process of manufacture.

It was held that the sale was within the exception and the implied condition of fitness for the buyer's purpose was broken. Lord Wright observed as-

"It is no doubt essential that the buyer must rely upon the seller's skill or judgment. But the reliance will seldom be expressed it will usually arise by implication from the circumstances. Where the seller deals in certain goods, the buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment'.

Lord Wright further added-

'There is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose within the meaning of the section, because it is the only purpose for which any one would ordinarily want the goods'.

In another case; Manchester Liners Ltd. v. Rea Ltd., (1922) 2 AC 74, the plaintiffs ordered coal specifically for their ship, Manchester. The furnaces of Manchester, required special variety of coal. The coal which was supplied for Manchester was fit for other steamers but not for Manchester:

In rejecting the coal, plaintiff was justified. In the words of Lord Buckmaster-

'The order was expressed for the use of a particular steamship and it must, therefore, be assumed that the respondents knew the nature of the furnaces and the character of the coal she used, for it was this coal they contracted to supply'.

8.1(i) Sale under Trade Name

We usually rely more on the trade name of a commodity when we go to buy the goods than the skill and judgment of the seller. Proviso of section 16 says-

'Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose'-

It clearly suggests that mere mentioning of the product's name does not exclude the condition, for even then the buyer may rely on the seller's skill and judgment.

In the case; Baldry v. Marshall, (1925) 1 KB 260, the buyer told the seller that he needed a car for touring purpose and the seller recommended 'Bugatti' car (a trade name). This did not exclude the implied condition of fitness.

Banks LJ. said as-

"The mere fact that an article sold is described in the contract by its trade name does not necessarily make the sale, a sale under a trade name may illustrate my meaning by reference to three different cases. First, where a buyer asks a seller for an article which will fulfil some particular purpose and in answer to that request the seller sells him an article by a well-known trade name; there I think it is clear that the proviso does not apply. Secondly, where the buyer says to the seller 'I have been recommended such and such article'.....mentioning it by its trade name.....'will it suit my particular purpose', naming the purpose and thereupon the seller sells it without giving more information; there again, I think the proviso has no application. But there is a third case where the buyer says to a seller. I have been recommended so and so, 'giving its trade name.....' as suitable for the particular purpose for which I want it. Please sell it to me. In that case I think it is equally clear that the proviso would apply and that the implied condition of the things fit for the purpose named would not arise. In my opinion, the test of an article having been sold under its trade name within the meaning of the proviso is: Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of seller, however great the skill or judgment may be?"

8.1(ii) Sale to consumer statutory changes

The Supply of Goods (Implied Terms) Act, 1973 (English Act) provides that the implied condition of fitness may also extend to every seller who sells the goods in the course of business.

In the case; Buchanan Jardine v. Hamlist, (1981) SLT 60, owners of a farm containing livestock sold their farm. After sometime, one of the cow was found to be a positive tuberculosis reactor. That was slaughtered and the movement of the cattle to the farm was prohibited. Subsequently one more cow had to be slaughtered and the buyer could not move his stock. It was the seller's plea that it was not a sale in the course of business.

The Court observed that if a person who sells any part of his business equipment, sells that part in the course of his business and that it made no difference whether the sale was of one item or the whole of the goods used

by him for the purpose of his business.

If a person purchases a thing repeatedly, it does not take him out of the category of a consumer so as to constitute it as a trade sale.

8.1(iii) Sale by Agent

If a person sells the goods on behalf of his principal and does not disclose that he is not the true seller but working as an agent even then the fitness remains applicable. The owner of the goods on whose behalf the sale was effected can be sued though he was an undisclosed principal.

In the case; *Boyer v. Thomson*, (1995) 3 All ER 135 HL, the buyer purchased a boat from the seller assuming that he is the owner but in fact, he was an agent. The boat turned out to be unseaworthy. It was also held that the right of rejection was exercisable against the undisclosed principal who was the real owner.

8.2 Merchantable Quality [Section 16(2)]

Q. What is merchantable quality of goods.

Merchantable quality means satisfactory quality of good which can be sold or purchased by the two consenting parties. Section 16(2) says that-

"Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be of merchantable quality".

8.2(i) Purchase by Description

Q. Write note on "Purchase by Description".

To fulfil this condition, goods must be purchased by description from a seller who sells goods with that description. After fulfilment of this condition it becomes the responsibility of the seller to supply the goods of 'merchantable quality'.

It has been said that some 'description inevitably occurs as and when an article is demanded. In the case - *Godley v. Perry*, (1960) 1 All ER 36, some plastic toy catapults were being displayed by a toy dealer in his shop window. A child bought one of the toys but when he was playing with it, the toy broke down and injured boy's left eye which had to be removed.

It was the plea of seller that there was no condition of merchantable quality as the toy was not purchased from him by description. But, the court rejected this plea and held-

"That a sale over the counter can be a sale 'by description' is clear....and where, as here, a child asks for a catapult and one is sold to him over the counter, that is no less a 'sale by description' than one where an order is placed on the strength of a catalogue"

8.2(ii) Marketability

In the case; *Grant v. Australian Knitting Mills*, (1936) AC 85 (105), it was held that 'Merchantability does not mean that the thing is saleable in the market because it looks all right, it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination'. In one another case; *Harlington & Leinster Enterprises Ltd. v. Christopher Hill Fine Art. Ltd.*, (1990) 1 All ER 737 CA (This case has already been discussed in this Chapter as case No. 13), it was held that 'where the thing is not defective in itself as such and no fraud was practiced on the buyer it may still be regarded as merchantable even if it is not able to fetch a full value in the resale market.'

8.2(iii) Sale of Pictures: A General Observation

In the world of Art, we have often heard about the fake, forged or imitated artworks of renowned painters which are being sold as the original work of that renowned artist who has really created/painted the original one. Many cases have come to the court and *Harlington* case is one of them. *Nourse LJ.* has passed the observation as follows regarding the state of the picture trade:

'Although that is enough to dispose off this appeal in favour of the defendants, I desire to add some general observations about sale of pictures by one dealer to another where the seller makes an attribution to a recognised artist. The huge additional value of an authentic attribution has, from the earliest periods of European art, seduced a corresponding volume of skill and energy into the production of fakes, even in the lifetime of the artist. An early example was *Durer* (1471-1528), who had to enlist the support of Emperor Maximilian I in order to prevent the imitation of his woodcuts and engravings.

With the great expansion in royal and noble collections which took place in the eighteenth century, faking became an art of its own. It has even been known for a faker, Han Van Meegeren, who between 1935 and 1945 produced forgeries of the works of Vermeer, to become almost as famous as the artist himself. Advance in technology, while in some respects increasing the possibilities of detection, have in others assisted the faker to apply his skill with ever-increasing ingenuity. Even if fakes are put on one side, many old master paintings cannot be safely attributed to a particular member of a group of artists, some of whom may still remain obscure'.

8.2(iv) Packing

Packing of goods plays an important role in sale of goods. Packing itself speaks the quality of goods about its manufacturer and other details. Packing of goods is an equally important consideration in judging their 'merchantability'. In the case; *Morelli v. Fitch and Gibbons*, (1928) 2 KB 636, a bottle of Stone's Ginger Wine was purchased by the plaintiff and when he attempted to draw its cork with a corkscrew and with due care, the neck of the bottle broke off and fell to the ground injuring plaintiff's hand. The seller had to answer in damages. Chorley and Tucker¹ in his book has mentioned that there was an implied condition that the bottles, as well as the contents, should be reasonably fit for the purpose for which they were required.

8.2(v) Goods should not violate Applicable Statutes

It is necessary that the goods which are being sold does not violate any applicable statute. The law in this connection means the law of the country where the goods are made. In this case; *Summer Permain & Co. v. Webb & Co.*, (1928) 2 KB 636, a seller is not bound to satisfy the requirements of a

1. Cases on Mercantile Law, 4th Edn., 1962, p. 186.

foreign law, unless that is a part of his contract or he has been trusted to supply goods fit for a particular purpose. The fact of this case was regarding sale of quantity of 'Webb's Indian Tonic Water'. It was for resale in Argentina. This tonic water contained 'salicylic acid' which was prohibited in Argentina. The buyer then sought to reject the goods as being unmerchantable. But, he was not allowed to do so, because merchantable quality has reference to the substance and quality of the goods and not restrictions which has been imposed by a foreign law.

8.2(vi) Test of Merchantable Quality

Q. Define and discuss the test of Merchantable Quality".

Merchantability is generally concerned with the quality of goods and goods are merchantable if they are fit for any one of the several purposes for which they may ordinarily be used. In a case, the plaintiff purchased the feed for his young poultry but the poultry died after giving them the feed. The House of Lords held that the feed was not fit for the purpose of buyer and the seller was responsible, but that the feed was merchantable as it was fit for older birds and other animals.

Changing the term from 'merchantable quality' to 'satisfactory quality' the Sale and Supply of Goods Act, 1994 (English), section 14(2B) says that the goods must be fit for all the purposes for which goods of the kind in question are commonly supplied. So, the goods should be of all round fitness for all their purported purposes and not only just fit for one of their common purposes.

In the case; *Aswan Engineering Establishment Co. v. Lupine Ltd.*, (1987) 1 WLR 1: (1987) 1 All ER 135, buckets were supplied and were found to be suitable for most types of export use, even when stacked in ships five or six feet high. These buckets were filled with a compound and remained for several days in direct sunlight on the quaside at Kuwait in very high temperatures. But, in the extreme heat, temperature reached very high and heavy-duty buckets collapsed resulting in loss.

The Court of Appeal held that the goods were to be regarded as merchantable quality if they were suitable for one or more of the purposes for which the goods of that description were normally bought. These buckets were suitable for most of the purposes for which buckets of that description (heavy duty) were commonly purchased or used. But the definition of satisfactory quality does not require that the goods should be fit for extreme or outlandish purposes but just for such uses or such goods are commonly, i.e., normally, used. Leaving the bucket stacked in such extreme temperatures could held to be an extreme, abnormal use.

8.2(vii) Statutory Definition of Merchantability

As per section 7(2) of the Supply of Goods (Implied Terms) Act, 1973 the merchantable quality means that the goods shall be fit for the purpose or purposes for which goods of that kind are commonly bought as it is

reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.

8.3 Conditions Implied by Trade Usage [Section 16(3)]

"An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade".

It gives a statutory force to conditions implied by the usage of a particular trade. It has been observed in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent.

In the case; Peter Darlington Partners Ltd. v. Gesho Co. Ltd., (1964) 1 Lloyd's Rep 149, it was observed that the contracts have to be construed in the light of trade usages. Here, a contract for the sale of canary seed was held subject to the custom of the trade that for impurities in the seed, the buyer would get a rebate on the price, but would not reject the goods.

8.4 Express Warranty [Section 16(4)]

'An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith'.

It is upto agreement between parties to include any express conditions and/or warranties in their contract at the same time. The express warranty doesn't negative a warranty or condition implied by the Act unless the express terms are inconsistent with the implied conditions.

9. Sale by Sample

Q. Discuss 'Sale by Sample' with the help of relevant cases.

Section 17 of the Act speaks about the sale which is performed on the basis of sample of goods-

"(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample there is an implied condition-

(a) that the bulk shall correspond with the sample in quality;

(b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

So, this section puts three conditions into every contract of sale by sample:

(i) that the bulk shall correspond with the sample in quality.

(ii) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(iii) that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

If a buyer purchase the goods on the basis of sample and finds that the goods are defective which was not apparent on reasonable examination of the sample, the buyer has got the right to reject the goods on discovering the defect later. Further, even on partial defects of some of the goods, the buyer can reject the entire quantity of goods.

In the case; Prabhu Dayal v. Bhagwan Sahai, AIR 1955 NUC 4067 (Raj), the goods were found defective which was purchased on the basis of sample and it was unmerchantable too. Here, the buyer was justified in not accepting the goods on delivery. Here, the buyer has not committed any breach of contract and the seller is not entitled to any damages which he may have suffered on release of the goods.

Section 41 gives the buyer an opportunity to examine the goods which have been delivered and if it was not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

If the buyer rejects the goods after inspection due to its non-conformity with the sample and if he has already paid for the goods then he can recover the price as money had and received for his use.

When the dispute arises from indifferent supply of goods (regarding quality), it would be the duty of the seller to prove that the goods were of the quality contracted for [Beharilal Baldeo Prasad, (in re:), MANU/TN/0137/1955 : AIR 1955 Mad 271].

9.1 Bulk to Correspond with Sample

It is the first essential that the bulk of the goods actually delivered must match the sample shown in quality.

In the case; E. & S. Ruben Ltd. v. Faire Bros., (1949) 1 KB 254, it was a contract for the sale of rubber materials of which samples were shown. The material was to be in rolls of specific length and width. The rubber material delivery was of measurements out of accord with the sample.

It was held that the goods did not correspond with the sample in quality, their measurement being a part of their quality and the buyer, having not rejected the goods, was entitled to damages for breach of the condition. And this would be so even if a very simple process was required to make them accord with the sample.

9.2 Opportunity to compare Bulk with Sample

Second implied condition is that the buyer shall have a reasonable opportunity of comparing the bulk of the goods with the sample.

9.3 Goods free from any defect, rendering them unmerchantable

Q. Discuss under section 17 the requirement of goods to be merchantable.

The third condition needs that the goods to be sold should be free from any such defect which renders them unmerchantable and which is not apparent on reasonable examination. It can also be said that there is no implied condition where the defect is a patent one. This condition arises only when the defect is a latent one, i.e. not discoverable by reasonable examination. In the case; Drummond & Sons v. Van Ingen, (1887) 12 App Cas 284, illustration of defect has been given as:

A cloth merchant ordered for worsted coating cloths from cloth manufacturers which were to be matched with quality of supplied sample. These clothes were to be supplied to clothiers and tailors. The coatings supplied corresponded with the samples, but arising certain defects of clothes, it was unmerchantable. Although, the same defect existed in the supplied sample but was not discoverable by due diligence upon such inspection as it was ordinary and usual upon sale of cloth.

It was the observation of House of Lords that the defect was a latent one hence, the goods were unmerchantable.

In the words of Lord Macnaghten the meaning and effect of a sample as follows:

"Correspondence of the goods with the sample does not relieve the seller from his obligation to supply goods fit for the purpose for which they were intended. After all the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract, which owing to the imperfection of language may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be considered as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country".

In another case; Champanhac & Co. Ltd. v. Waller & Co. Ltd., (1948) 2 All ER 724, the fact of the case was that the plaintiff's representative inspected surplus balloons which was possessed by the defendants. Plaintiff saw the sample of balloons, examined it and after finding it strong and merchantable, purchased 200 balloons subject to all faults and imperfections. After delivery, it was found that the material was perished and it was unmerchantable too.

It was observed that with the words like "with all faults and imperfections" meant that provided the bulk corresponded in type and quality with the sample it would be accepted with whatever faults and imperfections it had. But, here the fabric of the balloons did not correspond with the sample and, therefore, the implied condition was breached.

9.4 Buyer's State of Knowledge about Goods

Q. Upto what extent a buyer is responsible regarding his knowledge about the goods? Explain it with the help of relevant cases.

The most vital part of the administration of conditions and warranties is the buyer's state of knowledge about the goods and this in turn depends on the information which is imparted by sellers to buyers. In the book 'Quality of Goods. Information and Death of Contract',¹ Steve Hedley has given his statement as follows:-

1. 2001 JBL 114 (123).

"Strictly speaking goods are only defective in the eye of beholder. There is no such thing as a 'defective product': only a product which this buyer, properly informed as to its nature, would not have bought at this price. Few articles, indeed, are entirely useless or defective in everyone's eyes: one person's old and barely functioning car is another person's valuable antique, and yet another's promising piece of scrap metal. And some business exis rmation, by introducing an onus on the seller to explain to the buyer of the goods if they are not as the buyer would want them - and to do so in language which the buyer can be expected to understand.'

© Universal law Publishing Co.

CHAPTER 5

EFFECTS OF THE CONTRACT

In this Chapter

1. Introduction
2. Importance of Transfer of Property
3. Property Passes when intended to Pass (Section 19)
4. Sale of Specific Goods
5. Meaning of Terms
 - 5.1 Specific Goods
 - 5.2 Deliverable State
 - 5.3 Unconditional Contract
6. Goods to be put in Deliverable State (Section 21)
7. Goods to be Weighed or Measured (Section 22)
8. Sale of Unascertained Goods and Appropriation (Section 23)
 - 8.1 Some more points on Appropriation
 - 8.2 Appropriation without Buyer's Assent
 - 8.3 Buyer's Assent may be Express or Implied
 - 8.4 Appropriation - Unconditional and Goods - Contract Quality
9. Delivery to a Carrier
10. Goods Sent on Approval
 - 10.1 Delivery of goods on sale or return
 - 10.2 Risk of Loss or Damage
 - 10.3 Delivery on Sale or Return and Conditional Sale
11. Reservation of Right of Disposal (Section 25)
12. Transfer of Risk (Section 26)
 - 12.1 Separation of Risk from Property
 - 12.2 Delay in Delivery of Goods
 - 12.3 Express Agreement

Relevant Cases

1. Badri Prasad v. State of Madhya Pradesh, MANU/SC/0079/1969 : (1971) 3 SCC 23.
2. Kirkham v. Attenborough, (1897) 1 QB 201.
3. McEntire v. Crossley Bros. Ltd., (1895) AC 457 (467).
4. Agricultural Market Committee v. Shalimar Chemical Works, MANU/SC/0644/1997 : AIR 1997 SC 2502.
5. Bhagwat Narain Tendulkar v. Goa Coop. Marketing and Supply Federation Ltd., (1998) 2 Mah LJ 703 (Bom).
6. Aluminum Industries v. Romalpa, (1976) 2 All ER 552.
7. Dwarka Das Ajodhya Pd. v. Ram Ratan, MANU/UP/0634/1922 : AIR 1922 All 458.
8. Tarling v. Baxter, 6 Barn & Cress 360; 5 LJB 164; (1827) 30 RR 355.
9. Badri Prasad v. State of Madhya Pradesh, MANU/SC/0030/1965 : AIR 1966 SC 58; (1965) 3 SCR 381.

10. Shankar Das v. Bhanna Ram, AIR 1926 Lah 606.
11. Kursell v. Timber Operators and Contractors Ltd., (1926) 135 LT 223.
12. Aluminum Industries Ltd. v. Minerals and Metals Trading Corporation of India Ltd., MANU/TN/0836/1997 : AIR 1998 Mad 239.
13. Underwood Ltd. v. Burgh Castle & Cement Syndicate, (1922) 1 KB 343; (1921) All ER Rep 551.
14. Abdul Aziz v. Jogendra Krishna Roy, (1917) ILR 44 Cal 98.
15. Rugg v. Minett, (1809) 11 East 210; 10 RR 475.
16. Goverdhanlal v. Bakhtawarlal, AIR 1955 NUC (Raj) 4063.
17. Zagury v. Furnell, (1809) 2 Camp 240; 11 RR 704.
18. Sanwick v. Sothorn, (1839) 48 RR 704.
19. Shoshi Mohun Pal Chowdhry v. Nobo Kristo Poddar, (1878) 4 ILR Cal 801.
20. Loon Karan Sohan Lal v. Firm John & Co., MANU/UP/0102/1967 : AIR 1967 All 308.
21. Laidler v. Burlinson, (1837) 2 M&W 602, 610, 46 RR 717.
22. Emperor v. Kuverji Kavasji, MANU/MH/0111/1940 : AIR 1941 Bom 106; (1941) 43 Bom LR 95.
23. Healey v. Howlett & Sons, (1917) 116 LT 591; (1917) 1 KB 337.
24. Jenner v. Smith, (1869) 4 CP 270.
25. Pignataro v. Gilroy & Sons, (1957) 1 Lloyd's Rep 230 (240).
26. Carles Fedorspid & Co. S.A. v. Charles Tueiga & Co. Ltd., (1957) 1 Lloyd's Rep 240 (255).
27. Wait v. Baker, (1848) 2 Ex 1, 7, 76 RR 469.
28. Warder's (Import & Export) Co. Ltd. v. W. Norwood & Sons Ltd.
29. Elphick v. Barnes, (1880) 5 CPD 321.
30. Head and Tattersall, (1871) LR 7 Ex 7.
31. Loeschman v. Williams, (1815) 4 Camp 181; 16 RR 772.
32. Martinean v. Kitching, (1872) LR 7 QB 436.
33. Stems Ltd. v. Vikers Ltd., (1923) 1 KB 78 CA.
34. Demby Hamilton & Co. Ltd. v. Barden (Endeavour Wines) Ltd., (1949) 1 All ER 435.
35. Comptoir d' Achat et de Vented du Boernbod Belge S/A v. Luis de Ridder Limitada, 1949 AC 293.

1. Introduction

Q. Define 'ascertained goods' and differentiate it with 'unascertained goods'.

Chapter III of the Sale of Goods Act, 1930 speaks about the effects of the contract, i.e. Transfer of property as between seller and buyer. Section 18 says-

Goods must be ascertained.-Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

The Supreme Court in the case *Badri Prasad v. State of Madhya Pradesh*, MANU/SC/0079/1969 : (1971) 3 SCC 23, defined the term 'ascertained goods' as follows-

"It is true that trees which are agreed to be severed before sale or under the contract of sale are "goods" for the purposes of the Sale of Goods Act. But before they cease to be "proprietary" rights or interest in proprietary rights within the meaning of sections 3 and 4(a) of the Act they must be felled under the contract. It will be noticed that under clause 1 of the contract the plaintiff was entitled to cut teak trees of more than 12 inches girth. It has to be ascertained which trees fell within that description. Till this was ascertained, they were not "ascertained goods" within section 19 of the Sale of Goods Act. Clause 5 of the contract contemplated that stumps of trees after cutting had to be 2 inches high. In other words, the contract was not to sell the whole of the trees. In these circumstances property in the cut timber would only pass to the plaintiff under the

contract at the earliest when trees are felled. But before that happened the trees had vested in the State."

Unascertained goods are distinct from specific or ascertained goods in the sense that future goods include those goods which are not in existence yet or goods which have not been acquired so far by the seller. It may also be said that future goods for purposes of passing of property can never be distinct.

Unascertained goods are not defined by the Sale of Goods Act but they fall under following categories-

1st- Goods which are to be manufactured or grown by the seller which are necessarily future goods,

2nd- Generic goods, e.g., 20 tonnes of sugarcane or similar goods which must also be future goods where the seller does not own sufficient goods of the description in question to appropriate to the contract, and

3rd- An unidentified part of a specific whole, e.g. 1000 tonnes of sugarcane out of a particular lot of 5000 tons of sugarcane.

2. Importance of transfer of property

In a sale, the transfer of ownership of goods/property makes an essential part of that sale. It always becomes necessary to determine the time at which the seller ceases to be the owner and the buyer acquires ownership. There are rights as well as obligations of the parties which are linked with passing of property from seller to buyer.

One of the most important effects is that 'risk' prima facie passes with property. Secondly, when the property exchanges hands from seller to buyer then he can i.e. buyer can exercise proprietary rights over the goods. That means a buyer can sue the seller for delivery and if the seller has resold the goods to a mala fide buyer, the original buyer may recover from him also, as it was observed in the case; *Kirkham v. Altenborough*, (1897) 1 QB 201.

3. Property passes when intended to pass

Q. What are the circumstances in which it can be said that the goods have been passed?

Section 19 deals with the passing of properties when there is intention to pass it on-

"(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

Lord Watson in the case of; *McEntire v. Crossley Bros. Ltd.*, (1895) AC 457 (467), described passing of property as-

"It does not in the least follow that, because there is an agreement of sale and purchase, the property in the thing which is the subject-matter of the contract has passed to the purchaser. That is a question which entirely depends upon the intention of the parties. The law permits them to settle the point for themselves by an expression of their intention upon the point."

In the case; *Agricultural Market Committee v. Shalimar Chemical Works*, MANU/SC/0644/1997 : AIR 1997 SC 2502, Supreme Court applied the principle of *McEntire* case. Certain goods were sent from Kerala to Hyderabad. The terms and conditions of the contract showed that the parties intended that the sale would be complete in all its aspects in Kerala itself. In consequence all legal implications, including those of taxation, arose in Kerala itself. Here, the State of Andhra Pradesh was not justified in changing levy on the purchase of copra.

The Supreme Court further observed-

"Section 19 of the Sale of Goods Act attempts to give effect to the elementary principle of the law of contract that the parties may fix the time when the property in the goods shall be treated to have passed. It may be time of delivery, or the time of payment of price or even the time of making of the contract. It all depends upon the intention of the parties. It is, therefore, the duty of the court to ascertain the intention of the parties and in so doing they have to be guided by the principles laid down in section 19(2) which provides that for ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case".

In one another case; *Bhagwat Narain Tendulkar v. Goa Coop. Marketing and Supply Federation Ltd.*, (1998) 2 Mah LJ 703 (Bom), where it was said that the intention has to be gathered from the substance of the agreement and not merely from the words used by the parties. Here, there was a sale of second hand vehicle where price was payable in monthly instalments. Two advance instalments were paid and possession of vehicles were taken. One of the vehicles met an accident till then, the insurance was in the name of vendor therefore he collected the insurance money. The question arose then that who was the

owner of the vehicle at the time of accident. One of the clauses in the agreement was that only on full payment, the possession of vehicles would be transferred to the buyer by registering the change with the Regional Transport Officer. Due to this declared intention, ownership remained with the seller. Here, the buyer has defaulted with the instalments. The seller had the right to collect the insurance money. He was accordingly right in seizing the vehicles and was not liable for causing any loss of business to the buyer.

In another case; *Aluminum Industries v. Romalpa*, (1976) 2 ALL ER 552, a contract provided that the property would not pass to the buyers until they paid for it and even if they resold the goods without paying the price, the claim to the price would be assigned to the sellers, it was held that the property had not passed to the buyers and they resold the goods only as agents of the original sellers and the latter were entitled to the retail price in preference to the other creditors of the insolvent buyer.

In another case; *Agricultural Market Committee v. Shalimar Chemical Works Ltd.*, MANU/SC/0644/1997 : (1997) 5 SCC 516; MANU/SC/0644/1997 : AIR 1997 SC 2502, the Supreme Court discussed the factors which influenced the decision. The goods, the subject-matter of sale were ascertained goods and in deliverable state. The buyer placed the order and on his order the seller in the State of Kerala loaded the goods on the lorry and dispatched it to Hyderabad. One of the terms of contract was that the seller would not be liable for any future loss of goods and that the goods were being dispatched at the risk of the respondents. The respondents got the goods insured and paid the premium. He thus treated the goods as his own and ensured himself that he could claim the insurance money for the loss of goods if occurs any in course of transit of goods. Here, the weightment of the goods at Hyderabad or the collection of documents from the bank for payment of price through the bank at Hyderabad were immaterial since the property in the goods had already passed at Kerala and it was not dependent upon the payment of price or the delivery of goods. So, the sale took place in the State of Kerala and not in Hyderabad. Hence, the place where the sale did not take place, to levy the market fee on purchase of copra which was an agricultural produce under the AP (Agricultural Produce and Livestock) Act, 1966 was invalid.

Here, it would be pertinent to mention some excerpts from Benjamin's Sale of Goods¹ where he has quoted the observation from the case *McEntire v. Crossley Bros. Ltd.*, 1895 AC 457 (467)-"Where the intention of the parties is not apparent from their contract, their intention will be ascertained in accordance with the rules laid down in sections 18 and 20 to 24. These rules are presumptions only. The law permits the parties to settle 'the point for themselves by any intelligible expression of their intention'".

These sections relate with following situation-

- (i)sale of specific goods;
- (ii)sale of goods on approval; and
- (iii)sale of unascertained goods.

In another case; *Dwarka Das Ajodhya Prasad v. Ram Ratan*, MANU/UP/0634/1922 : AIR 1922 All 458-"where the defendants agreed to take certain goods as ascertained but requested the plaintiffs to postpone delivery until some more convenient time and under these circumstances, the provisions of section 78 of Contract Act come into operation, the property in the goods passed to the defendants as soon as the proposal for sale was accepted and they were liable for the price".

4. Sale of Specific Goods

Sections related to the sale of specific goods are 20, 21 and 22. The provision of section 20 is as below:

Specific goods in a deliverable state-'Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of goods, or both, is postponed.

To understand the provision as given in the section 20, we will be discussing here following cases-

- (a) *Tarling v. Baxter*, 6 Barn & Cress 360: 5 LJKB 164: (1827) 30 RR 355, the facts of the case was that A on the 4th of January, agreed to sell to B, a stack of hay to be paid on the 4th of February; and the stack was allowed to remain on A's land till 1st of May. A also stipulated that the hay should not be cut until it was paid for.

It was held that "this was a contract for an immediate sale and not a future sale, and that the property in the hay passed immediately by it to the buyer, and that the same having been accidentally destroyed by fire, the loss fell upon him."

- (b) *Badri Prasad v. State of Madhya Pradesh*, MANU/SC/0030/1965 : AIR 1966 SC 58, A forest contractor purchased the cut timber on an auction and also some forest's land

1. 4th Edn., 1992, p. 186.

area. As per condition of payment, the money was to be paid in four instalments. After the first payment, contractor took the possession of land as well as cut timber and he started carrying his work i.e. felling of trees and transportation of timber. One day fire broke out in the forest and it engulfed the timber which was the subject-matter of the contract. The contractor did not pay the remaining instalments. The contractor was accordingly prevented from collecting the timber. Here, it was held that the contract was unconditional, the goods sold were specific and they were in deliverable state and, therefore, the property in the goods passed at the time when the contract was made hence the contractor was bound to pay the remaining instalments.

So, the basic conditions for this rule for its application are-

- (i) the sale must be that of specific goods,
- (ii) the goods must be in a deliverable state; and
- (iii) the contract must be without any precondition.

The Supreme Court, in the case; Agricultural Market Committee v. Shalimar Chemical Works, MANU/SC/0644/1997 : (1997) 5 SCC 516; MANU/SC/0644/1997 : AIR 1997 SC 2502, has stated about the abovementioned requirements.

If, we look into the provision of section 20, it says that there is an unconditional contract for the sale of 'specific goods' in a 'deliverable state', the goods pass to the buyer as soon as the contract is made. It gives a clear indication that as soon as a contract is made in respect of specific goods which are in a deliverable state, the title in the goods passes to the purchaser. The passing or transfer of goods is not dependent upon the payment of price or time of delivery. When section 20 comes into picture, it has to be seen whether there is anything either in terms of the contract or in the conduct of the parties or in the circumstances of the case which indicates an intention which does not commensurate with the provision of this section. Intention of the parties as per section 19(1) is the decisive factor as to when the property in the goods passes to the purchaser. But, when the contract doesn't say anything about intention of the parties then it has to be gathered from the conduct of the parties and the circumstances of the case, under the provisions of the Act relating to passing of property.

5. Meanings of terms

5.1 Specific Goods

According to section 2(14), 'specific goods' means goods identified and agreed upon at the time a contract of sale is made.

It means, identity of goods has already been established at the time of the sale and individuality of goods has been found.

5.1(i) **Shankar Das v. Bhanna Ram, AIR 1926 Lah 606**

In the case, there was a sale of five buses and the price of these buses was to be paid in instalments and it was agreed upon by the parties that the ownership and route permit would be transferred within a week after the last instalment is paid. It was held that this was a sale of specific goods and the property passed when the contract was made.

5.1(ii) **Kursell v. Timber Operators and Contractors Ltd., (1926) 135 LT 223**

There was a sale of all the "merchantable timber" growing in the forest of Latvia. It was a sale on a particular date. The contract defined "merchantable timber" in contract as-"all trunks and branches of trees but no seedlings and young trees of less than six inches in diameter at a height of four feet from the ground." The buyer had a time-period of 15 years in which they had to cut the trees. But, after cutting the trees for few days only, the private rights were annulled as the forest was nationalized. Then, the sellers sued for the price.

Here, the buyers were held not liable. It was not a sale of specific goods and the property had not passed to the buyer at the time of the contract.

Scrutton LJ. observed as-

"It appears to me that the goods were neither identified nor agreed upon. Not every tree in the forest passed, but only those complying with a certain measurement not then made. How much of each tree passed depended on where it was cut, how far from the ground. Nor does the timber seem to be in a deliverable state until the buyer has severed it."

5.1(iii) **Aluminum Industries Ltd. v. Minerals and Metals Trading Corporation of India Ltd., MANU/TN/0836/1997 : AIR 1998 Mad 239**

A Government undertaking decided to sell aluminium metal to allottees and for this purpose entered into a contract. It was the condition of allotment of quota that the price ruling on the day of delivery would apply. As per the provisions

of sale notes, the allottees opened letters of credit accounts in favour of the undertaking. After that, the allottees repeatedly approached the Government godowns for delivery but the same was postponed every time without giving any valid reason. During this period, price structure was revised upwards. The Government attempted to deliver the metal at increased prices. But, the Court did not allow it. The Court allowed the writ petition of the allottee and held that judicial review in contractual matters was not absolutely excluded.

5.2 Deliverable State

Q. What do you mean by 'deliverable state' of goods? Discuss it in the light of provision of section 2(3).

According to section 2(3) of the Act, 'Deliverable State' means-

'Goods are said to be in a deliverable state when they are in such state that the buyer would under the contract be bound to take delivery of them.'

We may cite here the example of the case; *Underwood Ltd. v. Burgh Castle & Cement Syndicate.*, (1922) 1 KB 343: (1921) All ER Rep 551. Where it was said that where the article sold is complete in itself and nothing remains to be done to it, it may not be regarded to be in a deliverable state if the seller has to dismantle before forwarding it.

Banks L.J. gave the judgment as-

"The subject-matter of the sale was a horizontal condensing machine. The sellers agreed to sell it for London. The engine weighed 30 tons. It was bolted to a concrete emplacement in which it had become embedded by its weight so that it had first to be unfastened, and then to be dismantled.....The engine was damaged on its way to the rails. The sellers contended that where a specific article is complete in itself, for example, a complete engine or a complete cart-that is to say, where nothing more has to be done to make it an engine or a cart-it is then in a deliverable state.....I do not accept that test. A 'deliverable state' does not depend upon the mere completeness of the subject-matter in all its parts, but on the actual state of the goods at the date of the contract and the State in which they are to be delivered by the terms of the contract. Where the vendors have to expend as much trouble and as much money as the buyers had to expend before this engine could be placed on the rail, I cannot think that the subject-matter can be said to be in a deliverable state."

5.3 Unconditional Contract

A contract should be made without any condition. But, if both the parties are agreed to make the contract conditional with mutual consent then property should not pass unless certain conditions are fulfilled.

In the case; *Abdul Aziz v. Jogendra Krishna Roy*, (1917) ILR 44 Cal 98, the goods in question were in a deliverable state, but the property could not be passed since there was a custom of trade that the sale should not be completed until the goods were selected, tested and weighed by the buyer.

If the condition has been put into contract that prior to passing of property, the goods remain the property of the seller until the payment is realized by the seller. If the condition is not fulfilled the seller cannot sue for the price but he can only ask for damages for breach. But, if payment is not a condition precedent, the property may pass enabling the seller to sue for the price even if he is withholding delivery of the goods for recovering his price.

In the case; *Tarling v. Baxter*, 30 RR 355 (356) (1827), it was observed that if the requirements of section 20 are fulfilled, the property passes as soon as the contract is made and it is immaterial that the payment of the price or delivery of the goods or both is postponed.

Here, the vendor sold a kotha of barley, these goods were ascertained, specific and also in a deliverable state. There was a condition in the contract that the seller should keep the goods in his possession until the buyer has paid the price and if, the buyer fails to pay the price within the prescribed time then the seller is free to re-sale the goods. The seller successfully sued the buyer for the price because the time has passed from the stipulated time of contract.

Bayley J. said-"the right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless the payment is duly made and yet property in the goods may be in the vendee."

6. Goods to be put in Deliverable State

Q. What do you mean by "to put the goods in deliverable state". Discuss it with the help of relevant cases.

Section 21 of the Act says, as-

"Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into deliverable state, the property does not pass until such thing is done and the buyer has notice thereof".

So, section 21 commands over the sellers by putting duty on them to do something to the goods for the purpose of putting

them into a deliverable state.

If, anything remains to be done on the part of seller then it can't be said that the goods are in deliverable state. In the case; *Rugg v. Minett*, (1809) 11 East 210: 10 RR 475, there was a sale of turpentine oil which was lying in a cistern. The oil had to be filled up in the casks from the cistern. Some of the filling work was done by the seller in presence of the buyer. But, before the casks could be removed, the whole oil was consumed by fire. The buyer had to bear the loss for the casks since everything was done by the seller which lay upon them to perform in order to put the goods in deliverable state.

Goverdhanlal v. Bakhtawarlal, AIR 1955 NUC (Raj) 4063, explains the meaning of section 21 in beautiful manner. In this case, there was a contract for sale of a specific item of machinery. In the contract, it was mentioned that a person from seller's organization/shop will go to the buyer's place and will install the engine and put into working order and whatever parts except shaft, if lacking would be supplied by him at his own cost and on the seller having done all these would get remaining payment from the buyer. It was held that under section 21, the property would not be in a deliverable state and therefore the property in the goods would not pass to the buyer unless the seller did all he had to do under the contract before the buyer committed a breach of contract by non-payment of price within the period specified and therefore the seller would not be entitled to remedy under section 55(1)¹ which applied to cases where the property in goods has passed to the buyer. This case was also not covered under sub-section (2) also because under the contract the balance of price was not payable on the due date irrespective of delivery but the delivery and payment were to go together. Hence, the seller was not entitled to recover the balance of price.

7. Goods to be Weighed or Measured

Section 22 of the Act speaks about the weight, measure and test of the saleable goods for which contract has been made-

Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price.-Where there is a contract for the sale

1. Section 55(1) where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

So, where the seller has to weigh or take measurement of the goods to be sold under the contract for ascertaining the price of goods, such property does not pass until it is done by the seller and witnessed by the buyer.

Some cases to this section-

(a) *Zagury v. Furnell*, (1809) 2 Camp 240: 11 RR 704

In this case, there was a sale of goat skin, it was the duty of the seller to count the goatskins in each bale, and the price was for certain sum per dozen skins, it was held the seller had to bear the loss, which was caused by fire before he counted the goods.

(b) *Sanwick v. Sothern*, (1839) 48 RR 740

In this case, Lord Denman C.J. observed that, "if a part of a bulk is sold, so that weighing or separation is necessary to determine the identity or individuality of the article, or if the whole of the commodity be sold, but weighing is necessary to ascertain the price, because the quantity is unknown, the weighing and measuring must precede delivery, and symbolic delivery without such weighing will not be sufficient." It was further observed that, "on a contract for the sale of goods lying in a warehouse, the handing over of delivery order to the buyer, and the transfer of the goods to him in the warehouseman's books, will not vest the property in him, if something remaining to be done for the purpose of ascertaining the identity or quantity of the goods".

(c) *Shoshi Mohun Pal Chowdhry v. Nobo Kristo Poddar*, (1878) 4 ILR Cal 801

Here, there was a contract between A and B, where A had to sell B 975 mounds of rice i.e. the whole content of certain golah. B paid certain amount as earnest money and agreed to remove the whole of the rice after weighing. B transferred this contract to C who after taking the delivery of some bags refused to accept the remaining on account of their inferior quality. There was a fire in golah which burnt the remaining rice. It was held that it was a sale of specific goods and the property passed as soon as the contract was made. The buyer could have known the quality of rice with ordinary diligence before accepting the rice.

8. Sale of Unascertained Goods and Appropriation (Section 23)

"(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied and may be given either before or after the appropriation is made.

(2) Delivery to a carrier-Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Loon Karan Sohan Lal v. Firm John & Co., MANU/UP/0102/1967 : AIR 1967 All 308

(a) If a sale takes place and the goods are not specifically defined, then it becomes necessary that both the parties should agree upon what is to be delivered in course of honouring the contract. Until this is done there are no goods to which the contract can attach. When, however, the goods to be delivered under the contract have been identified, in a manner binding on the parties, as the goods to which the contract is to attach and the property wherein is to be transferred to the buyer and nothing further remains to be done to pass the property, the property may, and, in the absence of a contrary intention, will pass.

In the case; Laidler v. Burlinson, (1837) 2 M&W 602, 610, 46 RR 717, it was observed-

(b) "the term 'appropriation', may also be used in the sense that the goods have been identified by the agreement of the parties as the goods about which they are contracting, so that the contract can never apply to any other goods, and the seller would be guilty of a breach of contract if he did not deliver them and yet the property may not pass, so that if the seller sold them to someone else the buyer could not claim the goods from that person."

On appropriation, Sir Mackenzie Chalmers has written his commentary as follows¹-

'It is often a nice question of law whether the acts done by the seller merely express a revocable intention to appropriate certain goods to the contract'-i.e. specify them as the goods contracted for- 'or whether they show an irrevocable determination of a right of election.' That learned author maintains that in every case where it has been held that there was an irrevocable election there was delivery, actual or constructive, to the buyer.'

8.1 Some more points on Appropriation

Q. Why it is mandatory on part of seller to sort out the goods for appropriation of goods.

Property does not pass till Appropriation-The seller usually does the act of appropriation. If, the seller has done nothing to sort out the goods, the question of the property in them passing to the buyer does not arise. In the case; Emperor v. Kuverji Kavasji, MANU/MH/0111/1940 : AIR 1941 Bom 106: (1941) 43 Bom LR 95, there was a contract for the sale of a quantity of liquor out of a cask containing much larger quantity and it was observed that having no part separated or bottled, the property did not pass.

Another example can be found in the case-Healey v. Howlett & Sons, (1917) 116 LT 591: (1917) 1 KB 337-The defendants had ordered the plaintiff for supply of twenty boxes of fishes of hard bright mackerel. The plaintiff sent

1. Chalmers, Sale of Goods, p. 77

a consignment of 190 boxes of fishes by railway to defendants. These 190 boxes also contained boxes for two other consignees. Somehow, the consignment got delayed en route and when the defendant received their 20 boxes, it was found that the fishes were deteriorated and were not merchantable. The defendants refused to accept them then the sellers sued for the price.

It was observed that at the time of deterioration of goods, the same were not passed to the buyers. Ridley J., said-

"I think it is clear on the authorities that goods become the property of a consignee as soon as they are marked off by some distinct act... and are delivered to the carrier as agent to complete delivery to the purchaser. Here, however, out of a large number of boxes only a portion were to belong to the defendants and none had been marked off.... Suppose half the boxes had been lost, who could say whether they were those of the defendants or of the other purchaser? The name of the consignee should have been placed on the boxes."

8.2 Appropriation without Buyer's Assent

An appropriation without the buyer's assent is ineffective. In Jenner v. Smith, (1869) 4 CP 270, the plaintiff had undergone a contract with the defendants orally to sell two pockets of hops which were available there and others two lying in a warehouse in London. The buyer took the possession of available two and asked for remaining two on a future date. When the plaintiff came to London, he went to the warehouse and selected two out of three pockets

lying there and asked the warehouse keeper to mark them "to wait the buyer's order".

It was held that in this way, the property did not pass to the buyer since there was no evidence that the appropriation of the two pockets in the London warehouse was either originally authorised or subsequently assented to by the buyer.

8.3 Buyer's Assent may be Express or Implied

The assent of buyer may be express or implied for appropriation. In the case; *Pignataro v. Gilroy & Sons*, (1957) 1 Lloyd's Rep 230 (240), the buyer was informed that the goods were available for collection at the seller's warehouse and he did not give any reply for two months and before he sent his man to collect the goods, the goods were stolen from the warehouse without the seller's fault, it was held that the seller had appropriated the goods; that the buyer's assent was implied from his failure to reply and that the goods were the buyer's property at the time of theft and the seller was not liable for non-delivery.

8.4 Appropriation - Unconditional and Goods of Contract Quality

For effective appropriation, it should be unconditional and the goods must be of contract quality. This is the last act which has to be performed by the seller.

In the case; *Carles Fedorspid & Co. S.A. v. Charles Tueiga & Co. Ltd.*, (1957) 1 Lloyd's Rep 240 (255), the seller had to dispatch cycles and tricycles. They had the goods packed and also marked with the port of destination. Before sending the shipment the sellers went into liquidation. The buyers claimed the goods from the liquidator on the ground that the goods, having been unconditionally appropriated, became their property. It was held that the parties' intention was that property should pass on shipment and the mere preparation for shipment did not amount to an "appropriation" Pearson J. then observed as follows:

"Usually, but not necessarily, the appropriating act is the last act to be performed by the seller. For instance, if delivery is to be taken at the buyer's premises and the seller has appropriated the goods when he has made the goods ready and identified them and placed them in position to be taken away by the buyer and so informed the buyer, and if the buyer agrees to come and take them, that is the assent to the appropriation, but if there is a further act, an important and decisive act, to be done by the seller, then there is prima facie evidence that probably the property does not pass until the final act is done."

9. Delivery to a Carrier

Sub-section (2) of section 23 gives statutory recognition to the important rule that, where goods are delivered to a carrier or the like for transmission to a buyer, the carrier is presumed to be the buyer's agent not only to take delivery, but to assent to the appropriation to the contract of the goods so delivered, subject of course to any just grounds of exception which may subsequently be discovered.

It may be admitted, Baron Parke said in 1949 (*Wait v. Baker*, (1848) 2 Ex 1, 7, 76 RR 469)-

"If goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier becomes the agent of the vendee and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should be compatible agree with the contract."

• Acknowledgement by Bailee

If the goods are already in the possession of bailee and he acknowledges to hold them on the seller's behalf, it amounts to an "unconditional appropriation".

In the case; *Wardar's (Import and Export) Co. Ltd. v. W. Norwood & Sons Ltd.*, the seller had 1500 cartons of frozen Ox kidneys, which were lying in a third party's cold store. Out of 1500 cartons, he sold 600 cartons to the buyer and gave him a delivery order. The day after, the buyer's agent went to take the delivery of goods but he found that 600 cartons were waiting for him on the pavement. He gave the delivery order and it was accepted by an officer of the cold store. At this time, there was no evidence of the condition of the packed meat. But, it was found during loading that the meat has deteriorated and on arrival at the buyer's premises, it was unfit for consumption.

It was held by the Court of Appeal that in the above circumstances the loss fell upon the buyer, since the property had passed to him as soon as the officer of the cold store accepted the delivery order and the deterioration was followed later on.

10. Goods Sent on Approval or 'On Sale or Return - Section 24 of the Act says as

"When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer-

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time."

10.1 Delivery of Goods on Sale or Return

Q. Is it essential on the part of buyer to approve or 'on sale or return' before the goods passes to the buyer?

A delivery of goods after the approval, might have been held to pass the property subject to a condition that it should revert in the former owner if the optional buyer returned the goods within the prescribed time, or if the term is not mentioned then in a reasonable time. By, the accepted rule, which is as per the Act in such a case there is no complete sale until the buyer has either-

- (i) signified his approval, either expressly or by dealing with the goods as owner, or
- (ii) kept the goods until the lapse of the prescribed or a reasonable time without returning them, or
- (iii) made return impossible by his own act or default, as by letting the goods be destroyed or spoilt.

10.2 Risk of Loss or Damage

If the subject-matter perishes due to some inevitable accident then it is at the original owner's risk. As in the case *Elphick v. Barnes*, (1880) 5 CPD 321, it was observed that if a horse delivered on sale or return dies before the expiration of the time allowed for return, than provisional purchaser is not liable unless the accident is due to a defect for which the provisional purchaser is answerable by the terms of the contract or otherwise.

In the case, *Head and Tattersall* (1871) LR 7 Ex 7, it was observed that intervening damage which only depreciates the goods without the holder's fault, such as an accident to a horse while being tied, does not generally affect the right to return them.

10.3 Delivery on Sale or Return and Conditional Sale

It is not always easy to distinguish a transaction of sale or return from a conditional sale in which the property passes at once on the condition of buyer to return the goods if the prescribed condition is not fulfilled.

11. Reservation of right of disposal

Q. Explain the provision of section 25 of the Sale of Goods Act as-"Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the term of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled."

Section 25 of the Act, speaks about the Reservation of right of disposal-

"(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission, to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipts, as the case may be, the goods are deliverable to the order of the seller

or his agent, the seller is prima facie deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange; and if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him."

Explanation.-In this section, the expressions, "railway" and "railway administration" shall have the meanings respectively assigned to them under the Indian Railways Act, 1890 (9 of 1890).

We can take here the example of; *Loeschman v. Williams*, (1815) 4 Camp 181: 16 RR 772. A piano was sold, the payment was to be paid in cash and piano was to be delivered at the packer's premises. Piano was left at the packer's premises on the

express condition that it was not to be delivered to the buyer till the payment is paid. The packer, however, delivered it without payment. It was observed that the instrument was the seller's property and the packer was liable in trover in wrongfully delivering it to the buyer.

Sub-section (2) of this section gives an illustration of the right of disposal:

"Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipts, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal."

So, the meaning of above lines are that if by the contract of carriage the goods are deliverable to the seller himself or his agent, the property remains in the seller. Similarly, where the seller draws a bill of exchange on the buyer for the price and transmits the same to the buyer alongwith the bill of lading or railway receipt to secure the buyer's acceptance or payment, the property does not pass until the buyer accepts or pays, as the case may be.

12. Transfer of Risk

Q. When it is decided that risk of goods has been transferred to buyer? Discuss it with the help of relevant cases.

Section 26 speaks about the transfer of risk with property. Blackburn J., has said about this as-"As a general rule, res perit domino, the old civil law maxim, is a maxim of our law, and when you can show that the property passed the risk of the loss prima facie is on the person in whom the property is." Blackburn gave this observation in the case; Martinean v. Kitching, (1872) LR 7 QB 436.

Section 26 is as follows:

Risk prima facie passes with property-Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party."

In the case; Sterns Ltd. v. Vickers Ltd., (1923) 1 KB 78 CA, there was a sale of 1,20,000 gallons of white spirit out of 2,00,000 gallons in a tank which belonged to a third party. The buyer received a delivery warrant and it was accepted by the owner of the tank. But the buyer did not take the delivery of the spirit for some months for his own convenience. The spirit deteriorated. The buyer was responsible for loss because the property had passed by attornment, and even if it had not because the buyer did not take the delivery on time.

In the words of Scrutton LJ.,-

"The transfer of the undivided interest carries with it the risk of loss from something happening to the goods, such as deterioration in their quality, at all events after the vendor has given the purchaser a delivery order upon the party in possession of them."

12.1 Separation of Risk from Property

Although risk and property go hand in hand but these are not inseparable. Sometimes 'risk' may be in one party and 'property' in another. The expression 'unless otherwise agreed' indicates that section 26 is subject to a contract to the contrary.

12.2 Delay in Delivery of Goods

Second part of section 26 can be understood better if we refer Pothier here.

Second paragraph of section 26-

"Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

Pothier's illustration¹-

If, I sell you a horse and make default in delivery, and it is struck by lightning in my stables the loss falls on me, because the accident would not have happened if I had duly delivered the horse. But, if the horse dies from a disease which would have killed him in any case, I am not liable.

In the case; Demby Hamilton & Co. Ltd. v. Barden (Endeavour Wines) Ltd., (1949) 1 All ER 435. There was a contract

between defendants and plaintiffs for supply of 30 tons of apple juice which was to be supplied weekly. The plaintiffs crushed all the apples what they had for the season and put the juice in casks to enable them to perform the contract. The delivery was to be completed by February, 1946 but on buyer's request delivery was held up. The buyer again took some delivery and then stopped completely. The juice was kept waiting for the order of buyer and by November, it deteriorated.

It was held by the Court that in the circumstances, the loss fell upon the buyer.

12.3 Express Agreement

If parties are agreed then risk and property may be separated. Section 40 also provides that where the seller agrees to deliver the goods at his own risk at a distant place from where they are, the buyer has, unless otherwise agreed, to take any risk of deterioration if it happens to the goods in transit. Lord Normand said in; *Comptoir d' Achat et de Vented du Boernbod Belge S/A v. Luis de Ridder Limitada*, 1949 AC 293- "In those cases in which it has been held that the risk without the property has passed to the buyer it has been because the buyer rather than the seller was seen to have an immediate and practical interest in the goods, as for instance when he has an immediate right under the shop-keeper's delivery warrant to the delivery of an undivided bulk of in store or to an immediate right under several contracts."

1. Contract De Vente, section 58, cited Chalmer's Sale of Goods, 13th Edn., 1957, pp. 79-80

CHAPTER 6

TRANSFER OF TITLE

In this chapter

1. Introduction
2. Buyer is without Title when Sale is by a Person who is not the Owner of the Title
3. Nemo Dat Quod Non Habet
4. Estoppel
5. Sale by Mercantile Agent
 - 5.1 Mercantile Agent
 - 5.2 In Possession as Mercantile Agent
 - 5.3 With Owner's Consent
 - 5.4 Must Sell while Acting as Mercantile Agent
 - 5.5 Good faith and without Notice
6. Sale by one of Joint Owners
7. Sale by Person in Possession under Voidable Contract
 - 7.1 Seller under Voidable Title
 - 7.2 Goods must be obtained in Pursuance of a Contract
8. Seller or Buyer in Possession after Sale
 - 8.1 Seller in Possession after Sale [Section 30(1)]
 - 8.2 Buyer in Possession before Sale [Section 30(2)]

Relevant Cases

1. Farquharson Bros. v. King & Co., (1902) AC 325 (335-36).
2. Edwards v. Vaughan, (1910) 26 TLR 545 (CA).
3. Leo v. Bayes, (1856) 18 CB 599: 107 RR 424.
4. Mohambaram v. Ram Narayan, (1935) 69 MLJ 691: 158 IC 535: MANU/TN/0077/1935 : AIR 1935 Mad 850.
5. Cooper v. Willomatt, (1845) 1 CB 672: 68 RR 798.
6. Bishopsgate Motor Finance Corpn. Ltd. v. Transport Brakes Ltd., 1902 AC 325 (326).
7. Mercantile Bank of India Ltd. v. Central Bank of India Ltd., 1938 AC 287.
8. Heap v. Motorists Advisory Agency Ltd., (1883) 11 QBD 77.
9. Coventry Shepherd & Co. v. Great Eastern Ry. Co., 304 (4th Edn.).
10. Folkes v. King, (1923) 1 KB 282 CA.
11. Lowther v. Harris, (1927) 2 KB 393: (1926) All ER Rep 352.
12. Hayman v. Flewker, (1863) 32 LJCP 132.
13. Staffs Motor Guarantee Ltd. v. British Wagon Co. Ltd., (1934) 2 KB 305: (1934) All ER Rep 322.
14. Folkes v. R., (1923) 1 KB 282 (305).
15. Oppenheimer v. Attenborough & Sons, (1908) 1 KB 221: (1904) All Rep 1016.
16. Oppenheimer v. Frazee and Wyatt, (1907) 2 KB 50 CA.
17. Evan v. Truman, (1963) 2 All ER 547 (550).

18. Car & Universal Finance Co. v. Caldwell, (1963) 2 All ER 547 (550).
19. Scarf v. Jardine, (1862) 7 AC 345: 51 LJQB 612.
20. Reese River Silver Mining Co. Ltd. v. Smith, (1869) LR WHL 64; 39 LJ Ch 849.
21. Re Hop and Malt Exchange and Warehouse Co. Ex P Briggs, 1866 R1 Eg 483: 35 LJ Ch 320: 14 LT 39.
22. Lake v. Simmons, (1927) AC 487 (501-02).
23. Smith v. Wheatcroft, (1878) 9 Ch D 230 (233).
24. Phillips v. Brooks, (1919) 2 KB 243.
25. Staffs Motor Guarantee Ltd. v. British Wagon Co. Ltd., (1934) 2 KB 305.
26. Pacific Motor Auctions Pvt. Ltd. v. Motor (Hire Finance) Ltd., (1965) 2 All ER 105 (PC): (1965) 2 WLR 881.
27. City Fur Manufacturing Co. v. Fureenbond (Brokers) London Ltd., (1937) 1 All ER 799.
28. Capital and Counties Bank Ltd. v. Warriner, (1896) 12 TLR 216.
29. Marten v. Whale, (1917) 2 KB 480.
30. Newtons of Wembley Ltd. v. Williams, (1964) 3 All ER 332 CA.

1. Introduction

Sections 27-30 override section 108 of the Contract Act, while they deal with the same subject-matter.

There has always been differences between the legal and mercantile view; the law has emphasized the rights of the true owner of goods and has been reluctant to deprive him of them unless he was in some way responsible for his own loss, while the merchant has sought to protect the honest buyer of goods, or lender of money upon them, who deals with the person in possession of goods.

Section 27 speaks about the sale by that person who is not the real owner of the property. He sells the property without getting the authority from the owner to do so. There is no consent either given by the owner. In such circumstances, the buyer acquires no better title to the goods than the seller had. Section says in detail as follows-

"Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell."

2. Buyer is without Title when Sale is by a Person who is not the Owner of the Title

Q. Explain the meaning of-Buyer is without title when sale is by a person who is not the owner of the title."

The buyer doesn't get the title if the goods have been sold by a finder or a thief.

In the case; Farquharson Bros. v. King & Co., (1902) AC 325 (335-36), the judges said-"if a person leaves a watch or a ring on a seat in the park or on a table at a cafe and it ultimately gets into the hands of a bona fide purchaser, it is no answer to the true owner to say that it was his carelessness and nothing else, that it enabled the finder to pass it off as his own."

Other examples:

(a) Delivery of goods by A, on sale or return to B, upon the condition that they are to remain the property of A until the price is paid. B sells them to C without paying A for them. C purchases in good faith and without notice of A's title. Here, A can recover the goods or their value from C; Edwards v. Vaughan, (1910) 26 TLR 545 (CA).

(b) A stolen horse was sold at a public auction, the fact of theft being known neither to the auctioneer nor to the buyer; Leo v. Bayes, (1856) 18 CB 599: 107 RR 424.

(c) A, the bus owner appointed B to ply his bus for hire. Then A handed over B a letter which was to be delivered to the magistrate to obtain a permit for hiring the bus. B fraudulently altered the letter into one addressed to the District

Superintendent of Police requesting him to transfer the bus in his own (B's) name. After this, he sold the bus to stranger. Here, the buyer does not obtain any title against the real owner; Mohambaram v. Ram Narayan, (1935) 69 MLJ 691: 158 IC 535: MANU/TN/0077/1935 : AIR 1935 Mad 850.

(d) A sold goods to the plaintiff, but was allowed to keep possession of them upon payment of a weekly rent, and an undertaking to deliver them up on demand. He subsequently sold them to the defendant. He thereby determined the bailment of the goods to him, and the defendant, though he bought in good faith, acquired no title against the plaintiff; Cooper v. Willomatt, (1845) 1 CB 672: 68 RR 798.

In all the abovementioned cases the buyer could not get a good title.

3. Nemo Dat Quod Non Habet

Q. Explain the maxim nemo dat quod non habet

This is a Latin maxim which means that no one can transfer a better title than he himself has. In the case; Bishopsgate Motor Finance Corpn. Ltd. v. Transport Brakes Ltd., 1902 AC 325 (326). Denning LJ, has defined the position of the modern law as follows:

"In the development of our law, two principles have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle held sway for a long time but it has been modified by the common law itself and by statute so as to meet the needs of our times."

Through legislation, mercantile law has been strengthened so that it may give a good title to a buyer who buys in good faith and without notice of their want of title.

Provisions in sections 27, 28 and 30, regarding transfer of good title-

(a) Those who having sold goods continue or are in possession of the goods or of the document of title to the goods. [Section 30(1)]

(b) Those who having bought or agreed to buy goods obtain, with the consent of the seller, possession of the goods or documents of title to the goods. [Section 30(2)].

(c) Mercantile agents acting in the ordinary course of business of a mercantile agent who have, with the consent of the owner, possession of the goods or the documents of title to the goods, (Section 27).

(d) Part owners who, with the permission of the co-owners, are in the possession of the goods.

4. Estoppel

Q. What do you mean by estoppel in the sale of goods? Explain with the help of relevant cases.

Section 27 concludes with the remark that the purchaser may get a good title if:

"The owner of the goods is by his conduct precluded from denying the seller's authority to sell".

Estoppel means when the owner is not permitted to deny the seller's authority.

For example if a son sells the goods belonging to his father in his presence, he made no objection and he (father) was not subsequently permitted to deny his son's authority to sell and the sale was binding on him. In fact, estoppel arises from a representation that the seller has the authority to sell. And when that representation is innocently acted upon by the buyer, it becomes too late to deny the seller's authority. Representation may arise from words or declarations or it may arise from an act or omission.

In the case; Mercantile Bank of India Ltd. v. Central Bank of India Ltd., 1938 AC 287, it was emphasized that the duty must be a legal obligation. Here, certain railway receipts were pledged by a firm of merchants with a bank for borrowing loan. After that they took back the receipts for clearing the goods and storing them in the bank's warehouse. But after taking the paper from the bank, they repledged the receipts with another bank for another loan. When it came to the light, the second bank contended that the first bank should not have returned the receipts without the impression upon them their stamp of pledge. Since the first bank omitted to carry out a legal obligation of impression upon the stamp on pledge and their omission to do so enabled the merchants to repledge the receipts with the second bank for loan. Therefore, the first bank should be estopped from denying the validity of the second pledge. But the Privy Council held that the duty to impress the stamp of pledge was not a legal duty. It was a duty of commercial origin and its omission did not create a legal estoppel and, therefore, the title of the second bank on the railway receipts was subject to that of the first bank.

• Estoppel by Negligence

Carelessness may not create an estoppel. In the case; *Heap v. Motorists Advisory Agency Ltd.*, (1883) 11 QBB 776. Heap allowed his car to be taken away by one North to show it to a potential customer. But, in fact there was no customer. After using the car for few weeks, North then sold it to the Motorists Advisory Agency. Heap then claimed the car from the Agency. The Agency claimed estoppel against Heap.

But, the Court held that Heap was entitled to take back his car. The Court said-"He was not so careful as he should have been in his own interest but that does not mean that he was negligent in the sense that he broke some duty that he owed to the defendants".

Lush J., observed in this case-

"Negligence, in order to give rise to a defence under this section.....must be more than mere carelessness on the part of a person in the conduct of his own affairs, and must amount to a disregard of his own obligations towards the person who is setting up the defence".

Sir Rupert Cross¹ has given his observation for estoppel by negligence as follows-

"There is, however, a type of estoppel, often called estoppel by negligence in which the party in whose favour it operates is the victim

1. Sir Rupert Cross on Evidence, 4th Edn., p. 304.

of the fraud of some third person facilitated by the careless breach of duty of the other party. An example is provided by; *Coventry Shepherd & Co. v. Great Eastern Rly. Co.*, 304 (4th Edn.), (Sir Rupert Cross on Evidence). In that case the defendants carelessly issued two delivery orders relating to the same consignment of goods, thus enabling the person to whom they were issued to obtain an advance from the plaintiff, and the defendants were held to be estopped as against him from denying the fact that the goods mentioned in the order were held on behalf of the assignor. Someone who puts documents of this nature into circulation owes a duty to those into whose hands they may come."

5. Sale by Mercantile Agent

A buyer of goods from a mercantile agent acquires good title if the conditions laid down in section 27 (1st Proviso) are satisfied.

"Where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title of the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell".

In the case; *Folkes v. King*, (1923) 1 KB 292 CA, the plaintiff entrusted his car to a mercantile agent for sale with a stated price and not below that. He sold it to X below that price and misappropriated the proceeds. X resold the car to the defendant. But, the plaintiff could not recover it from the defendant. X got a good title from the mercantile agent and he conveyed a good title to the defendant.

5.1 Mercantile Agent

Q. Define 'mercantile agent'.

The conditions subject to which the rule operates may now be discussed. The first essential is that the sale must be by a 'mercantile agent'. The expression is given in section 2(9) as-

"Mercantile Agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods."

In the case; *Lowther v. Harris*, (1927) 2 KB 393: (1926) All ER Rep 352, the plaintiff engaged Prior, a shopkeeper, to act for him in the disposal of some tapestry. Prior obtained possession of the goods by fraud and sold them to a bona fide purchaser. Prior, misappropriated the sale proceeds. Then, the plaintiff sued the purchaser. It was held that the purchaser acquired a good title. Wright J., observed as-

The first question is whether Prior was mercantile agent....., that is, an agent doing a business in buying and selling, or both having in the customary course of his business as such authority to sell goods. I hold that he was.....it was contended that Prior was a mere servant or a shopman and had no independent status such as was essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or

shopman. I think this is still law under the present Act. In my opinion, B. Prior, who had his own shops and who gave receipts and took cheques in his own registered business name and earned commissions was not a mere servant, but an agent.....It is also contended that even if he were an agent he was acting as such for one principal only, the plaintiff, and the Factor Act acquires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in; Hayman v. Flewker, (1863) 32 LJCP 132, and I think the same is the law under the present Act."

5.2 In Possession as Mercantile Agent

In the case; Staffs Motor Guarantee Ltd. v. British Wagon Co. Ltd., (1934) 2 KB 305: (1934) All ER Rep 322, it was held that the mercantile agent should be in possession of the goods and if goods are entrusted to him in any other capacity, he cannot convey a good title.

Here, a dealer who was dealing in used cars, sold his lorry to a company and then immediately took it back from the company under a hire-purchase agreement. He then resold the lorry to another company, which claimed that it had good title to the lorry which he had purchased from a mercantile agent in good faith.

The court refused to sustain this claim. The lorry had been handed back to the dealer not as an agent but as a hirer and therefore, as its bailee. Mackinnon J.,-

Because one happens to trust his goods to a man who is in other respects a mercantile agent but with whom he is dealing, not as a mercantile agent, but in a different capacity. I do not think it is open to a third party who buys the goods from that man to say that they were in his possession as a mercantile agent.....

5.3 With Owner's Consent

The goods should be in the possession of the mercantile agent 'with the consent of the owner'.

As Scrutton LJ. put it; Folkes v. R., (1923) 1 KB 282 (305), this requirement is satisfied when it is shown that the true owner did intentionally deposit in the hands of the mercantile agent the goods in question". When this is the fact then it is redundant that the consent was obtained by fraud or tricks or other methods which render the consent voidable."

5.4 Must sell while acting as Mercantile Agent

The mercantile agent must sell the goods 'when acting in the ordinary course of business of a mercantile agent, Bukley LJ., observed in the case; Oppenheimer v. Attenborough & Son, (1908) 1 KB 221: (1904) All Rep 1016, as-"acting in such a way as a mercantile agent in the ordinary course of business as a mercantile agent would act; that is to say, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the other party to suppose that anything wrong is being done."

5.5 Good faith and without Notice

It is also necessary that the buyer must act in good faith and should not have notice that the seller has no authority to sell. We can understand it easily with the help of the case; Oppenheimer v. Frazee and Wyatt, (1907) 2 KB 50 CA, where a firm purchased certain goods from a mercantile agent, who within the knowledge of one of the partners, though not of the others, had obtained possession of the goods by larceny by a trick. It was held that the requirement of good faith was not satisfied and, therefore, the firm did not acquire a good title.

In another case; Evan v. Truman, (1963) 2 All ER 547 (550), Lord Tenterden explained the meaning of 'notice' as follows:

"A person may have knowledge of a fact either by direct communication or by being aware of the circumstances which must lead a reasonable man applying his mind to them and judging from them, to the conclusion that the fact is so. Knowledge acquired in either of these ways is enough. To exclude a party from the benefit of this provision of the statute, a slight suspicion will not do."

6. Sale by one of Joint Owners

Section 28 of the Sale of Goods Act speaks about the sale of goods by one of the joint owners. It says as-

"If one of several joint owners of goods has sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell."

In fact, this section in effect reproduces section 108 exception 2 of the Contract Act. In this section the term 'permission' has been used as in the section 108 of the Contract Act and it does not appear that the question has yet arisen whether 'permission' has the same meaning as 'consent' and if not, what the difference is and what its legal effect may be.

7. Sale by Person in Possession under Voidable Contract

Section 29 reads as follows-

"When the seller of goods has obtained possession thereof under a contract voidable under section 19 or section 19A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title."

We will try to explain this section with the help of some cases under following heads:

7.1 Seller under Voidable Title

Q. What do you mean by sale by person who is in possession of goods under voidable contract?

This section enables a seller to give a better title to buyer than he himself has. Although, he is not in possession of the goods by the free consent of the owner. The seller in possession of goods under a voidable contract may transfer the ownership thereof, he cannot do so after the contract is rescinded by the owner we may study here the case of; *Car & Universal Finance Co. v. Caldwell*, (1963) 2 All ER 547 (550), which establishes the principles very well-

Facts-Mr. Caldwell, defendant in this case was a resident of Bosham, he owned Jaguar Car, on Saturday 9th January, 1960, he gave a classified in a local newspaper for sale of his car for a price of £ 975. Two persons came to him and approached him to sell his car to them, they gave cash £ 10 and a cheque for remaining amount. Although Mr. Caldwell was reluctant to part with his car but he acceded to their request and gave away his car on 12th January. They also left a Hillman car of much less value. Next day i.e. on 13th January, Caldwell presented the cheque to the Midland Bank Ltd. 114, London Road, Brighton, it was signed as-For and behalf of Dunn's Transport, W Forster, F Norris (names of the duo who had purchased the car). But, the Manager of the Bank declined to honour the cheque, saying that they had a similar previous case and asked Mr. Caldwell to go to the Soreham police. The police showed a photograph of a wanted man in some case and Mr. Caldwell recognized him as one of the duo. The police had a warrant to arrest Rowley (Norris) on 20th January, the car was found when it was being driven by

Mr. Brian Charles Allen, Director, of a motor car dealers-Motobella Co. Ltd. (so-called Norris had sold the car to Motobella Co. Ltd.)

On 29th January, 1960, the defendant's solicitors demanded from Motobella Co. Ltd. to return the car to the defendant but the Motobella contended to have a good title. In the meantime, Rowley alias Norris was arrested who pleaded guilty of obtaining cars by false pretences. The Motobella Co. defended in their pleadings that they had purchased it in good faith and it was theirs.

Trial-When the case came up for trial in 1962, it was not defended by Motobella Co. Ltd. and the defendant got the judgment in his favour. When the defendant sought to take the possession of the car, another company, Car and Universal Finance Company Ltd. claimed that the car belonged to them.

The car seems to have been transferred to a Finance house called G and C Finance Corp. Ltd by Motobella and in due course, it was further transferred to another finance company Car and Universal Finance Co. Ltd., the plaintiffs.

Issues-Now the question arises-Whether this car belongs to defendant, the original owner or does it belong to the plaintiffs, who have purchased it in good faith and without noticing anything amiss about it?

The car was first obtained from the defendant by fraud by means of a worthless cheque. It was a case of procuring goods by false pretences. When the car passed from Caldwell to Norris and Foster on 12th January, 1960, it was voidable due to fraud. So, it was open to the defendant to avoid it provided that he did so before a third person bought it in good faith and without notice of a defect in the title. The important question here is whether the defendant did succeed in avoiding the sale by presenting the cheque to the Bank and approaching the police before Norris alias Rowley sold it to Motobella Co. Ltd. The plea on behalf of the plaintiffs was put forward by their counsel that a man from whom goods have been obtained by false pretence cannot avoid the transaction unless he does an act which unequivocally shows his election to avoid it and communicate it to the other party of the contract. The avoidance does not takes place until it is communicated. In this case, defendant went to the Bank and approached the police. So the avoidance did not take place. It did not take place until the defendant discovered Norris and Foster and communicated his election to them. Counsel for the plaintiffs conceded that it was avoided till January 29, 1960, but by that time, he said, Motobella Co. Ltd. had sold it to G&C Finance Corp. Ltd., who had acquired a good title:

In support of this supposed requirement of communication, counsel for the plaintiffs referred me particularly to the judgment of Lord Blackburn in; *Scarf v. Jardine*, (1862) 7 AC 345: 51 LJQB 612, where Lord Blackburn says that a man does not elect to avoid a contract simply because in his own mind he decides to avoid it or even makes a note in his own book about it. An election, he indicated is not completed until he 'has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice. Then, he has completed his election and can go no further.'

Counsel for the plaintiffs also referred me to a passage in *Benjamin on Sale*, which appears in the 2nd Edn., in 1873 by Mr Benjamin, and it is also in the present edition, the 8th Edn., at p 441. It says:

The rescission is the legal consequence of his election to reject it, and takes date from the time at which he announces this election to the opposite party.'

Those passages do seem to support counsel for the plaintiffs' contention that the defendant's acts on the morning of January 13 did not amount to an election to avoid the contract, because they were not communicated to the opposite party. I quite appreciate the force of that argument, but I am afraid that I cannot accept it. In point of principle, it seems to me that a seller can avoid a contract by an unequivocal act of election which demonstrates clearly that he elects to rescind it and no longer to be bound by it. It is sufficient if he asserts his intention to rescind 'in the plainest and most open manner competent to' him. I take those words from the speech of Lord Hatherley LC, in; *Reese River Silver Mining Co Ltd v. Smith.*, (1869) LR WHL 64; 39 LJ Ch 849. Lord Hatherley goes on to give communication as one of the ways in which an election can be demonstrated: but not, I think, in such a way as to make it essential, so as to make it a *sine qua non*. I would ask this simple question: How is a man in the position of defendant ever to be able to rescind the contract when a fraudulent person absconds as Norris did here? If his right to rescind is to be a real right, when the rogue absconds, it must be sufficient if he does all that he can in the circumstances unequivocally to make it known. It is not sufficient for him, of course, to keep it in his own mind or write down a note in his own private sitting room; but conduct such as we have here, namely, telling the bank, the police and the AA, 'Find this car if you possibly can. Get it back. It is mine', seems to me an unequivocal act of rescission.

If you take comparable cases of election, none of them requires communication as an essential prerequisite. Take forfeiture, which Lord Blackburn took as his guide. If a lessor elects to determine a lease for forfeiture, it is sufficient for him to issue a writ for possession. The forfeiture dates from the issue of the writ, not from the time it is served. Or if the lessor does an act which, if done by a stranger, would be a trespass, it is an entry. The forfeiture dates from the time of the re-entry, even though the lessee is away and does not know anything about it. Next take ratification. Where a person has a right to ratify an unauthorized act made professedly on his behalf by an agent, any unequivocal act of affirmation is sufficient. Again, take repudiation. If a contract is repudiated by a party and the other has a right to elect whether to accept it or not, any unequivocal act clearly evidencing his election is sufficient. Take finally the affirmation of a contract. Counsel for the defendant referred me to; *Re Hop and Malt Exchange and Warehouse Co. Ex p Briggs*, 1866 R1 Eg 483; 35 LJ Ch 320; 14 LT 39, where it was held that an affirmation by instructing a broker to resell (which was an unequivocal act) was held to be sufficient affirmation even though not communicated.

I hold, therefore, that, where a seller of goods has a right to avoid the contract for fraud, he sufficiently exercises his election if he at once or discovering the fraud, takes all possible steps to regain the goods even though he cannot find the rogue or communicate with him. That is what the defendant did here by going to the police and asking them to get the car back. I, therefore, hold that, on January 13, the contract of sale to these rogues was avoided and the defendant then became the owner of the car again. It was only after he avoided it (so that it was once again his property) that these rogues purported to sell it to Motobella Co Ltd and then Motobella Co Ltd purported to sell it to G & C Finance Corp Ltd. Those sale were ineffective to pass the property because it had already re-vested in the defendant.

7.2 Goods must be Obtained in Pursuance of a Contract

The possession of goods may be procured in pursuance of the contract. If there is a contract of sale of some goods between A and B, but C fraudulently representing to A either that he is authorized by B to take delivery of the goods on B's behalf or that he is entitled to delivery as a sub-purchaser from B, obtains possession of the goods, he acquires and can give no title whatever, for the goods are delivered to him not in pursuance of but despite, the contract.

The difficulty occurs in a particularly acute form in cases in which the whole transaction is carried out between the parties face to face and there is an apparent contract and possession is obtained under it, but the seller thinks that he is dealing with A when in fact he is dealing with B. Lord Haldane has laid down in the case; *Lake v. Simmons*, (1927) AC 487 (501-02), as follows-

Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier (*Traite des obligations*, section 19) lays down the principle thus, in a passage adopted by Fry J in; *Smith v. Wheatcroft*, (1878) 9 Ch D 230 (233). Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.' In the careful judgment delivered by him in; *Phillips v. Brooks*, (1919) 2 KB 243, Horridge J., decided that the alternative view secondly stated by Pothier applied to the case he was dealing with. A fraudulent person had

entered a jeweller's shop and looked at and selected certain jewels, which the jeweller was prepared to sell to him individually as a casual customer who had entered his shop. All that remained to be subsequently arranged was payment of the price. The unknown customer, who drew a cheque pretending to be someone else, and signed it in a well-known name, was allowed in exchange for the cheque to take away one of the jewels, of which he disposed of subsequently. Horridge J. found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation. In the other type of case referred to by Pothier, where the belief of the contracting seller depends wholly on identity of character or capacity, that is, as Mr. Justice Holmes says at the beginning of the ninth lecture in his book on the common law, no contract, because there is really only one party.

Under this section, the onus is on the person to prove absence of good faith and notice who wants to invalidate the transaction.

8. Seller or Buyer in Possession after Sale

Section 30 speaks about the possession of goods in the hands of sellers or buyer after sale. We can see the provisions of this section as follows-

"1. Where a person having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

2. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist."

8.1 Seller in Possession after Sale [Section 30(1)]

Q. Explain the conditions as mentioned under section 30(1).

If a seller after selling the goods, still keeps the goods with himself and sells them over again to another person then the buyer gets a good title provided the conditions of section 30(1) are satisfied.

So, the first requirement of the exception is that the seller should continue to be in possession of the goods after having sold them. In the case; *Staffs Motor Guarantee Ltd. v. British Wagon Co. Ltd.*, (1934) 2 KB 305, the owner of a lorry sold it to the defendants and took it back on hire-purchase. Further, he resold it to the plaintiffs. Here, the buyer could not get a good title because the seller was not in possession "as seller" but as a bailee under a hire-purchase agreement.

But, in the case; *Pacific Motor Auctions Pvt. Ltd. v. Motor Credits (Hire Finance) Ltd.*, (1965) 2 All ER 105 (PC): (1965) 2 WLR 881, the Privy Council criticized the theory that the seller should remain in possession "as seller" and not in an altered capacity like "bailee".

The facts of this case were as M. Co. purchased from a motor dealer a number of cars and allowed them to remain in the showroom of the dealer for the purposes of display and sale to customers on hire-purchase. Subsequently M. Co. terminated the dealer's authority to sell. The same day, the dealer sold them to a bona fide buyer. It was held that the buyer had a good title.

Lord Pearce gave his observation as-

"Where a vendor retains uninterrupted physical possession of the goods, why should an unknown agreement, which substitutes a bailment for ownership, disentitle the innocent purchaser to protection from a danger which is just as great as that from which the section is admittedly intended to protect him. There is, therefore the strongest reason for supposing that the words 'continues.....in possession' were intended to refer to the continuity of physical possession regardless of any private transaction between the seller and purchaser which might affect the legal title under which the possession was held."

In the case; *City Fur Manufacturing Co. v. Fureenbond (Brokers) London Ltd.*, (1937) 1 All ER 799, A purchased a quantity of skins from a broker. The goods were lying in the broker's house due to delay in payment. A sold them to the plaintiffs who gave A a bill of exchange to enable him to pay the broker and to arrange delivery to the plaintiff. Instead A pledged the goods with the defendant. It was held that the defendant have acquired a good title.

It was further held that the seller should be in personal possession of the goods. It is sufficient that the goods are at his disposal even if they are in the custody of a warehouse keeper.

8.2 Buyer in Possession before Sale [Section 30(2)]

Section 30(2) deals with a condition where a buyer has goods in his possession before the formalities of sale have been completed. In other words we can say that if a person has purchased or has agreed to purchase certain goods of which possession has been given over to him, but the seller still has some lien or right over the goods and in such condition if the buyer resells the goods, the second buyer will get a title free from the seller's right of lien.

Section 30(2)-

'Where a person having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.'

A sale may be made by actual transfer of goods or by transfer of documents of title. As it was observed in the case; *Capital and Counties Bank Ltd. v. Warriner*, (1896) 12 TLR 216. In another case; *Marten v. Whale*, (1917) 2 KB 480, the plaintiff agreed to purchase a plot of land from one A in return for a car subject to the condition that his solicitor approved the title to land. A got the possession of the car even before anything was done regarding title of land. A sold the car to the defendant. It was held that the car was in the possession of a person who had agreed to buy it and therefore, the defendant acquired good title.

In the case; *Newtons of Wembley Ltd. v. Williams*, (1964) 3 All ER 332 CA, A sold a car to B, one of the terms of the sale was that property would not pass until the negotiated amount is paid or cheque honoured. The cheque given by B was dishonoured by the Bank. In the meantime, B sold the car to C in a second-hand car market and C further sold the car to another person. A, first owner had already rescinded the sale, when the cheque was dishonoured. But, it was held that the last buyer have obtained a good title.

© Universal law Publishing Co.

CHAPTER 7

PERFORMANCE OF THE CONTRACT

In this Chapter

1. Introduction
2. Duties of Seller and Buyer (Section 31)
3. Payment and Delivery two Concurrent Conditions (Section 32)
4. Delivery (Section 33)
 - 4.1 Delivery of Goods
 - 4.2 Acceptance and Receipt
 - 4.3 Symbolic Delivery
 - 4.4 Constructive Delivery
5. Effect of Part Delivery (Section 34)
6. Buyer to apply for Delivery (Section 35)
7. Rules to Delivery (Section 36)
 - 7.1 Place of Delivery
 - 7.2 Time for Delivery
 - 7.3 Duty of Seller to Dispatch
 - 7.4 Delivery 'As required'
 - 7.5 Attornment of Bailee
 - 7.6 Expenses of Delivery
8. Delivery of Wrong Quantity (Section 37)
 - 8.1 Delivery of less quantity of Goods
 - 8.2 Delivery in excess of Contract Quantity
 - 8.3 Delivery of Contractual Goods together with Others
9. Instalment Deliveries (Section 38)
 - 9.1 Instalment Deliveries
 - 9.2 Entire Contracts
 - 9.3 Severable Contracts
 - 9.4 Failure in Paying an Instalment
10. Delivery to Carrier or Wharfinger (Section 39)
 - 10.1 Delivery to Wharfinger or Carrier
 - 10.2 Duty of Seller on Delivering Goods in a Carrier
 - 10.3 Transit by Sea
11. Risk where Goods are Delivered at a Distant Place (Section 40)
12. Buyer's right of Examining the Goods (Section 41)
13. Acceptance (Section 42)
14. Buyer not bound to return rejected Goods (Section 43)
15. Liability of buyer for neglecting or refusing Delivery of Goods (Section 44)

Relevant Cases

1. Morton v. Lamb, (1797) 7 TR 125: 4 RR 395.
2. Dixon v. Fletcher, (1837) 3 M&W 146: 49 RR 543.
3. Vishnu Sugar Mills Ltd. v. FCI, MANU/BH/0005/1987 : AIR 1987 Pat 22.
4. Kunwar Bhan-Sukha Nand v. Ganpat Rai-Ram Jiwan, (1926) 7 Lah 442: 94 IC 304.
5. Kidar Nath Bihari Lal v. Shimbhu Nath - Madhu Mal, (1926) 8 Lah 198: 99 IC 812.
6. Dayabhai Dipchand v. Maniklal Vribhukan, 8 BHC AC 133.
7. Four Point Garage Ltd. v. Carter, (1985) 3 All ER 12.
8. Union of India v. West Punjab Factories Ltd., MANU/SC/0039/1965 : AIR 1966 SC 395.
9. Word v. Turner, 2 Ves Sr 431, 1 Dick 170.
10. Ancona v. Rogers, (1876) 1 Ex D 285 (CA).
11. Milgate v. Kebble, (1841) 3 Man & Gr 100: 60 RR 475.
12. Castle v. Swarder, (1861) 6 H&N 828: 123 RR 860 Ex Ch.
13. Hurry v. Mangles, (1808) 1 Camp 452: 10 RR 727.
14. Godts v. Rose, (1855) 17 CB 229: 104 RR 668.
15. Edan v. Dudfield, (1841) 1 QB 302: 55 RR 258.
16. Kemp v. Falk, (1882) 7 App Cas 573 (586).
17. Bolton v. L&YR Co., (1935) 62 IA 89: 58 Mad 670: 154 IC 1097: MANU/PR/0021/1935 : AIR 1935 PC 67.
18. Sivayya v. Ranganayakulu, (1935) 62 IA 89: 58 Mad 670: 154 IC 1097: MANU/PR/0021/1935 : AIR 1935 PC 67.
19. Smith v. Chance, (1819) 2 B&Ald 753 (755).
20. Juggernath Khan v. MacLachlai, (1881) 6 Cal 681.
21. Grenon v. Lachmi Narain, (1896) 4 Cal 8 LR 23 IA 119.
22. Nagnath Kaulwar & Sons v. Govindram Shyamsunder, MANU/MH/0282/2004 : AIR 2004 Bom 271.
23. Jackson v. Union Marine Insurance Co., (1874) LR 10 CP 125 Ex Ch.
24. Pearl Mill Co. v. Ivy Tannery Co., (1919) 1 KB 78.
25. P.P. Looke v. N.S. Mathew, (1967) 11 Comp LJ 146.
26. Pattison v. Robinson, (1816) 5 M&S 105 (110).
27. Bartlett v. Holmes, (1853) 13 CB 630: 93 RR 658.
28. Kingdom v. Cox, (1848) 5 CB 522 (526).
29. Champion v. Short, (1807) 1 Camp 53: 10 RR 631.
30. Regent OHG Aisenstadt and Barig v. Francesco of Jermyn Street Ltd., (1981) 3 All ER 327.
31. Cunliffe v. Harrison, (1851) 6 Ex 903 (906).
32. Dudhia Forest Co-op. Labourers & Artisans Society Ltd. v. Mohammed Saiyed and Abdul Rehman's Co., (1980) 21 GLR 272.
33. Levy v. Green, (1859) 1 E&E.
34. Nicholson v. Bradfield Union, (1866) LR 1 QB 620.
35. Reuter v. Sala, (1866) LR 1 QB 620.
36. Honck v. Muller, (1881) 7 QBD 92 (100).
37. Oxendale v. Wetherell, (1829) B&C 386: 33 RR 207.

38. Howell v. Evans, (1926) 134 LT 570.
39. Freeth v. Burr, (1874) LR 9 CP 208.
40. Withers v. Reynolds, (1831) 2 B&AD 882: 36 RR 782.
41. Shree Bajrang Jute Mills Ltd. v. State of Andhra Pradesh, MANU/SC/0032/1964 : AIR 1966 SC 376.
42. Manior Narottam Das Dharamshi v. Barjatya Traders, 21(2) GLR 89.
43. Ruttonjey v. Jamnadas, (1882) 6 Bom 692.
44. Cusack v. Robinson, (1861) 1 B&S 299.
45. Hardy & Co. v. Hillerns & Fowler, (1923) 2 KB 490 (498) (CA).
46. J&J Cunningham Ltd. v. Robert A. Munro & Co., (1922) 28 Comp Cas 42.
47. Grimoldby v. Wells, (1875) LR 10 CP 391.
48. Phaggu Mal v. Babu Lal, (1913) 35 All 325: 19 IC 254.
49. China Pacific SA v. Food Corporation of India, (1982) AC 939.
50. JL Lyons & Co. v. May & Baker Ltd., (1923) 1 KB 685.
51. Harlow and Jones Ltd. v. Panex International Ltd., (1967) 2 Lloyd's Rep 509 (531).
52. Charles Rickards Ltd. v. Oppenheim, (1950) 1 All ER 420 CA.

1. Introduction

Chapter IV of the Sale of Goods Act, 1930 describes about the 'Performance of the Contract' which consists of sections from 31 to 44. These sections mainly deal with delivery of goods i.e. rules of delivery, effect of part delivery, instalment deliveries etc.

2. Duties of Seller and Buyer

Section 31 of the Act says-"It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale".

When there is a contract for sale of goods, the simple rule behind that agreement is to deliver the goods by the seller and the buyer has to pay the sum for which both the parties have agreed upon. Here, the property includes the right to possession, and it is the duty of the seller to complete the contract by giving the buyer possession, whether the goods are in the hands of seller or of a third party and the buyer's obligation is to accept the goods and pay the price. Here, 'duty to accept' make 'taking of delivery of the goods' an integral part of the contract and refusal by buyer in rejecting the goods will be amounted to a breach of 'duty of accept'. There is also a distinction between acceptance of goods and taking delivery of them.

The buyer may signify his approval regarding goods he wants to purchase though he may not have taken delivery of the goods. It may not be out of place to mention here that the Act does not expressly impose any duty to take delivery although it prescribes sanctions when there is a delay in taking delivery of goods.

This section must be read subject to the provisions of Chapter V (to be discussed in next Chapter of this book) and section 7. The parties may but make such stipulations as they please as to matters which may excuse delivery by the 'seller or payment of the price.

3. Payment and Delivery, two Concurrent Conditions (Section 32)

Q. Do you agree with the facts that payment and delivery in sale of goods are two concurrent conditions, to be fulfilled in sale?

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

This section resemble to section 28 of the English Act. In the 'Notes on; Pordage v. Cole, Edn., 1871, p. 556, it was observed-

'Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay a sum of money on the same day, neither can maintain an action without sharing performance of, or an offer to perform, his part though it is not certain which one of them is obliged to do the act, and this

particularly applies to all cases of sale'.

In the case; *Morton v. Lamb*, (1797) 7 TR 125: 4 RR 395, it was observed that there is a general principle under section 51 of the Contract Act, the seller is not bound to deliver, and commits no breach of contract in failing to deliver, if the buyer is not ready and willing to pay the price on delivery. In another case; *Dixon v. Fletcher*, (1837) 3 M&W 146: 49 RR 543, where it was said that the buyer is not bound to pay the price, and is not liable to an action for failure to accept the goods, if the seller was not ready and willing to let the buyer have the goods on demand.

In the case; *Vishnu Sugar Mills Ltd. v. Food Corporation of India*, MANU/BH/0005/1987 : AIR 1987 Pat 22 (31), it was observed that in a statutory sale, in the absence of any agreement to the contrary, whilst the seller is obliged to sell and then deliver the goods under the sanction of law, here the buyer is equally bound to tender the price thereof against delivery. The facts were that Food Corporation of India brought a new formula for payment of the price of the 'levy sugar' which required that delivery should first be made to the corporation against an initial small payment. After that the sellers had to send the relevant documents to a centralized payment office at Muzaffarpur leaving sellers to the tender mercy of the corporation officials for clearance of their bills or the payment. The High Court held that the corporation must abide by the payment procedure in conformity with the cardinal rule that in the context of compulsory statutory sale the law mandates a concurrent tender of price against delivery of sugar and not a deferred payment thereafter on the whimsicality of the compulsory purchaser in absence of any mutual agreement of the parties to the contrary.

• Readiness and Willingness

In the latter part of the section it is mentioned-

'The seller shall be ready and willing to give possession of the goods'. It shows capacity of the seller. There is no need that the goods should be in actual possession of the seller to fulfil the contract but it is sufficient if he has such control of them that he can cause them to be delivered; *Kunwar Bhan-Sukha Nand v. Ganpat Rai-Ram Jiwan*, (1926) 7 Lah 442: 94 IC 304. At the same time, the buyer should be ready and willing to pay if he has made proper arrangements for securing payment; *Kidar Nath Bihari Lal v. Shimbhu Nath-Mandu Mal*, (1926) 8 Lah 198: 99 IC 812.

In the case; *Dayabhai Dipchand v. Maniklal Vribhukan*, 8 BHC AC 133, it was held that a wrongful refusal by one party to be bound by the contract discharges the other from the performance of conditions which he would otherwise have to fulfil and the latter is thereupon exonerated from the necessity of proving his readiness and willingness to perform them.

4. Delivery

Section 33 of the Act says as-

"Delivery of goods may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf".

4.1 Delivery of Goods

Q. What is symbolic delivery? Explain it with the help of relevant cases.

This section has similarity with section 90 of the Contract Act with the added words-'which the parties agree shall be treated as delivery'. The goods may be delivered to a third party only when the buyer has nominated him. In the case; *Four Point Garage Ltd. v. Carter*, (1985) 3 All ER 12, the buyer purchased a motor car and requested the seller to deliver it directly to a sub-purchaser from the buyer, and it was so delivered. It was held that the buyer had obtained the constructive possession of the vehicle.

In another case; *Union of India v. West Punjab Factories Ltd.*, MANU/SC/0039/1965 : AIR 1966 SC 395, the parties had agreed that the seller would deliver the goods at buyer's godowns, further the goods were to be dispatched by railway at the seller's risk and the delivery to be taken by surrendering the railway receipt and signing the delivery. Here, it was held that there was no real delivery to the consignee, for the goods had not been unloaded and were still under the control and custody of the railway.

4.2 Acceptance and Receipt

If an agreement or contract is done between two consenting parties then it is the duty of seller to deliver the goods to the buyer and the latter has to pay the price. One of the essentials of sale of goods is that the buyer should

'accept part of the goods so sold and actually receive the same.'

4.3 Symbolic Delivery

Delivery of goods keep an important place when there is a sale of goods, since it gives the buyer actual control of the place where the goods are and thereby of the goods themselves. Sometimes, the term 'symbolic delivery' is also used. Lord Hardwicke in the case; *Word v. Turner*, 2 Ves Sr 431, 1 Dick 170, said about 'symbolic delivery' as-'delivery of the key of bulky goods...has been allowed as delivery of the possession, because it is the way of coming at the possession or to make use of the thing and therefore the key is not a symbol which would not do.'

But, if a person keeps the goods in a room and hands over the key to the buyer then it is an emphatic declaration of intention to transfer control. In the case; *Ancona v. Rogers*, (1876) 1 Ex D 285 (CA), the facts was that A went to live in B's house with B's consent and C, acting under A's orders, took furniture of A's to B's house, put it in certain rooms, locked the doors of those rooms and took away the key, to the knowledge of B's servants and without any objection, it was held that A had not delivered the goods to B to hold as bailee, but on the contrary B had given possession to A of the rooms in which the goods were placed.

In the case; *Milgate v. Keble*, (1841) 3 Man & Gr 100: 60 RR 475, delivery of a key does not operate as delivery of the goods under the lock if it does not, in fact, give complete access to them. Here the seller gave the buyer, the key of a receptacle in which the goods were, but retained the key of an enclosure, it was held without difficulty that the buyer had not acquired possession.

4.4 Constructive Delivery

Q. What is constructive delivery? Discuss it with the help of some cases.

It may also happen that delivery may involve change in the possession of goods and delivery may also take place without any change in their actual and visible custody. And in such cases, there is said to be constructive delivery in such cases. These have been classified as follows.

4(d)(i) Acts of the buyer who treats himself as owner and the seller as his servant or bailee are relevant to prove delivery as against the buyer. Here, we can cite the example of the case; *Castle v. Swooner*, (1861) 6 H&N 828: 123 RR 860 Ex Ch, 'A' ordered a certain quantity of goods (not specified although) from B and B sent A an invoice in which particular goods were specified as sold to A 'free for six months', i.e. to remain, in B's warehouse without charge and credit was also given for six months and at the end of six months A asked B if he would take the goods back or sell them on A's account, this was held evidence of assent by A to B holding those goods for him as warehouseman.

So that the buyer pays, or agrees to pay, warehouse rent for goods left in the seller's warehouse is not of itself sufficient to show that the seller holds as his bailee.

In the case; *Hurry v. Mangles*, (1808) 1 Camp 452: 10 RR 727, Lord Ellenborough, said-'If I pay for a part of a warehouse, so much of it is mine'. But, these observations would be applicable if the buyer had actually rented part of the warehouse, or agreement to pay it. Lord Ellenborough's language doesn't go along with commercial usage. In the ordinary economic sense the owner who is paying such rent is entitled to get his goods stored in any particular part of the warehouse.

4(d)(ii) Sometimes it happens that a seller and buyer agree with the assent of a third person, in whose custody the goods are and who has been keeping the goods for seller and will keep on holding them for the buyer. Such attornment has the effect of transferring legal possession to the buyer. In this situation all the three parties should concur otherwise delivery won't take place.

In the case; *Godts v. Rose*, (1855) 17 CB 229: 104 RR 668, the seller directed the warehouseman to transfer the goods sold to the buyer's order, the warehouseman did it accordingly and sent the invoice and certificate of transfer by his clerk to the buyer with a request for payment but the payment request was turned down, it was held that there was no attornment hence no delivery as the buyer had not given his assent to the warehouseman holding the goods as his agent.

In the case; *Hurry v. Mangles*, (1808) 1 Camp 452: 10 RR 727, example (6), we can find the example of attornment. The payment of rent by the buyer is not sufficient to show that the seller holds as his bailee, but this case is not the same where the first buyer sells to a sub-buyer and the original seller by his direction assents to hold the goods for the sub-buyer.

4(d)(iii). If the buyer is already holding the goods as the seller's bailee, the seller agrees with him that he shall hold them as owner, the character of the possession is changed accordingly and the buyer ceases to hold as bailee and begins to hold as owner, as where an agent entrusted with goods for sale agrees to buy them himself; *Edan v. Dudfield*, (1841) 1 QB 302: 55 RR 258.

5. Effect of Part Delivery (Section 34)

Q. Explain the effect of part delivery with relevant case laws.

Section 34 of the Sales of Goods Act, 1930 says as-

"A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods with an intention of severing it from the whole, does not operate as a delivery of the remainder".

Part Delivery-

In the case; *Kemp v. Falk*, (1882) 7 App Cas 573 (586), it was observed by Lord Blackburn that the common law rule, which this section affirms, is that delivery of part may be delivery of the whole if it is so intended and agreed, but not otherwise, and the burden of proof seems to be on the party affirming that such was the intention.

Brett LJ has described 'part delivery' as-It seems to me that a delivery of part or even of the bulk of a cargo is not prima facie a delivery of the whole. Parties are bound to show that the part delivery took place under such circumstances as to make it a constructive delivery.

In the case; *Bolton v. L&YR Co.*, (1935) 62 IA 89: 58 Mad 670: 154 IC 1097: MANU/PR/0021/1935 : AIR 1935 PC 67, Siles J. said-'It is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole i.e. a recognition that the actual holder of the residue has begun to hold as the buyer's agent.

6. Buyer to apply for Delivery

Section 35 of the Sale of Goods Act, 1930 speaks that the buyer has to apply for delivery of goods.

'Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.'

• Buyer's Duty to Apply for Delivery

There is a similarity between this section and section 93 of the Contract Act except some words-'in the absence of any special promise' for which in this section 'apart from any express contract' has come in the place. So, the meaning of section is very clear i.e. if in the contract, the term of delivery is clear then there is no need for buyer to apply for delivery but if such term has not been expressed, then the buyer will have to apply.

In the case; *Sivayya v. Ranganayakulu*, (1935) 62 IA 89: 58 Mad 670: 154 IC 1097: MANU/PR/0021/1935 : AIR 1935 PC 67, it was observed that even if there is an obligation on the part of the seller to inform the buyer when the goods are in a deliverable state, it is not a 'special promise' though it may postpone the obligation of the buyer to apply for delivery, and after the lapse of a reasonable time to enable the goods to be procured by the seller, the buyer would be entitled and bound to apply for delivery.

Citing the example of; *Smith v. Chance*, (1819) 2 B & Ald 753 (755), the learned Author Chalmers has described regarding this section-'it was for the buyer to take delivery and that in the absence of any different agreement the duty of the seller to

deliver was satisfied by his affording to the buyer reasonable facilities for taking possession of the goods at the agreed place of delivery'.

In an Indian case; *Juggernath Khan v. Maclachlan*, (1881) 6 Cal 681, the facts were that when the buyer applies for delivery and the seller then fails to deliver, the seller is guilty of a breach of contract. As per the contract terms, the goods were to be all delivered in the month of November on a 7 day's notice from the buyer, the buyer in early November gave the notice for delivery. It was held that by the terms of contract, the buyer had the right to fix the date of delivery, and the seller having failed to deliver as required by the notice was guilty of a breach of contract.

7. Rules to Delivery [Section 36]

Q. Define the rules of delivery.

In sale of goods, there are many rules which bind both the sellers and buyers to perform their duties and honour the terms of contract. Delivery constitutes an important part in the sale. Section 36 speaks about the Rules to delivery in following terms-

"(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell or if not then in existence, at the place at which they are manufactured or produced.

2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

7.1 Place of Delivery

Q. What are the rules of delivery of goods? Under provisions of section 36 of the Sale of Goods Act?

Sub-section (1) speaks about the place where the goods have to be delivered. This sub-section, we can say is the modified form of section 94 of the Contract Act and has also similarities with section 29 of the English Act. In the absence of any special agreement, 'the place of delivery is the seller's place of business if he has got one and if not his residence, unless the contract is for the sale of specific goods, which may be some other place and known to both the parties.

In the case; *Grenon v. Lachmi Narain*, (1896) 4 Cal 8 LR 23 IA 119, there was a contract for the sale of goods and the goods were to be delivered at any place in Bengal to be mentioned hereafter does not fall within the operative part of this sub-section, for there is a special term as to delivery giving the buyer the right to fix the place anywhere in Bengal, and the words 'to be mentioned hereafter' express only what the law would have implied that the seller is entitled to reasonable notice of the buyer's choice.

If the goods are delivered at a place other than that stipulated, the buyer may recover the expenses incurred in forwarding them to the agreed place of delivery.

Here, it would be pertinent to mention section 49 of the Contract Act, which is as follows:

"Place for the performance of promise, where no application to be made and no place fixed for performance-When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such a place". It can easily be construed from the above section its closeness with that of sub-section (1) of section 36.

7.2 Time for Delivery

When there is a sale but no time has been fixed for delivery then it's up to seller to deliver the goods within a reasonable time. But, if the seller fails on this account even due to some government's order or intervention of war, still liability falls upon him.

In the case; Nagnath Kaulwar & Sons v. Govindram Shyamasunder, MANU/MH/0282/2004 : AIR 2004 Bom 271, there was a contract for supply of a certain quantity of rice, but the time for delivery was not fixed. After sometime, the seller shown his inability to deliver the rice as the railway wagons were not available. After that, the seller informed the buyer regarding cancellation of contract, as there was no chance of getting railway wagons available for transporting the rice. The buyer claimed in the court for damages since the seller did not dispatch the goods within reasonable time and it attracts the provisions of section 36. The Court allowed the claim for damages.

7.3 Duty of Seller to Dispatch

Section 36(2) what is a reasonable time, it's a question of fact. Evidence is required regarding surrounding circumstances in which the contract was made in order that question may be determined. If delivery has not been made within a reasonable time then the buyer is not bound to accept the goods even though the delay may not have been due to the seller's default; Jackson v. Union Marine Insurance Co., (1874) LR 10 CP 125 Ex Ch.

7.4 Delivery 'as required'

Sub-section (2) conveys the meaning that nothing further remains to be done by the buyer. The request for delivery is a pre-condition to the seller's obligation to delivery. If no time frame has been given to make it then the request must be made within a reasonable time and if there is excessive delay by the buyer, the seller is prejudiced, the seller may be discharged, and in certain circumstances, such delay may amount to evidence of the abandonment of the contract by mutual consent, or to conduct on the part of the buyer misleading the seller into believing that the contract has been abandoned and therefore stopping the buyer from setting it up. [It was the observation of the court in the case; Pearl Mill Co. v. Ivy Tannery Co., (1919) 1 KB 78.

7.5 Attornment of Bailee

As per the provision of sub-section (3), the assent of the buyer and the seller to the attornment is assumed and it merely declares that there is no delivery until the bailee also assents; P.P. Looke v. NS Mathew, (1967) 11 Comp LJ 146, so, it is the duty of both the seller and the buyer to do what is necessary to obtain the assent of the bailee, consequently if the buyer has done all that he is required to do, but still cannot obtain it, he may repudiate the contract and if there is failure to do so is due to the buyer's default, the seller may treat the delivery as duly made; Pattison v. Robinson, (1816) 5 M&S 105 (110) and Bartlett v. Holmes, (1853) 13 CB 630: 93 RR 658.

7.6 Expenses of Delivery

Sub-section (5) of the sections says-"Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller." So, if somehow the expenses is incurred on the goods in putting it in a deliverable state then such expenses will be borne by seller and not the buyer.

8. Delivery of Wrong Quantity

Section 37 of the Sale of Goods Act speaks about the wrong quantity of goods. Whether it is less or more compared to prescribed quantity of goods, the buyer has to pay only the sum for which both the parties have agreed upon. We may first see here the provisions of this section which is follows:-

"(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties."

8.1 Delivery of less Quantity of Goods

Sub-section (1) says in unambiguous terms that if the seller supplies the goods less in quantity as mentioned in the contract then the buyer can reject the goods but if the buyer accepts the lesser quantity of the goods then he will have to pay the price as per the terms of the contract. In the case; *Kingdom v. Cox*, (1848) 5 CB 522 (526), if the seller does not fulfil his contract by tendering less than the stipulated quantity and cannot call upon the buyer to accept it and equally the buyer cannot call for delivery of anything short of the full quantity, if he is not prepared to accept the whole if the law were otherwise, either party could impose a new contract upon the other.

In another case; *Champion v. Short*, (1807) 1 Camp 53: 10 RR 631, it was held that the tender of a less quantity by the seller amounts to a new contract up to the extent, which the buyer must accept and pay for, or reject the whole of the amount tendered, he cannot accept part of the goods and reject the rest, unless indeed the seller acquiesces in such a course, which would be an acceptance by him of a counter offer by the buyer.

In one more case; *Regent OHG Aisenstadt and Barig v. Francesco of Jermyn Street Ltd.*, (1981) 3 All ER 327, it was observed that if delivery is to be done in instalments then the buyer cannot reject the whole of the goods on the ground of short delivery of one or more instalments unless such short delivery is a repudiation of the whole contract.

8.2 Delivery in Excess of Contract Quantity

Sub-section (2) of this section says that if the seller sends the quantity of goods which is larger than the quantity mentioned in the contract terms, then it is upto the buyer to accept the whole or reject the excess quantity of the goods. If, the buyer accepts the whole quantity (i.e. including excess) then he will have to pay the price at the contract rate to the buyer.

In the case; *Cunliffe v. Harrison*, (1851) 6 Ex 903 (906), A delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his, and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him.

Justice Ahmadi, in the case; *Dudhia Forest Co-op. Labourers & Artisans Society Ltd. v. Mohammed Saiyed and Abdul Rehman's Co.*, (1980) 21 GLR 272, observed that "a slight deficiency in the quantity will not entitle the buyer to reject the goods or claim damages because some flexibility in such contracts of sale of goods in bulk is unavoidable and trivial short fall in quantity must be overlooked."

8.3 Delivery of contractual goods together with others

Sub-section (3) says that if the buyer delivers the goods mixed with that goods which did not figure in the terms of contract then in such circumstances, it is upto buyer to accept the goods as per the contract and reject the rest or reject the whole consignment.

This sub-section replaces and modifies in favour of the buyer. Section 119 of the Contract Act, which, limited the

buyer's right to reject to cases where there is risk or trouble in separating the goods ordered from the goods not ordered'. In the case; *Levy v. Green*, (1859) 1 E&E example (2), Byles J., said-

"I do not say that, in all cases where the goods ordered are sent together with others not ordered, the vendee would have a right to refuse to accept any; but, if there is any danger or trouble attending the severance of the two, or any risk that the vendee might be held to have accepted the whole if he accepted his own, he is at liberty.....to refuse to accept at all.

In *Nicholson v. Bradfield Union*, (1866) LR 1 QB 620, a contractor for the supply of coal sent coals partly according to contract and partly not, and mixed them all together in delivery, it was held that the whole quantity so delivered must be considered not according to contract'.

9. Instalment Deliveries

Section 38 of the Act speaks about the deliveries of goods in instalment-

"Instalment deliveries.-

(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated."

9.1 Instalment Deliveries

Sub-section (1) of this section is a corollary to section 37(1). In the case; *Reuter v. Sala*, (1866) LR 1 QB 620, it was observed that neither seller nor buyer can claim to make or demand delivery of less than the full quantity and neither, therefore, can, in the absence of agreement, insist that delivery should be made by instalments.

Such an agreement is made expressly and may also be inferred from the circumstances of the case i.e. from the conduct of the parties in delivering and accepting an instalment, or from the nature of the contract e.g. when it is obvious that the full quantity of the goods cannot be delivered in one delivery.

9.2 Entire Contracts

A contract is entire contract where the liability of one party to perform is dependent upon complete performance of his obligations by the other *Bramwell LJ*, held, in the case; *Honck v. Muller*, (1881) 7 QBD 92 (100), that the whole of what is to be done on one side is the consideration of the whole of what is to be done on the other. Here, there was an agreement for delivery by instalments, but the price is made payable on complete delivery, or where there is no stipulation that it shall be paid before complete delivery, the contract is still an entire contract.

In the case; *Oxendale v. Wetherell*, (1829) B&C 386: 33 RR 207, it was observed-there was a contract to deliver a large quantity of goods which consisted of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of that time, bring an action to recover the price of that part delivered.

9.3 Severable Contracts

The contract may provide for delivery by instalments and payment for each instalment, and be of such a nature that each delivery is really like a delivery under a separate contract, to be paid for separately. The seller must then deliver instalments according to the contract and the buyer must accept and pay for them, but in case of a failure by either party to fulfil his obligations in respect of one instalment, 'the parties may well be assumed to have contemplated a payment in damages rather than a recession of the whole contract; *Howell v. Evans*, (1926) 134 LT 570.

9.4 Failure in paying an Instalment

Q. What would be the effect of non-payment of an instalment on contract? Discuss with case laws.

A mere refusal or failure by the buyer to pay for one or more instalments, unaccompanied by any other act, does not amount to a repudiation of the contract by the buyer as it was observed in the case; *Freeth v. Burr*, (1874) LR 9 CP 208. The seller can't rescind the sale if there is a case of insolvency. Although, he may refuse to deliver unless he is paid for instalments already delivered and receives cash for subsequent instalments.

In the case; *Withers v. Reynolds*, (1831) 2 B&AD 882: 36 RR 782, a buyer who had to get a quantity of straw in instalments and was to pay on delivery said to the seller, "you may bring your straw, but I will not pay you on delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you."

It was held that he had shown an intention to repudiate the contract and that the seller might treat it as an end. So, in any case where such a refusal can be inferred, the seller may treat the contract as rescinded.

10. Delivery to Carrier or Wharfinger

Section 39 tells about delivery of goods through a carrier or delivery of goods to a wharfinger for safe custody. It is as follows:

"(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger, as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit."

10.1 Delivery to Wharfinger or Carrier

In England, it's a century old proposition as well as settled law that if a tradesman ordered goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser'. As it was also held in the case; *Shree Bajrang Jute Mills Ltd. v. State of Andhra Pradesh*, MANU/SC/0032/1964 : AIR 1966 SC 376, delivery to the carrier will, unless the seller reserves the right of disposal, pass the property in the goods to the buyer and the general result of delivery to the carrier or wharfinger is that the goods are then at the buyer's risk that the carrier or wharfinger is his agent and that he alone may sue that latter for damages done by him to the goods, or failure to deliver them.

In another case; *Maniar Narottam Das Dharamshi v. Barjatya Traders*, 21(2) GLR 89 (99), it was said "where there is a contract where the delivery of goods is done through 'bilty' and the goods are consigned by the seller to self with Railways and the receipt is endorsed in favour of a bank for being given duly endorsed to the buyer against payment. The property in the goods doesn't pass to the buyer as soon as it is handed over to Railways under section 39 as the goods are not delivered for transmission to the buyer within the meaning of this section."

10.2 Duty of Seller on Delivering Goods in a Carrier

Sub-section (2) of section 39 says that unless the buyer has authorized the seller, the latter shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of goods and

other circumstances which prevail at that very time. But, if the seller skips to do so, and the goods are lost or damaged during the course of transit or during the custody of the wharfinger, the buyer may choose to decline in accepting the delivery as his own or may hold the seller responsible in damages.

This sub-section is not confined to any particular type of contract of carriage and would apply to the contracts for the carriage of goods whether by land, sea or air or by any combination of the three. This sub-section will also apply even where the seller is merely 'authorised' but not 'required' to send the goods to the buyer.

10.3 Transit by Sea

Sub-section 3 says that where the goods are sent by the seller to buyer by a route which involves sea then in such circumstances it is very usual to get the goods insured and the seller will surely give such notice to the buyer as may enable him to insure them during the sea transit and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Even if the transport is partially through sea transit, it would be within the expression route involving sea transit and duty to give notice under sub-section (3) will arise.

Generally there are four means by which a claim can be made for damage to goods on board a ship. These are as follows-

- (a) the shipper may sue in contract, assuming that he has not divested himself of his rights by endorsement on the bill of lading,
- (b) a consignee whose name is given on the bill of lading can sue in contract under the Bills of Lading Act,
- (c) there is also a possibility of taking a delivering of goods at the port of discharge which may give rise to implied contract, and
- (d) the person who was the owner of the goods at the time when the damage occurred can sue in tort.

11. Risk where Goods are delivered at a Distant Place

Section 40 of the Act speaks as follows-

"Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit."

Earlier, there was a suggestion to omit this section as it tended to confuse sellers and also inconsistent with the seller having undertaken to bear the risk. But it was decided to retain it to secure conformity between Indian and English Law.

This section applies the principle generally and not only to the case of a manufacturer; it is however limited by the rule that perishable goods which are consigned to a distant place are not merchantable unless they are in a condition to remain saleable for a reasonable time.

12. Buyer's Right of Examining the Goods

Q. Can a buyer reject the goods after delivery if he finds that the supplied goods do not commensurate with the quality agreed at the time of contract? Explain it.

Section 41 speaks about rights of buyer to examine the goods which he has not examined previously.:

- "(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
- (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in

conformity with the contract."

Right to Examine the Goods.—It is very genuine on the part of buyer to examine the goods what he has purchased or proposed to purchase. As per sub-section (1) in cases where there has been no previous examination of the goods, 'the mere fact that the buyer has taken delivery of them does not amount to an acceptance until he had a sufficient period for examining them to see whether they are or are not in accordance with the contract. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract, at the same time no complete and final acceptances so as to irrevocably vest the property in the buyer can take place before he had exercised or waived that right.

This section gives buyer a right to examine the goods and not a right to repudiate the contract. The right of inspection could only arise either when the consignee had taken the delivery from the carrier or when the goods were tendered for delivery to the buyer.

In the case; *Ruttonjey v. Jamnadas*, (1882) 6 Bom 692, it was observed that reasonable opportunity of examination is all that the Act requires; it is buyer's business to verify, not the seller's to supply further proof that the goods are according to contract. What is a reasonable time in which the buyer should examine the goods when they are available to him for inspection is a question of fact to be judged on facts and circumstances of each case. The Bombay High Court while projecting the facts stated the principles—

The facts of the case were that the defendant agreed to purchase from the plaintiff, 100 bales 'fully good fair Kishli cotton', to be delivered from 15th March to 1st April, 1881. On 30th March, the plaintiffs sent the defendant a letter enclosing a sampling order, which was received by the defendant's agent at 11.30 a.m. that day. The defendant got samples taken of the cotton, and a dispute having arisen as to the quality and classification of the cotton, the plaintiffs wrote to the defendant on 31st March asking him to attend with his surveyor at 1 p.m. on that day to survey the cotton as, otherwise an ex parte survey would be held. It being a mail day, the defendant's surveyor could not attend at the appointed hour, and the plaintiffs had an ex parte survey held by their own surveyors and pronounced the cotton to be of the description contracted for. Shortly afterwards the defendant asked for a survey by a letter which reached the plaintiffs at 2.19 p.m. on that day. The plaintiff did not comply with the application, and called upon the defendant to take delivery of the goods.

The plaintiffs filed a suit for breach of contract. It was defendant's plea that no reasonable opportunity was given to them to examine the goods, as there was no joint survey, and that the time allowed by the plaintiffs for examination of the cotton was not sufficient. It was held by the court that the defendant had reasonable opportunity within the meaning of this section.

Latham J. said as—

The rule in the section 38 of the Contract Act agrees with the rule of English law laid down in *Benjamin's Sale of Goods*¹ but there is little authority as to what is a reasonable opportunity of inspection.....in the present case the sampling order was delivered to the defendant by 11.30 a.m. on the 30th March, and he had till 1 p.m. on the 31st March, before any refusal by the plaintiffs, to allow a further examination is alleged. Now *Vizbookandas Atmaram* seems to have been certainly dilatory in his examination, he not having compared the samples with the standards till past noon on the 31st and it seems to me that a period of over 24 hrs. gave a reasonable opportunity to see whether the cotton offered was the cotton which the plaintiffs were bound by their contract to deliver.

Then we are to go further and to say that the purchaser is entitled to continue inspecting and examining until there are expiration of the period for delivery? I find no authority for this and in many cases it would be unreasonable to place no limit on the inspection. Is a purchaser at liberty to open and taste every bottle of wine in a lot sold or in the present case to pass every pound of cotton through an expert's hands? There must be some limit and I think that a reasonable opportunity is the limit alike for vendor and purchaser, and that such a reasonable opportunity had been had by 1 p.m. on 31st March. The goods need not be in the seller's actual possession, control is enough.²

13. Acceptance

Q. When it can be said that the goods have been accepted by the buyer? Explain it with the help of relevant cases.

Section 42 speaks about the acceptance of goods as follows-

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

From the section, it appears that buyer may accept the goods even before they are delivered, by intimating to the seller that he accepts them as he may do by actually selecting the goods, or directing delivery to be made to third

1. 2nd Edn., pp. 573 and 576.

2. Pollock and Mulla, the Contract and Specific Act, 11th Edn., 1994, p. 515 (also cited *Arunachalam Chettiar v. Krishna Aiyar*, (1925) 49 Mad LJ 530.

parties; in *Cusack v. Robinson*, (1861) 1 B&S 299, just to take delivery does not amount to acceptance and this is particularly the case where delivery is made to a carrier. If however, after delivery the buyer deals with the goods in a manner inconsistent with the ownership of the seller, he thereby accepts them, nor does it signify that he so deals with them before the time which he has for examining them has elapsed.

In the case; *Hardy & Co. v. Hillerns & Fowler*, (1923) 2 KB 490 (498) (CA) the corresponding section of the English (Section 35) was discussed by Atkin LJ as follows-

"One of the acts upon the doing of which the buyer is deemed to have accepted the goods is that he intimates to the seller that he has accepted them. I think it is plain that such an intimation may be made before he has had a reasonable opportunity of examination and if such an intimation is made then it appears to me that without more the section operates and he is to be deemed to have accepted them. In the same way, when he does an act in relation to the goods which is inconsistent with the ownership of the seller, the section must be treated as coming into operation notwithstanding that the reasonable opportunity of examining them has not expired; as for instance where a man having had goods delivered to him turns them, or part of them, at once into his mill and uses them in the manufacture. In the present case the Tribunal of Appeal have found that the buyer had not had a reasonable opportunity of examination until 23 March a date which is subsequent to the act relied on by the sellers as being inconsistent with their ownership, but that finding is, in my opinion, immaterial.

Therefore, we have here to face the problem whether the act of the buyers in reselling and dispatching the goods was inconsistent with the ownership of the sellers. If it was they must be deemed to have accepted them. I would like to point out, in reference to that provision, that all the words of the section must have given effect to them. The words are 'when the goods have been delivered to him'- that is to the buyer-'and he does any act' of the kind specified. That means that the buyer must have got delivery before he does the act; *J&J Cunningham Ltd. v. Robert A Munro & Co.*, (1922) 28 Com Cas 42.

⌘ Time for Rejection

By contract, the parties may limit the time within which the buyer must determine whether to accept or reject the goods and if after the expiration of such a limit, or if no time be fixed, he does not reject, within a reasonable time, he is deemed to have accepted them. We can understand it further, where it was considered that whether a buyer had goods for a reasonable time and hence had lost his right to reject them, the nature of the particular defect and the speed with which it might have been discovered were irrelevant, since section 42 was directed solely to what was a reasonably practical interval between a buyer receiving the goods and his ability to return them, with keeping it in mind regarding desirability of finality in commercial transactions.

14. Buyer not bound to return Rejected Goods

Q. Is buyer bound to return the rejected goods?

Section 43 has the provision that with rejection of goods, buyer is not bound to return the same to the seller. It says-

"Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

It is well-established common law that whenever a buyer rejects the goods, it is not his duty to send the same back to the seller, but it is sufficient for him to give clear notice to the seller that the goods have been rejected and the seller should

collect them back i.e. the goods are lying at the seller's risk; *Grimoldby v. Wells*, (1875) LR 10 CP 391.

In another case; *Phaggu Mal v. Babu Lal*, (1913) 35 All 325: 19 IC 254, it was observed that the buyer is not bound to put himself to the expense and trouble of returning the goods and it is the seller's business to take away the goods, if he is so minded.

The buyer also owes a duty of care in relation to such goods which may entitle him to reimbursement for expenses incurred; *China Pacific SA v. Food Corporation of India*, (1982) AC 939.

The goods must be put at the disposal of the seller; the buyer for instance cannot claim to keep them as security for the price which he may have paid in advance. The buyer in such a case is not in a position analogous to that of an unpaid seller within the meaning of section 45(2); *JL Lyons & Co. v. May & Baker Ltd.*, (1923) 1 KB 685.

15. Liability of Buyer for Neglecting or Refusing Delivery of Goods

Section 44 keeps a tab on buyers who fails to take the delivery of goods. It speaks on-

"When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods:

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract."

This section in unambiguous term protects the rights of seller saying that if the seller has requested the buyer to take the delivery of goods within a reasonable time but if the buyer fails to succeed the requests of seller then the buyer would be liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods.

In the case; *Harlow and Jones Ltd. v. Panex International Ltd.*, (1967) 2 Lloyd's Rep 509, 531, Lord Ellenborough gave the ruling as follows:

"If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room; or he may bring an action for not removing them, should he be prejudiced by the delay. An arrangement by which the seller had agreed with the person from whom he had himself bought the goods that he would be liable to pay storage charges only to the extent that he could recover from the buyer would not preclude such seller from claiming storage charges."

As it was observed in the case of; *Charles Rickards Ltd. v. Oppenheim*, (1950) 1 All ER 420 CA, that the seller's request must be for the buyer not to accept only but to take delivery. Just delay in taking the delivery by the buyer does not entitle the seller to rescind the contract, unless indeed the date at which he is to do so is the essence of the contract. Where the time of delivery is postponed by the seller at the request of the buyer and if no period of postponement is fixed, the seller may give notice to the buyer and requests buyer to take delivery of the goods within a reasonable time and the buyer must then take delivery of goods within that time.

© Universal law Publishing Co.

CHAPTER 8

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

In this Chapter

1. Introduction
2. Unpaid Seller Defined (Section 45)
 - 2.1 Unpaid Seller
 - 2.2 Payment by Bill - Conditional Payment
 - 2.3 Payment by Credit Card
3. Unpaid Seller's Rights (Section 46)
4. Seller's Lien (Section 47)
 - 4.1 Seller's Lien
 - 4.2 When Lien Exists
5. Part Delivery (Section 48)
 - 5.1 Lien Available though Seller has parted with Possession of Part of the Goods
 - 5.2 Instalment Deliveries
6. Termination of Lien (Section 49)
 - 6.1 Loss of Lien
 - 6.2 Buyer tortiously obtaining possession
 - 6.3 Waiver of Lien
 - 6.4 Waiver of Lien by Wrongful Acts
7. Right of Stoppage in Transit (Section 50)
8. Duration of Transit (Section 51)
 - 8.1 Delivery to the Buyer
 - 8.2 End of Transit before its destination
 - 8.3 Acknowledgement to the Buyer
 - 8.4 Rejection of goods by Buyer
 - 8.5 Delivery to a ship Chartered by a Buyer
 - 8.6 Wrongful Refusal to deliver the Goods
 - 8.7 Part Delivery
9. How Stoppage in Transit is Effectuated (Section 52)
 - 9.1 Notice to Principal
 - 9.2 Duties of the Carrier and the Seller
10. Effect of Sub-sale or Pledge by Buyer (Section 53)
 - 10.1 Seller's Rights do not get affected by the Buyer's dealing with the Goods
 - 10.2 Transfer of the Bill of Lading
 - 10.3 Good Faith
11. Sale not Generally Rescinded by Lien or Stoppage in Transit (Section 54)
 - 11.1 Further rights of the unpaid seller against the Goods

11.2 Contract not rescinded by the buyer's default in payment

11.3 The Seller's Right to Resale

11.4 Lawful Resale by the seller

Relevant Cases

1. Longbottom & Co. Ltd. v. Bass, Walker & Co., (1922) WN 245 (246).
2. Edwards v. Brewer, (1837) 2 M&W 375: 46 RR 626.
3. Gunn v. Bolckow, (1875) LR 10 Ch App 491 (501).
4. Cowasjee v. Thompson, (1845) 3 MIA 422: 5 Moore CP 165: 70 RR 27.
5. Man [Ed&F] Ltd. v. Nigerian Sweets & Confectionery Co. Ltd., (1997) 2 Lloyd's Rep 50.
6. Charge Card Services Ltd., (Re) (1988) All ER 707 (CA).
7. Bloxam v. Sanders, 4 B&C 941 (948): 28 RR 525.
8. Griffiths v. Perry, (1859) 1 E&E 680 (688): 177 RR 397.
9. Somes v. British Empire Shipping Co., (1860) 8 HLC 338: 30 LJ QB 229.
10. Kemp v. Falk, (1882) 7 App Cas 573.
11. Manekji Pestonji Bharucha v. Wadilal Sarabhai & Co., (1926) 50 Bom 360: 53 IA 92: 94 IC 824: AIR 192 CPC 38.
12. Litt v. Cowley, (1816) 7 Taunt 169: 17 RR 482.
13. Anguis v. McLachlan, (1883) 23 Ch D 330.
14. Jones v. Tarleton, (1842) 9 M&W 675: 60 RR 863.
15. Berndison v. Strong, (1868) LR 3 Ch App 588 (591).
16. G.I.P. Rly. Co. v. Hanmandas, ILR (1889) 14 Bom 57.
17. James v. Griffin, (1837) 2 M&W 623: 6 LJ Ex 241.
18. Lyons v. Honffnung, (1890) 15 App Cas 391 PC.
19. Whitehead v. Anderson, (1842) 9 M&W 518: 60 RR 819.
20. Roservear China Clay Co. ex p., (1879) 11 Ch D 560.
21. Bird v. Brown, (1850) 4 Ex 786.
22. McEwan v. Smith, (1849) 2 HLC 309: 81 RR 166.
23. Ambalavana Chettiar v. Express Newspapers Ltd., MANU/SC/0052/1967 : AIR 1968 SC 741.
24. Stephen v. Wilkinson, (1831) 2 B&Ad 320.

1. Introduction

Chapter V of the Sales of Goods Act, 1930 consists of 10 sections i.e. from section 45 to section 54. These sections invariably deal with unpaid seller and their rights, part delivery, termination of lien etc.

2. 'Unpaid seller' defined

Section 45 defines 'unpaid seller' as follows:

"(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act-

(a) when the whole of the price has not been paid or tendered;

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed or a consignor or agent who has himself paid, or is directly responsible for, the price."

2.1 Unpaid Seller

Earlier, there was a question whether a seller who had been partially paid was entitled to the rights of an unpaid seller but this question was put to rest many years ago. At the same time, it was also established that the partially unpaid and wholly unpaid seller, both were in the same position. A seller cannot be said to be unpaid if the buyer has tendered the price and the seller has refused to accept it; and in such circumstances the seller loses all his rights against the goods and such seller will be estopped from claiming that he is an 'unpaid seller' under the meaning of section 46. In the case; Longbottom & Co. Ltd. v. Bass, Walker & Co., (1922) WN 245 (246), it was observed that where the goods are to be delivered by separate instalments and to be paid for separately the price may be apportioned accordingly and the expression 'whole of the price' will take colour from the context.' In another case; Edwards v. Brewer, (1837) 2 M&W 375, 46 RR 626 it was said that the seller was not unpaid only when the price of goods was not paid but in that circumstances also when the seller has taken bills of exchange or other negotiable instruments as conditional payment and the buyer has failed on his part of facilitate these instruments to be got realized on maturity.

In the case; Gunn v. Bolckow Vaughan, (1875) LR 10 Ch App 491 (501), Mellish, LJ has stated the law-

"No doubt, if the buyer does not become insolvent, that is to say, if he does not openly proclaim his insolvency, then credit is given by taking the bill and, during the time that the bill is current, there is no vendor's lien, and the vendor is bound to deliver. But, if the bill is dishonoured before delivery has been made, then the vendor's lien revives; or if the purchaser becomes openly insolvent before the delivery actually takes place, than the law does not compel the vendor to deliver to an insolvent purchaser."

2.2 Payment by Bill - Conditional Payment

If a seller has taken a negotiable security as an absolute payment is no longer an unpaid seller, and therefore has no rights against the goods; Cowasjee v. Thompson, (1845) 3 MIA 422: 5 Moore CP 165: 70 RR 27.

If under the contract, the banker arranges for a banker's commercial credit in favour of the seller for payment of the price of goods then the opening of the credit would normally be only conditional payment and in the event of

the banker's default in honouring the credit the seller is entitled to claim the price from the buyer and his remedies against the goods would revive; Man (Ed & F) Ltd. v. Nigerian Sweets & Confectionery Co. Ltd., (1977) 2 Lloyd's Rep 50.

In Charge Card Services Ltd. Re, (1988) All ER 702 (707) (CA), it was held that there was no general principle of law that whenever a method of payment was adopted involving a risk of non-payment by a third party, it was presumed that the acceptance of payment through the third party was conditional on his making (third party) the payment if he failed to pay, the original obligation of the purchaser remained. So, each method of payment has to be considered and other circumstances attending that type of payment. In the modern times, payment through credit card has started and in new circumstances, it becomes necessary to consider whether such payment should be treated as absolute or conditional in the light of consequences of such payment and not according to any general principle.

2.3 Payment by Credit Card

Where in the transactions credit card is used, there is an underlying contractual scheme which predates the individual contracts of sale. In this scheme, sellers agree to accept the card payment worth the price of goods and the buyers commit the credit card company to pay the sellers/suppliers. Here, there are two separate contracts-first, between the credit card company and the seller and second, between the credit card company and the cardholder. In the first case, the credit card company agrees to reimburse the amount what the buyer has incurred on purchasing the goods and in the latter case, the card holder agrees to reimburse the credit company what it has paid to seller. It is a tacit assumption that the legal consequences will be regulated by the separate contractual obligations between the seller and the credit company when a credit card is tendered and accepted. Credit card system is beneficial for both sellers and card holders. Sellers attract customers by agreeing credit cards as the buyer can purchase the things even when he has no cash since he has to pay the due amount to the credit card company on a later date. At the same time card holder is free from carrying cash.

3. Unpaid Seller's Rights

Q. What are the rights of unpaid seller?

Section 46 talks about the rights of unpaid seller in following words-

"(1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property

in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

- (a) a lien on the goods for the price while he is in possession of them;
- (b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;
- (c) a right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer."

This section seeks to protect the interest of an unpaid seller by conferring upon him the following rights against the goods, notwithstanding the fact that the property in the goods has been passed to the buyer-

- (i) a lien on the goods for the price while he is in possession of them;
- (ii) in case of the insolvency of the buyer a right of stoppage of the goods in transit after he has parted with the possession of them;
- (iii) a right of resale as limited by the Act.

These rights arise usually due to implication of law and not because of agreement express or implied between the parties.

Bayley J. in the case; *Bloxam v. Sanders*, 4 B&C 941 (1848): 28 RR 525 has observed as follows-

"The buyer has no right to have possession of the goods till he pays the price. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grants out of his original ownership and dominion and payment or a tender of the price is a condition precedent on the buyer's part and until he makes such payment or tender, he has no right to the possession.

• Rights where Property Remains in the Seller

In the case; *Griffiths v. Perry*, (1859) 1 E&E 680 (688): 177 RR 397, it was observed "where the contract is executory, unpaid seller is not obliged to complete it in the event of the buyer becoming insolvent and he will not be liable to an action at the suit of the buyer or his trustee in bankruptcy for non-delivery until the price is tendered to him even in case of sale was undergone on credit."

If the property in goods has already passed to the buyer then the unpaid seller's lien would be an appropriate term.

4. Seller's Lien

Section 47 of the Act says about the seller's lien-

"(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

- (a) where the goods have been sold without any stipulation as to credit;
- (b) where the goods have been sold on credit, but the term of credit has expired;
- (c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer."

4.1 Seller's lien

A seller's lien is described as an additional security which is given to a person who has a right to be paid and he has a right to be paid besides and independently of his lien. Section 47 also confers the seller's lien 'to protect a vendor from incurring the expense in manufacturing or acquiring goods for which payment remains justly in doubt.'

4.2 When lien exists

The right wholly depends upon the statutory provisions and not upon any equitable considerations. In the case; *Somes v. British Empire Shipping Co.*, (1860) 8 HLC 338: 30 LJQB 229; it was held by the House of Lords that where the price has been tendered, the seller cannot claim to retain the goods further for the expense incurred by him on storage during the period that he was holding the goods in the exercise of his lien.

5. Part Delivery

Section 48 of the Sale of Goods Act, says-

"Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien."

5.1 Lien Available though Seller has Parted with Possession of Part of the Goods

The section recognizes the rule that the seller's lien is available so long as he holds any part of the goods, and no case appears to have arisen in which part delivery has been held to be delivery of the remainder so as to divest the seller's lien, when the goods were actually in the sellers "own custody".

5.2 Instalment Deliveries

If, a part of the goods are delivered under circumstances which show an agreement to waive the lien, the seller cannot then retain the remainder or where delivery of a part is intended a delivery of the whole, the lien is lost. As it was observed in the case; *Kemp v. Falk*, (1882) 7 App Cas 573. If both parties intend it as a delivery of the whole; then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole'.

6. Termination of Lien

Section 49 of the Act speaks about losing of lien by unpaid seller as-

"(1) The unpaid seller of goods loses his lien thereon-

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) when the buyer or his agent lawfully obtains possession of the goods;
- (c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon does not lose his lien by reason only that he has obtained a decree for the price of the goods."

6.1 Loss of Lien

Lien of seller depends on possession. It was observed in the case of; *Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co.*, (1926) 50 Bom 360: 53 IA 92: 94 IC 824: AIR 1926 PC 38-when the vendor has given the buyer possession under the contract of sale, all his right in the goods are completely gone; he must recover the price exactly as he would recover any other debt.

*Benjamin on Sale of Personal Property*¹ considered that-

"Whenever the property has passed and the goods have reached the actual possession of the buyer, the seller's sole remedy is by personal action. He stands in the position of any other creditor to one the buyer may owe a debt; all special remedies in his favour qua seller are gone."

6.2 Buyer Tortiously obtaining Possession

If, a buyer obtains the possession of goods through some tortious act then the seller may take them back, if he can do so or can sue the buyer if he refuses to redeliver them for the mere right to have possession of the goods is a sufficient right upon which to found an action; *Litt v. Cowley*, (1816) 7 Taunt 169: 17 RR 482.

6.3 Waiver of lien

The seller when sells the goods on credit then his lien gets waived during the currency of the credit, unless in the meantime the buyer becomes insolvent and the same would follow in case the contract of sale where the seller accepts conditional payment by taking a bill of exchange for the price and if some other security measures are taken to postpone the date of payment then it is inconsistent with the right of lien; *Angus v. McLachlan*, (1883) 23 Ch D 330.

1. Eighth Edn., p. 829.

6.4 Waiver of lien by Wrongful Acts

To keep the lien, conduct of seller must be genuine. If he keeps the goods on one or another pretext and refuses to

deliver them to buyer on the ground which is not consistent with the terms of lien then he certainly waives the lien. In such situation, he cannot, when sued by the owner, defend his action by setting up the lien or objecting that the amount due in respect of which the lien is exercisable had not been tendered before action was brought; Jones v. Tarleton, (1842) 9 M&W 675: 60 RR 863.

7. Right of Stoppage in Transit

Q. What are the grounds to invoke the provisions of section 50 if the seller wants to stop the goods in transit?

Section 50 empowers the unpaid seller to stop the goods in transit if the buyer becomes insolvent before paying the price of goods. It says-

"Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price."

The essentials of this section are-first the seller should be unpaid; second-the buyer should have become insolvent; third-the property should have passed to the buyer, for if the seller reserves the right of disposal, the goods remain his property and therefore under his lien and last and most important that the goods should be in the course of transit. Out of the above four, first three can be ascertained very easily but about the fourth i.e. the goods are in the transit or not is little difficult to ascertain sometime. Sometimes the goods may be with the carrier but not in transit. If, there is some middleman and the middleman is seller's agent and the goods lying with him then the goods are very much in the possession of the seller and if the middleman holds the goods on behalf of buyer then it has already gone to buyer's possession. If, the seller holds the goods as an independent contractor i.e. in his own right as a carrier or bailee, that there is transit in law and that there is question of stoppage in transit. It is not necessary that the goods should be actually moving. In the case; Berdison v. Strang, (1868) LR 3 Ch App 588 (591) Lord Cairns has said-

"If they arrive injured and damaged in bulk or quality, the right to stop in transitu is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive and to claim some money which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of their property."

8. Duration of Transit

Q. When a transit deemed to be at an end? Explain in the light of provisions of section 51.

Section 51 of the Act tries to solve the difficulty by laying down the basic propositions which speak about the commencement and end of transit. It says-

"(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods."

8.1 Delivery to the Buyer [Section 51(1)]

Sub-section (1) of section 51 says that goods are deemed to be in course of transit from the time it has been delivered to a carrier or other bailee for the purpose of transmission to the buyer till the buyer or his agent takes the delivery. So, the transit comes to an end as soon as the goods are handed over to the buyer or his agent.

In the case; G.I.P. Rly. Co. v. Hanmandas, ILR (1889) 14 Bom 57, the seller had consigned the goods with the G.I.P. Rly. Co. for transportation to the buyer. When the goods reached the destination, the Railway Company delivered the goods to buyer and the same was loaded by the buyer on carts. In the meanwhile, the Railway Company received a telegram to stop the goods and by that time the carts were still in the railway compound. The company did not do so and were sued by the seller in damages.

It was held that as soon as the goods were handed over to the buyer, the transit was over and the company was left with no power to stop buyer from taking the goods.

In another case; James v. Griffin, (1837) 2 M&W 623: 6 LJ Ex 241, the seller sent the goods on its destination in the part of river Thames. The buyer sent his son to get the goods landed but told him that due to his insolvency he did not intend to take the goods and would like the seller to have them. When the goods were so lying, the seller's instruction to stop them was received. The buyer's trustee in bankruptcy claimed the goods.

Here, the goods were effectively stopped and since it was not accepted by the buyer, they were still in the course of transit.

8.2 End of Transit before its Destination [Section 51(2)]

Sub-section (2) of the section 51 says that if the buyer or his agent obtains the delivery of goods before the goods reaching to its destination, transit comes to an end then and there.

In the case; Lyons v. Honffnung, (1890) 15 App Cas 391 PC, the buyer was at Sydney. He instructed the seller to send the goods to Sydney from where they would be going to Kimberley and that he would go by the same ship and would take the goods with him.

It was not known whether the buyer was there in the ship. The buyer became insolvent and the seller gave notice to stop. It was held that the notice was effective. It was not the buyer who was carrying the goods. But, the carrier was carrying the goods as well as the buyer. The transit did not end by mere entry of buyer in the ship.

8.3 Acknowledgement to the Buyer [Section 51(3)]

When the goods have arrived at the appointed destination the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and he continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

In the case; Whitehead v. Anderson, (1842) 9 M&W 518: 60 PR 819, a quantity of timber was loaded on board a ship. The ship reached at its destination. The buyer was bankrupt at that time. Nevertheless his agent went on the ship and after inspection of the timber he asked the captain to give him the possession of timber. But, the captain said that he would deliver only once the freight is paid. Before, this could be done, the seller sent a notice to stop and consequently the goods were delivered to the seller's agent.

It was held that the carrier was within his rights in returning the goods to the seller because the transit had not ended. The captain's wish for conditional delivery (when the freight is paid) being not fulfilled, the buyer had not acquired constructive possession.

8.4 Rejection of Goods by Buyer [Section 51(4)]

When the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

8.5 Delivery to a Ship Chartered by a Buyer [Section 51(5)]

Where goods are delivered to a ship chartered by the buyer, it is a question which depends on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

So, if the circumstances show that the carrier is acting as agent of the buyer, then the transit is at an end as soon as the goods are loaded on board the ship.

In the case Roservear China Clay Co. ex p (1879) 11 Ch D 560, there was a contract for the sale of China clay. The buyer chartered a ship and instructed the seller to load the goods at Forey, which was accordingly done. The destination of the ship was not told to the sellers, nor any bill of lading signed. The sellers gave notice to stop the goods. Here, the notice was held to be effective.

James LJ said-"When the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right of stopping them so long as they remain in the possession of the carrier."

8.6 Wrongful refusal to deliver the Goods [Section 51(6)]

Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end. It is clear that the goods should have arrived at their destination, because otherwise the carrier has the right to refuse to deliver them. In the case; *Bird v. Brown*, (1850) 4 Ex 786, the goods had arrived at their destination. The buyer being insolvent, a merchant, acting for the seller but without his authority, gave stoppage notice to the carrier. After that the trustee of bankrupt buyer demanded the goods. The carrier refused to deliver the goods and handed them to the merchant. Subsequently to this the seller ratified the unauthorized stop notice.

The Court observed, "There could be no valid stoppage in transitu after the formal demand of the goods by Bird (Trustee). The goods had then arrived at Liverpool, the master was bound to deliver the goods to Bird and he could not by his wrongful detainer of them prolong the transit and so extend the time during which stoppage might be made."

8.7 Part Delivery [Section 51(7)]

Where part delivery of the goods has been made to the buyer or his agent in that behalf, remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

We can understand it with following example-

X sells 1,000 quintals of rice to Y; 600 quintals rice has reached to Y's possession and while 400 quintal still in transit, Y becomes insolvent, and X, being still unpaid, stops 400 quintals in transit. X is entitled to hold 400 quintals until the price of 1000 quintals is paid.

9. How Stoppage in Transit is Effected (Section 52)

Section 52 of the Act gives the provision regarding how stoppage can be effected in transit. It says-

"(1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of the seller. The expenses of such re-delivery shall be borne by the seller.

9.1 Notice to Principal

Q. What are the ways by which the unpaid seller stops the goods in transit?

When the seller wishes to exercise this right by giving notice of his claim then the notice may be given to the principal of the person who is in actual possession of the goods. If the transit is by sea then that expression includes the shipowner; who is the person most likely to know where the ship and its master are to be found.

In the words of Lord Blackburn who commented in 1882 in the case; *Kemp v. Falk*, 7 App Cas 585 in the Court of Appeal as follows-

"I had always myself understood that the law was that when you became aware that a man, to whom you had sold goods which had been shipped, had become insolvent, your best way, or at least a very good way, of stopping them in transitu was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to be and he might send it on; and I have always been under the belief that although such a notice, if sent, cast upon the shipowner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage in transitu. I have always thought that when the shipowner, having received such a notice used reasonable diligence and sent the notice on, and it arrived before the goods were delivered that was a perfect stoppage in transitu."

To get such notice effectual, it must be so given that the principal can by the exercise of due diligence communicate with his servant or agent, for 'the only duty that can be imposed on the absent principal is to use reasonable diligence to prevent delivery; *Whitehead v. Anderson*, (1842) 9 M&W 518, 534, 60 RR 832.

9.2 Duties of the Carrier and the Seller

To stop the goods in transit when the notice is given, whether to the person in actual possession of the goods or his

principal is to revert the right to the possession of the goods in the seller. If by mistake, or by reason of the principal not using due diligence to communicate with his agent to stop the delivery, or otherwise, the goods are delivered to the buyer, the carrier is liable in damages, and the buyer or his trustee in bankruptcy must restore them on demand to the seller and on his failing to do so, is also liable to be sued by the seller; *Litt v. Cowley*, (1816) 7 Taunt 169, 17 RR 482.

10. Effect of Sub-sale or Pledge by Buyer [Section 53]

Section 53 of the Sale of Goods Act tells about the effect of sub-sale or pledge by buyer:

"(1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto:

Provided that where a document of title to goods has been issued, or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer."

10.1 Seller's rights do not get affected by the Buyer's dealing with the goods

It was in the mid 19th Century that as regards to unpaid seller's rights a second vendee is not better placed compared to the first one. Regarding rights of latter, the existence of this rule shows that whatever that right may once have been, it has not been today a merely equitable right, being in their essence personal, are liable to be defeated by a purchaser of the legal estate or interest for value and without notice. Section 53 is one of sections which sets out circumstances in which the right of lien or stoppage in transit may be defeated by a sub-sale or subsequent transaction.

Lord Blackburn¹ has stated the rule in this regard as follows-

"A purchaser who has acquired ownership may sell the goods subject to the first vendor's rights and if he does so, the property is transferred

1. Blackburn on Sale, 3rd Edn., pp. 418-419.

to the second purchaser by the second bargain and sale without any delivery of possession. But though the second purchaser acquires by his bargain and sale the legal property in the goods and every right which his immediate bargainer had in the goods, yet (if there be not an assignment of the bill of lading) he acquires no greater right; he takes the property subject to the same restrictions that his immediate vendor held it under."

We can further understand the above position with the illustration given in the case; *McEwan v. Smith*, 166 (1849) 2 HLC 309: 81 RR 166 - A was the owner of some goods and the goods were lying in N's warehouse. A sold the goods to B in lieu of a bill of exchange for a certain price and also gave a delivery order addressed to N. B resold the goods to C and gave him a delivery order but before taking the goods by C. B became insolvent, A warned N not to deliver the goods without A's order. Here, A had not lost his lien on the goods and was entitled to hold them against C.

10.2 Transfer of the Bill of Lading

Q. Discuss 'transfer' of the bill of lading with the help of relevant cases.

has been earlier established law that the unpaid seller's right to stop the goods in transit is defeated by the transfer of the bill of lading to a third party. If the transfer is such as absolutely to pass the property in the goods, the seller's right is completely defeated where it operates as a pledge or mortgage of the goods, the seller has still the right to stop all the property which remains in the buyer, but it cannot be exercised so as to affect the interests of transferee.

Here, we can cite the illustration of the case; *Kemp v. Falk*, (1882) 7 App Cas 581. Lord Blackburn observed:-

"It appears that Mr. Falk of Liverpool had sold to Mr. Kiell a quantity of salt, which was shipped on board a vessel bound for Calcutta; that Mr. Kiell accepted a draft drawn against that cargo; that bills of lading were made out, which were signed not as usual by the master but by the shipowner himself and that Mr. Kiell got those bills of lading. Now so far as that goes, standing there, nothing can be more thoroughly established than the law upon it. Mr. Falk having delivered the goods and taken a bill of exchange had no right whatever to

meddle with those goods further, unless before the end of the transitus (I shall say a word presently as to what comes at the end of the transitus). Kiell the purchaser became insolvent and stopped payment and then if Falk had stopped the goods in transitu he would have been revested in his rights as an unpaid vendor as against Kiell. It is pretty well settled now that it would not have rescinded the contract. But before the end of the transitus came, his right to stop the goods in transitu might be defeated by an endorsement upon the bill of lading to a person who gave value. In the present case, there was such an endorsement and transfer for a particular and 'limited purpose'. It appears that Mr. Kiell in order to obtain an advance got T. Wiseman & Co of Glasgow, the correspondents and agents of Wiseman Mitchell Reid & Co of Calcutta, to make an advance in his favour by drawing a bill of exchange upon him; and to secure the payment of that bill of exchange the bill of lading was endorsed and the Bank of Scotland, who discounted or took that bill, became holders of the bill of lading for the purpose of protecting themselves. It was clearly a transfer for value to the Bank of Scotland, and as such, so far as that went, it defeated the right of stoppage in transitu at law. But the unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop in transitu everything which was not covered by that pledge."

10.3. Good Faith

Good faith means absence of notice of such circumstances as render the bill of lading not fairly and honestly assignable e.g. that the buyer is insolvent. Knowledge that the goods are still unpaid for does not constitute bad faith.

11. Sale not Generally Rescinded by Lien or Stoppage in Transit (Section 54)

Section has got the provision as follows:-

"(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages."

11.1 Further rights of the Unpaid Seller against the Goods

This section deals with further rights of the unpaid seller. The effect of stoppage in transit is not to rescind the sale, but to replace the seller in the position of an unpaid seller who has not parted with the possession of the goods. His further rights against the goods are therefore the same in both case and subject to the same limitations.

11.2 Contract not Rescinded by the Buyer's Default in Payment

Time of payment is not the main essence of the contract. If a buyer fails to fulfil this commitment (payment towards purchase) by due date does not of itself rescind or entitle the seller to rescind the contract. Buyer may put an end to the seller's lien and entitle himself to delivery by payment or tender of price within a reasonable time. But, when the buyer has absolved himself of obligations on his part then the seller has the option of either affirming the contract, or treating it as discharged. After that the seller is also under no obligation to perform his remaining contractual duties. At the same time he also can't sue the buyer for price. In this section, the term 'rescinded' means 'treated as discharged by the seller' or 'terminated by the seller'.

11.3 The Seller's Right to Resale

The statutory power for resale under section 54(2) arises if the property in the goods has passed to the buyer subject to the lien of the unpaid seller. If, the property in goods has not passed to the buyer, the seller has no right of re-sale. But, the seller can claim as damages the difference between the contract price and the amount realized on resale of the goods where he has the right to resale under this section. In the case; *Stephens v. Wilkinson*, (1831) 2 B&Ad 320, it was observed that the unpaid seller, though in possession of goods does not have the right merely because he is unpaid, to resume a complete right of property, so as to divest totally the property rights of buyer so as to divest totally the buyer's right of property in the goods.

11.4 Lawful Resale by the Seller

In the case; *Ambalavana Chettiar v. Express Newspapers Ltd.*, MANU/SC/0052/1967 : AIR 1968 SC 741, it was held that the right of resale is exercised by the seller on his own behalf and not as agent of the buyer when notice is given. Here the buyer is not entitled to the profits of resale though he may be liable for damages. But the position changes when no notice is given and the buyer is then entitled to the profits of the resale and not liable for damages. As per the provisions of section 54(2), no notice is required to be given of intention to resale the perishable goods and it would appear that on the buyer's failure to pay on the stipulated date or within a reasonable time, the seller may immediately become entitled to resell such goods.

© Universal law Publishing Co.

CHAPTER 9

SUITS FOR BREACH OF CONTRACT

In this Chapter

1. Introduction
2. Suit for Price (Section 55)
3. Damages for non-acceptance (Section 56)
4. Damages for non-delivery (Section 57)
5. Specific Performance (Section 58)
6. Remedy for Breach of Warranty (Section 59)
 - 6.1 Notice to Seller of Defective Condition
 - 6.2 Resale by Buyer
 - 6.3 Acceptance of Goods without Inspection
7. Repudiation of Contract before Due Date (Section 60)
 - 7.1 Measure of Damages
 - 7.2 Measure of Damages when Goods are to be Delivered by Instalments
8. Interest by way of Damages and Special Damages (Section 61)

Relevant Cases

1. Gordon v. Whitehouse, (1856) 4 WR 231.
2. Bilasiram Thakurdas v. Gubbay, (1915) ILR 43 Cal 305.
3. Union of India v. Kesar Singh, AIR 1978 J&K 102.
4. Lazenby Garages Ltd. v. Wright, (1976) 2 All ER 770.
5. Jamal, A.K.A.S. v. Moola Dawood Sons & Co., (1916) 43 IA 6: ILR (1916) 43 Cal 493.
6. Stoozina Gdanska SA v. Latvian Shipping Co., (1998) 1 All ER 883 HL.
7. Sitaram Srigopal v. Daulati Devi, MANU/SC/0035/1979: (1979) 4 SCC 351.
8. Jamal v. Moola Dawood Sons & Co., (1916) 1 AC 175.
9. A.P. Tobacco Growers Coop. Union Ltd. v. Anjaneya Tobacco Co., (1998) 5 Andh LT.
10. Mason v. Burningham, (1949) 2 All ER 134.
11. Lexmead (Basingstoke) Ltd. v. Lewis, (1981) 55 Aust LJ 753.
12. Kotu Mal v. Bihari Lal, AIR 1921 Lah 355.
13. National Traders v. Hindustan Soap Works, MANU/TN/0137/1959: AIR 1959 Mad 112.
14. Bradley v. H. Newson Sons & Co., (1919) AC 16 (53).
15. Garnac Grain Co. Inc. v. HMF Faure and Fairclough Ltd., (1968) AC 1130 (1140).
16. Millett v. Van Heek & Co., (1921) 2 KB 369 CA.
17. Marwar Tent Factory v. Union of India, MANU/SC/0354/1989: (1990) 1 SCC 71: AIR 1990 SC 1753.
18. Seedain Suppliers Syndicates v. H.P. State Co-op. Marketing and Development Federation Ltd., (1995) AIAC 373 (All).
19. Andhra Cotton Mills Ltd. v. Sri Lakshmi Ganesh Cotton Ginning Mill, (1996) 1 ALT 537 AP.
20. Alco Chem. Ltd. v. Hyderabad Chemical and Pharmaceutical Works Ltd., (2003) 3 Banking Cases 508 (AP).

1. Introduction

Chapter VI (Sections 55 to 61) of the Sale of Goods Act, 1930 mainly talks about the suits and damages in case of breach of contract. Section 55 deal with suit for price. Section 56 and 57 deals with Damages for non-acceptance and non-delivery respectively. Section 58 talks about specific performance and section 59 about the remedy for breach of warranty. Repudiation of contract before due date is covered under section 60 and interest by way of damages and special damages are discussed in section 61.

2. Suit for Price (Section 55)

If a buyer wrongfully neglects or refuses to pay for goods then the seller may sue him. This section says-

"(1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract."

2(i) If the passing of the property depends upon the fulfilment of some condition and that condition is not fulfilled, the seller cannot sue for the price, even if the non-fulfilment of the condition is due to the default of the buyer, he can bring an action for damages under the next section i.e. section 56. But, if the property has passed and the payment of the price is subjected to fulfilling of some condition and that condition is not fulfilled owing to the default of the buyer, then the seller may sue for the price and that too even if by the terms of the contract the non-fulfilment of the condition reverts the property in the seller.

2(ii) Breach of agreement to pay by Bill.-If, as per terms of the contract, the price is to be paid by a bill payable at a future day, and the buyer does not give the bill, the seller can only sue for the price when the bill if given would have matured, in the meantime, he can only sue for damages for breach of the buyer's agreement; *Gordon v. Whitehouse*, (1856) 4 WR 231.

If, the payment is to be done through negotiable instrument and which covers only a part of price of the goods then the seller could not obtain judgment for the whole price unless the instrument has been dishonoured.

3. Damages for non-acceptance [Section 56]

If, the buyer wrongfully neglects or refuses to accept and pay for the goods then the seller may sue him for his wrongful conduct. Section 56 says-

"Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance".

We can understand the above section with the help of some cases-

(a) In the case; *Bilasiram Thakurdas v. Gubbay*, (1915) ILR 43 Cal 305, the goods were deliverable by instalments and the buyer refuses to accept one or other instalments. It was held that the differences in prices to be reckoned on the day a particular instalment was to be delivered.

(b) In the case; *Union of India v. Kesar Singh*, AIR 1978 J&K 102, the military authorities were to receive the supply of cots as per the contract but when it reached to them, they refused to accept some supplies. In breach of their contract, the J&K High Court allowed

Rs. 4 per cot to supplier as damages being the profit which the supplier would have earned under his contract of supply.

(c) In the case; *Lazenby Garages Ltd. v. Wright*, (1976) 2 All ER 770, a dealer who was dealing in second hand car, purchased a car for a 1325. Then decided to resale the car to the defendant for £ 1670, but the defendant finally did not take the car. Then the dealer sold it to another buyer for £ 1770 but even then brought an action against the defendant to recover £ 345 as damages, being the difference between his purchase price and the resale price to the defendant. Although, the Court of Appeal agreed in principle for damages but since, as a matter of fact, they had suffered no loss, they were entitled to no compensation.

There is a case; *Jamal, A.K.A.S. v. Moola Dawood Sons & Co.*, (1916) 43 IA 6: ILR (1916) 43 Cal 493, where it was held that, "if a seller does not resell the goods and his loss is aggravated by the falling market, he cannot recover the enhanced loss. Here, the plaintiff contracted to sell to the defendants 23,500 shares to be delivered and paid for on December 30, 1911. The shares were tendered on the stipulated date, but the defendants declined to take delivery or to pay for them. The shares could have fetched a sum of Rs. 1,09,218 less than their price under the contract. But the plaintiff sold the shares only after

February when the Market was again rising and he realized only Rs. 79,862 less than the price under the contract."

The defendants contended that they should be held liable to pay the loss of only Rs. 79,862. But, he was held liable for Rs. 1,09,218. Lord Wrenbury explained the principles of law as follows-

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss subsequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained in the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.

❧ Damages for Breach of Contract

Q. Discuss 'damages for breach of contract' and cite some cases relevant to it.

In the case; *Stoczina Gdanska SA v. Latvian Shipping Co.*, (1998) 1 All ER 883 HL, the question arose before the House of Lords whether damages for breach of contract can be recovered and also unpaid instalments upto the date of breach.

Here, the contract was to design and build a number of ships. The contract was so designed that the payment was to be done in four instalments-first 5% of total payment at the outset, second 20% when the keel was laid, third 25% on successful launching and 50% on delivery.

The property was to pass on delivery. The supplier had the right to rescind the contract on default in payment of instalments. The buyer failed to pay the second instalment. The supplier terminated the contract and brought an action to recover the unpaid second instalment and also damages for breach of contract. The House of Lords accepted the proposition that the seller had the right to recover damages and that did not affect the right to the unpaid instalment. The fact that the buyers got nothing was not the same thing as a total failure of consideration. Their Lordships held that the contract between both the parties was not simply to require the sellers to deliver the vessels, but rather the sellers were obliged to design and build the vessels. If the contract was to an end before the passing of property, the consideration provided by the sellers would not have totally failed, and they would remain entitled to claim instalments and also damages for breach. The fact that the buyers had not received any benefit under the contract did not mean that the consideration provided by the sellers had totally failed.

4. Damages for non-delivery (Section 57)

Q. What are the remedies available for a buyer if he doesn't get delivery of goods from the seller.

It says-

"Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery."

The Supreme Court in the case; *Sitaram Srigopal v. Daulati Devi*, MANU/SC/0035/1979: (1979) 4 SCC 351 laid down that if the buyer wants to recover damages with showing the difference between the contract price and market price, the onus is on the buyer to prove the difference otherwise he won't have a decree beyond refund of price. Here, the goods were purchased at an auction and sold to the appellant for which the sale price was received but delivery of goods was not given. The buyer besides refund of the sale price also claimed the difference between the market and contract price on the date of breach. But, in the absence of convincing and reliable evidence to establish either that the goods were in brand-new condition at the time of the sale or of the market price of goods of similar specifications, it was held that the buyer was entitled only for the refund paid by him and not to the damages.

If the original contract does not by its terms make any provision for sub-sales, the seller can't be charged with liability in respect of the sub-sale if there is likelihood or probability of sub-sales. *Mangham LJ in the Arpad* (1934) p. 189, 230 said in this regard as-

"I suppose that most vendors of goods and most carriers might be taken to know that if the purchaser or consignee is a trader the goods will probably be sold, or be bought for sub-sale; but the authorities seem to show conclusively that something more than necessary to enable the damages to be assessed by reference to a contract of sub-sale entered into before the date of delivery."

In the same case Lord Haldane*observed-

"I think that the contract and the conditions which it incorporates show that it was contemplated that the cargo might be passed on by way of sub-sale if the buyer did not choose to keep it for himself, and that the seller in such a case contracted to put the buyer in a position to fulfil his sub-contracts if he entered into them. They were regarded by the terms of the original contract as sub-contracts which the original buyer was to be in a position to enter into, with stipulations which bound the original seller to enable the original buyer to fulfil them. Whether the latter was likely to enter into sub-contracts and pass the cargo down a chain of a resales is not material. It is enough that the

contract contemplated by its terms that he should have the right to do so if he chose."

• Duty of Mitigation

The Privy Council in the case; *Jamal v. Moala Dawood Sons & Co.*, (1916) 1 AC 175 laid down this principle. It said that the duty of mitigation requires that the buyer's loss should be calculated on the basis of the prevailing prices on the day of breach. At the same time the buyer should also keep his loss to the minimum by purchasing his requirements on the day of breach from alternative sources. The dealing buyer in a fluctuating market will gain,

* (1928) All ER Rep 763 (765).

if the market falls and lose if it rises. It is not essential that he should actually effect the purchase.

5. Specific Performance (Section 58)

Q. What is specific performance? Describe it under the provision of section 58 of the Sale of Goods Act.

Section 58 of the Sale of Goods Act provides a remedy for the buyer and gives no correlative right to the seller. It says-

"Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and condition as to damages, payment of the price, or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree."

Where the contract is for the sale of specific or ascertained goods and the seller refuses to deliver them the court may order him to supply the goods as per the terms of contract instead of permitting him to retain them on payment of damages.

We may cite here the illustration of *Wait, (in re:)* (1927) 1 Ch 606: (1926) All ER Rep 433-

The seller had a consignment of 1000 tonnes of wheat out of which he sold 500 tonnes to the buyers. The buyer paid for it. Then, the seller became bankrupt. On the arrival of the ship, the 500 tonnes sold were not separated from the rest and the trustee refused to deliver.

It was held that the buyers were not entitled to recover the goods by a decree of specific performance. Here, the goods were neither "specific" at the time of contract, nor subsequently ascertained.

In the case; *A.P. Tobacco Growers Coop. Union Ltd. v. Anjaneya Tobacco Co.*, (1998) 5 Andh LT, a certain quantity of tobacco was sold but the buyer failed in taking it away and further time was allowed to him to take away his purchase but even then no response came from the buyer's side. It was held that the time of performance was the essence of the contract. The buyer's failure disentitled from claiming specific delivery of the goods. Here, the seller could not be prevented from reselling and recovering his loss from the buyer on resale. The seller was also allowed 6% interest from the date of the suit till realisation of the decree amount.

6. Remedy for Breach of Warranty (Section 59)

A breach of warranty does not entitle a buyer to reject the goods and his only remedy is available under section 59 of the Sale of Goods Act, 1930. It says-

"(1) Where there is a breach of warranty by seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may-

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage."

So, this section clearly speaks that if, a seller breaches the warranty terms then the buyer is not only entitled to reject the goods but he may also set up against the seller the breach of warranty in diminution or extinction of the price or may also sue the seller for damages for breach of warranty.

In the case; *Mason v. Burningham*, (1949) 2 All ER 314 a lady purchased a second hand typewriter and spent some money on

getting it overhauled. After sometime, police seized the typewriter as it was a stolen property. This was a breach on the part of the seller of the warranty of quiet possession.

The Court held that she is entitled to recover damages including the cost of repair. She did the natural thing in having the typewriter repaired and the amount she had spent was a loss directly and naturally resulting from the breach.

In the case; Lexmead (Basingstoke) Ltd. v. Lewis, (1981) 55 Aust LJ 753, the House of Lords explained about the limitations of seller's liability. Here a farmer purchased a trailer and used it even after knowing the fact that there is a fault in the coupling mechanism. After few months of use when the trailer was passing through it got separated from the towing vehicle and stood on the road in the way of oncoming car. The accident caused the death of two passengers of car and two other got injured. The farmer and manufacturer of trailer, both were held liable for negligence. The farmer sought to recover his indemnity from the dealer on the ground that he suffered this loss on account of the dealer's breach of the warranty of fitness. But the court did not allow this plea. Their Lordships held that the implied warranty on the coupling continued only until the time when the farmer discovered that the handle of the locking mechanism was missing. Thereafter the warranty ceased and at the time of accident there was no warranty, either express or implied, in existence and the farmer could not claim that the accident was linked to the retailer's breach.

6.1 Notice to Seller of Defective Condition

The right enshrined in this section cannot be exercised where the buyer has waived the condition.

The remedy under this section is not absolute. Its benefit can't be extended at the point suitable to the buyer. The buyer is duty-bound to give notice of his intention to the seller in what respect the goods are defective and whether he is electing to treat the condition as a condition or as a warranty. Proper time, form and manner of notice will depend on facts and circumstances of each case.

6.2 Resale by Buyer

In the case; Kotu Mal v. Bihari Lal, AIR 1921 Lah 355, there was a resale by the buyer, in order to recover damages for breach of a warranty, it is necessary that the buyer should not have been negligent in failing to detect the inferior quality of the goods before he resells or otherwise deals with them.

6.3 Acceptance of Goods without Inspection

In the case; National Traders v. Hindustan Soap Works, MANU/TN/0137/1959: AIR 1959 Mad 112, there was a sale of specific goods by description in the circumstances in which it was not possible for the buyer to inspect the goods. It was held that the mere acceptance of the goods and payment of price did not disentitle the buyer from availing his remedy under section 59.

7. Repudiation of Contract before Due date (Section 60)

Section 60 - Speaks about the anticipatory breach.

"Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach."

This section deals with the case, also known as an anticipatory breach of contract.

"An anticipatory breach has also been defined as follows by Lord Wrenbury in the case; Bradley v. H. Newson Sons & Co., (1919) AC 16 (53)-

"There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not anticipatory breach of an act to be done in the future."

This section reflects a much wider principle which give a much needed right of action to the party who faces damages due to second party non-commitment towards the terms of contract.

7.1 Measure of Damages

Measure of damages is fixed, it is not affected by the defaulting party's repudiation if there is a market for that goods. In the case; Garnac Grain Co. Inc. v. HMF Faure and Fairclough Ltd., (1968) AC 1130 (1140) the plaintiff has treated the defendant's refusal as immediate breach of the contract. The relevant date for ascertaining the market price is *prima facie* and subject to the plaintiff's duty to mitigate the loss, is date fixed for delivery and not the date of repudiation or the date of the acceptance of repudiation.

7.2 Measure of Damages when Goods are to be Delivered by Instalments

In the case; *Millett v. Van Heek & Co.*, (1921) 2 KB 369 CA, the contract was for the sale of cotton to be delivered by instalments when the government removed the embargo which was at the time of making the contract when this would be. The seller repudiated the contract and the same was accepted by the buyer before the removal of the embargo. The buyer claimed that the damages should be fixed by reference to the market price at the date of rescission, but the court did not find this contention justified.

Lord Atkin has also elaborated this concept in following words-

"It is admitted that, if a contract is made for the sale of goods deliverable in the future by specified instalments at specified dates, and before the time has arrived for performance the contract is repudiated and the repudiation is accepted, the damages have to be measured in reference to the dates on which the contract ought to have been performed. That is beyond controversy.....But it is said that, if no time have been expressed in the contract, and the contract would be construed by law as one for delivery by reasonable instalments over a reasonable time, even though those times might be ascertained as a question of fact by the jury, the plaintiff suing may not merely have an option, but is compelled, to fix his damages in reference to the market price at the time when the repudiation takes place. That, it seems to me, would introduce an anomaly entirely without any kind of principle to justify it. I am satisfied that the code never intended to make distinction, or to vary what was the rule of law at the time when it was passed.....namely, that the damages are to be fixed in reference to the time for performance of the contract subject to questions of mitigation."

8. Interest by way of Damages and Special Damages (Section 61)

It has provision about recovery of interest-

"(1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the court may award interest at such rates as it thinks fit on the amount of the price-

(a) to the seller in a suit by him for the amount of the price-from the date of the tender of the goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller - from the date on which the payment was made."

There are cases where the court allowed recovery of interest from a period before the suit for the price was filed that is, from the date of delivery of the goods. In the case; *Marwar Tent Factory v. Union of India*, MANU/SC/0354/1989: (1990) 1 SCC 71, the Supreme Court held that the award of interest to unpaid seller if the price is not offered within reasonable time cannot be denied merely because in the notice served on the Government under section 80 of the Civil Procedure Code (a requisite for filing cases against the Government) the seller had not mentioned his claim as to interest.

In another case; *Seedaln Suppliers Syndicate v. H.P. State Coop. Marketing and Development Federation Ltd.*, (1995) AIHC 373 (HP), the buyer had paid the price in advance and the seller handed over the material to another buyer at a higher price and whatever material he attempted to supply was inferior, the buyer was allowed to recover back his price with 8% interest by way of damages for the seller's breach.

In *Andhra Cotton Mills Ltd. v. Sri Lakshmi Ganesh Cotton Ginning Mills*, (1966) 1 ALT 537 AP, the seller demanded only interest without claiming the unpaid portion of the goods supplied by him, the court granted it. The court said that the intention of the legislature in enacting section 61(2) seems to be that where there is no provision in the contract for interest on the unpaid price, the seller should not be put to loss by the buyer's default in paying the price.

In the case; *Alco Chem. Ltd. v. Hyderabad Chemical and Pharmaceuticals Works Ltd.*, (2003) 3 Banking Cases 508 (AP), the invoice did not require the buyer to pay interest even if there was delayed payment and also there was no agreement between the parties on the point, it was held that the award of interest at 18% on the amount of export duty till date of the suit was not justified. Interest could be claimed at 6% provided a demand was made.

CHAPTER 10

MISCELLANEOUS

In this Chapter

1. Exclusion of Implied Terms and Conditions (Section 62)
 - 1.1 By Express Contract
 - 1.2 Course of Dealing
 - 1.3 Trade Usage
2. Reasonable Time (Section 63)
3. Auction Sale (Section 64)
 - 3.1 Aim
 - 3.2 Ring or Knock Out
 - 3.3 Bidder's Right to Withdraw Bid
 - 3.4 Auctioneer's Right not to Accept any Bid
4. In Contracts of Sale, Amount of Increased or Decreased Taxes to be Added or Deducted (Section 64A)
5. Repeal (Section 65)
6. Savings (Section 66)

Relevant Cases

1. Andrews v. Singer, (1934) 1 KB 17: (1933) All ER Rep 479 CA.
2. Chanter v. Hopkins, (1838) 4 M&W 339 (404): 8 LJ Ex 14.
3. Kar-Sales (Harrow) Ltd. v. Wallis, (1956) 1 WLR 936 CA.
4. Ernest Beck & Co. v. K.K. Syzman Owski & Co., (1924) AC 43.
5. Poehontas Fuel Co. v. Ambatielos, (1922) 27 Com Cas 148 (152-3).
6. Steel Bros & Co. v. Dayal Khatao & Co., ILR (1923) 47 Bom 924.
7. Cointal v. Myham & Sons, (1913) 2 KB 220.
8. Haivela Investments Ltd. v. Royal Trusts Co. of Canada (CI) Ltd., (1986) AC 207.
9. Thornelt v. Haines, (1846) 15 M&W 367 (372).
10. Coffee Board v. Famous Coffee & Tea Works, MANU/TN/0156/1965 : AIR 1965 Mad 14.
11. Consolidated Coffee Ltd. v. Coffee Board Bangalore, MANU/SC/0398/1980 : (1980) 3 SCC 358: AIR 1980 SC 1468.
12. Jai Bhavani Timber v. State of Madhya Pradesh, MANU/MP/0055/1992 : AIR 1992 MP 250.
13. Zila Parishad, Muzaffarnagar v. Udaiveer Singh, MANU/UP/0232/1989 : AIR 1989 All 64.
14. Sramajibi Stores v. Union of India, AIR 1982 Del 76.

Miscellaneous is the last Chapter of the Sale of Goods Act, 1930 which consists of sections 62, 63, 64, 64A, 64B, 65 and 66. It speaks about Exclusion of implied terms, Reasonable time, Addition and Deduction of increased taxes amount, Repeal and Savings respectively.

1. Exclusion of Implied Terms and Conditions (Section 62)

This section enables the parties to a sale to exclude liability for implied terms. It says as-

"Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract."

This section recognizes three modes by which liability for implied terms may be negated. These are-(i) By express contract (ii) By course of dealing and (iii) By usage.

1.1 By Express Contract

The Court has never seen those clauses of contract in good taste which excludes seller from his liability for breach of implied terms. Accordingly they are strictly construed and unless the liability is excluded by very appropriate terms, the seller is held responsible.

In the case; *Andrews v. Singer*, (1934) 1 KB 17: (1933) All ER Rep 479 CA, there was an agreement for the supply of "new singer cars", which excluded liability for "all conditions, warranties and liabilities, implied by statute, common law or otherwise." One car out of these were a used car. The buyer claimed damages for breach of contract. Then the sellers took the plea of exemption clause.

The Court of Appeal held that the sellers had excluded liability for implied conditions, whereas the undertaking to supply "new singer car" was not an implied condition but an express one.

In another case; *Chanter v. Hopkins*, (1838) 4 M&W 339 (404): 8 LJ Ex 14, Lord Abinger has explained about fundamental breach-

"If a man offers to buy peas of another and he sends him beans, he does not perform his contract. But that is not a warranty, there is no warranty that he should sell him peas; the contract is to sell peas and if he sends him anything else in their stead, it is a non-performance of it."

One more case; *Karsales (Harrow) Ltd. v. Wallis*, (1956) 1 WLR 936 CA, also gives a good example on fundamental breach. Here, a second hand Buick car was shown to a garage owner which was in an excellent condition. The garage owner shown his interest in buying it. The terms of contract were as-"No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owners or implied herein". When the seller brought the car to the buyer's premises at night, it was found that the vehicle was not in a good shape, it had been towed there, some parts were also missing and the engine was so defective that it was impossible to move the car. Denning LJ observed that it was a fundamental breach of the contract which disentitles the seller to rely on the exemption clause. He said-

"It is now settled that exemption clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach while it goes to the root of the contract."

In the case; *Ernest Beck & Co. v. K. Syzman Owski & Co.*, (1924) AC 43, there was a contract note for the sale of 2,000 gross of '200 yards reels' of sewing cotton which contained following condition:

"The goods delivered shall be deemed to be in all respects in accordance with the contract and the contract and the buyer shall be bound to accept and pay for the same accordingly unless the sellers shall within 14 days after the arrival of the goods at the destination receive from the buyers notice of any matter by reason whereof they may allege that the goods are not in accordance with the contract."

Some 18 months after delivery of cotton, the buyer found that the length of cotton was less than 200 yards, and the average shortage was found as 6%. The buyer after finding this defect, brought an action against the seller. The sellers pleaded that the above condition was a bar to the action. But by a majority decision (3-2), it was held that the condition applied to quality only and not to quantity and that the buyers were entitled to judgment. Lord Shaw of Dunfermline observed as follows-

".....damages are claimed not in respect of the goods delivered but in respect of goods which were not delivered. Otherwise the results would be extraordinary; if the seller innocently sent forward the number of reels with only half the thread that should be upon them, the clause would cover that price for the whole thread, although he had supplied only half. The clause may cover objections to the goods delivered on the points, say, of quality, colour, weight or tensile strength. But the clause can never be used so as to convert goods undelivered into goods delivered."

1.2 Course of Dealing

In a contract of sale, the implied terms can also be negated by a course of dealing between the parties. In the case; *Poeahontas Fuel Co. v. Ambatielos*, (1922) 27 Comp Cas 148 (152-3) Mc Cardie J., said that a course of dealing may arise with equal force from a written or parol bargain, or from the repeated occurrence of similar methods as between the parties. In each case, the question is as to the implication to be drawn from the past as applied to a new transaction.

In *Steel Bros. & Co. v. Dayal Khatao & Co.*, ILR (1923) 47 Bom 924, it was held that a single transaction is not

sufficient to exclude the implied incidents of a c.i.f. contract by which the buyer has to pay only against shipping documents.

1.3 Trade Usage

The implied terms may be excluded by trade usage. In the case; *Cointal v. Myham & Son*, (1913) 2 KB 220, there was a sale of meat by a butcher which was seized and condemned as unfit for human consumption, the seller was allowed to give evidence of the fact that by the usage of the market no warranty of fitness for food was implied. Here, the buyer was, however, allowed to recover damages in respect of the fine and costs and for his loss of trade.

2. Section 63 of the Act speaks about the Reasonable time

It says-

"Where in this Act any reference is made to a reasonable time, the question what is a reasonable time, is a question of fact.

3. Auction Sale

Section 64 tells about the sale which takes place by auction-

"In the case of sale by auction-

- (1) where goods are put up for sale in lots, each lot is prima facie deemed to be the subject of a separate contract of sale;
- (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid;
- (3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction;
- (4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer."
- (5) the sale may be notified to be subject to a reserved or upset price;
- (6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

3.1 Aim

Section 64 thus lays down the principles relating to auction sales. Benjamin¹ while citing the case of; *Harvela Investments Ltd. v. Royal Trusts Co. of Canada (CI) Ltd.*, (1986) AC 207 said-'an auction sale is a sale by competitive bidding, normally held in public at which prospective purchasers are invited to make successively increasing bids for the property, which is then usually sold to the highest bidder.

An auction sale is completed when the hammer falls. Before falling of the hammer, a bidder can retract from his bid but not after that. Property passes on the fall of the hammer.

Section 64(3) says that a right to bid may be reserved expressly by or on behalf of the seller and if such right is expressly so reserved, but not otherwise, the seller or any other person who is acting on behalf of the seller may subject to the provisions hereinafter contained, bid at the time of auction.

Sub-section (4) of this section forbids seller to take part in bid in person or through his agent unless it has been notified in sale. It shall not be lawful for the seller/auctioneer knowingly to take a bid from the seller or his agent. Any contravention of these rules renders the sale fraudulent.

In the case; *Thornett v. Haines*, (1846) 15 M&W 367 (372), it was held that the seller may, however, expressly reserve the right to bid at the auction and in that case bidding by him or on his behalf does not render the sale fraudulent or voidable, provided that he employs only one bidder. If he employs more than one, then the intention is not to protect his interest, but to enhance the price and that is fraudulent.

It was said in the case; *Coffee Board v. Famous Coffee and Tea Works*, MANU/TN/0156/1965 : AIR 1965 Mad 14 that the auctioneer has the right to make the auction subject to any conditions he likes-one of the conditions for auction sale of coffee was-"The seller does not bind himself to accept the highest bid or any bid, he is not bound to assign any reason for his decision and his decision shall be final and conclusive."

In *Consolidated Coffee Ltd. v. Coffee Board*, Bangalore, MANU/SC/0398/1980 : (1980) 3 SCC 358: AIR 1980 SC 1468,

the Supreme Court has pointed out that the function of the fall of hammer or of any other customary manner of acceptance is only this that a contract of sale comes into existence and the parties get into the relationship of promisor and promisee. Section 64(2) does not deal with the question of passing of property. It merely deals with the completion of the contract of sale. If the conditions of section 20 are not satisfied, property will not pass even if the goods have been knocked down to a bidder.

One of the conditions of the auction was that the "property in the coffee sold shall not pass to the buyer until after he has paid the full price and the coffee sold to him is weighed and set apart for delivery to him." It was accordingly held that the property in goods could not have passed at the moment that they were knocked down. The Court further observed that where

1. Sale of Goods, 4th Edn., 1992, pp. 98-99.

a reserve price has been fixed, then even if the goods are specific, property will not pass if the highest bid falls short of the reserve price.

3.2 'Ring' or 'knock-out'

In *Jai Bhavani Timber v. State of Madhya Pradesh*, MANU/MP/0055/1992 : AIR 1992 MP 250, there was an auction of teak wood forest. The bids which were accepted were all above the reserved price except one lot. The question was that whether it was the effect of a 'ring' or 'knock-out' on the validity of the auction. The Court observed-

"We are also of the view that the formation of a 'ring' cannot, in all circumstances, be taken as a good ground to set aside the sale. Bidder's right is a sort of a mutual agreement where one dealer agrees not to bid for one item and another for some other item. It is also described as a knock-out. This sort of formation of a ring or knock-out has not been regarded as illegal at common law in England or by any statutory law in India.

The Court cited the observation as given below from *Pollock and Mulla on Sale of Goods and Partnership Act*¹-

"Knock-outs"-A combination between intending bidders to refrain from bidding against each other, commonly known as a 'Knock-out', has been held not to be illegal at common law and the same rule applies in India. The bidders may form a "ring" and refrain from bidding in competition with each other in order to depress the price.

3.3 Bidder's Right to Withdraw Bid

A bidder can withdraw his bid before the acceptance of his bid is symbolized. If he does so his security amount cannot be forfeited. But, if he does so after the fall of the hammer, that amounts to a breach of the contract and his security deposit will become open to forfeiture.

3.4 Auctioneer's Right not to Accept any Bid

It may happen that bids may not be accepted by the auctioneer and the auction may be cancelled.

In the case; *Zila Parishad, Muzaffarnagar v. Udai Veer Singh*, AIR 1980 All 64, the highest bidder was given the impression that his bid would be accepted and he was all the time acting under that expectation the Allahabad High Court held that the auction should not have been cancelled by reason of any secret parleys with another party and without giving any information or opportunity to the highest bidder to come to the negotiation table. This should particularly be so when the auction is by a public authority.

4. In Contracts of Sale, Amount of Increased or Decreased Taxes to be Added or Deducted (Section 64A)

This section was inserted by Act 41 of 1940, section 2

"(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section

1. 5th Edn., p. 399: AIR 1992 MP 256.

(2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time-

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the

amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of sub-section (1) apply to the following taxes, namely:-

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods."

This section deals with the liability of the seller to pay sales tax to the Government. This section also provides for the rights and liabilities inter se of a seller and buyer of goods, where any customs or excise duty or any sales tax or purchase tax is imposed or its rate increased or decreased, or such duty or tax remitted in whole or in part after the making of the contract of sale.

The view behind enacting section 64A obviously was that the increase or decrease in duty should be taken note of in the case of contracts concluded prior to the increase or decrease. No party should be made to unnecessarily gain or suffer on account of such state action. In the case; *Sramajibi Stores v. Union of India*, AIR 1982 Del 76, the seller contracted to supply to the buyer waterproof coats and caps made of cotton canvas and therefore cotton canvas was the raw material from which the goods were to be manufactured. It was held that section 64A would be attracted if the exercise on the principal raw material, i.e. cotton canvas went up.

It is submitted that if section 64A is stretched too far i.e. to cover the raw materials which go into the making of goods subjected to contract of sale, several problems can arise. It is also worth mentioning here that the raw materials are certainly different from the finished products and both are subjected to independent transactions under the Act.

Section applicability is subject to any agreement the parties may make.

5. Repeal

Section 65 has been repealed by the Repealing Act, 1938 (1 of 1938) Sec. 2 and Sch.]

6. Savings

"(1) Nothing in this Act or in any repeal effected thereby shall affect or be deemed to affect-

(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(c) anything done or suffered before the commencement of this Act, or

(d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or

(e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

© Universal law Publishing Co.

CHAPTER 11

QUESTIONS AND ANSWERS

Q.1. Distinguish between sale and hire purchase.

Ans. A sale is different from hire purchase as the sale gives complete authority to buyer to use or dispose off the goods on his own Will. But, a hirer gets only possession of goods. He cannot pass the title of goods to any buyer. Secondly, sales tax is not leviable on hire purchase unless and until it is converted into a sale.

If the hirer does not have the option to return the goods to its owner then it will be an agreement to buy and not a hire purchase.

The hirer cannot be compelled to buy as observed by the Supreme Court in the case K.L. Johar & Co. v. Dy CTO, MANU/SC/0348/1964 : AIR 1965 SC 1082, Wanchoo, J. said-

The essence of sale is that the property is transferred from the seller to the buyer for a price, whether paid at once or paid later in instalments. On the other hand, a hire purchase agreement has two aspects. There is first an aspect of bailment of goods subject to the hire purchase agreement, and there is next, an element of sale which fructifies when the option to purchase is exercised by the intending purchaser.

It was further added-

"Coming into being of sale is a question of fact and it takes place when the hirer exercises the option. It cannot be said that merely because the hire purchase agreement stipulates a particular period for the total payment of the consideration and for the purchaser to exercise the option to purchase at the end of the said period, the sale does take place at the end of that period willy-nilly. There may be cases where the hirer may default in paying the amount within the stipulated period, he may ask for extension and the dealer may grant it. In such cases, the sale obviously takes place only when the purchaser exercises the option to purchase after fully paying the agreed amount."

We can take another example of the case Lee v. Butler, where a lady hired certain furniture from the plaintiff for which the price was to be paid in two instalments. The condition was also there that in case the lady fails to give instalments, the plaintiff had right to take the furniture back. But, before the last instalment was paid, the furniture was sold by the lady to defendant.

The court held that the defendant had acquired a good title, the lady being in possession of the furniture under an agreement to buy. She did not have the option to return, but was compellable to buy.

Q.2.Can a buyer claim the price of goods if it was found on possession that it was stolen and seller sold it knowingly?

Ans. In sale, the ownership of goods is transferred from seller to buyer. The law confers the rights on seller to sell the goods if there is an implied condition that the seller has the right to sell. Buyer may reject the goods if, the title of the seller turns out to be defective.

In a case, Rawland v. Divall, (1923) 2 KB 500 CA, the buyer had purchased a second hand car from a dealer and used it but within few months, the care was seized by the police as it was stolen. Here, the buyer may recover the full price from the buyer (dealer) although he had used it for few months. Lord Atkin said-

"There can be no sale at all of goods which the seller has no right to sell. The whole object of a sale is to transfer property from one person to another....In fact the buyer has not received any part of that which he contracted to receive - namely, the property and right to possession - and that being so, there has been a total failure of consideration. Even, when a seller has full ownership of the goods, yet he may commit a breach of this condition.

In Niblett v. Confectioner's Materials Co., (1921) 3 KB 387: (1921) All ER Rep 459 CA,

3000 tins of condensed milk was sold by the defendants. The consignment reached from New York to London and the plaintiff found that 1000 tins were labelled as "Nissly brand". Another manufacturer of condensed milk under the name of 'Nestle brand' claimed that that this was an infringement of their trade mark. Then the plaintiff removed the labels and sold it on reduced price. Then the plaintiff sued the sellers for the breach of the condition as to title.

In the case, it was held that the plaintiff had the right to reject the goods or was entitled to recover the damages what he lost due to sale of milk on reduced prices.

Lord Atkin has explained the meaning of the words "right to sell" as follows-

"The seller had not the right to sell these goods....having admitted that there being an infringement of the Nestle Company's trade mark they were liable to an injunction restraining the sale. Therefore, they had no right to sell these goods at the time when the property was to pass".

It was the view of their Lordship that the defendants could have passed the property in the goods but for the intervention of the third party, they had nevertheless no right to sell the goods arising to the existence of a title superior to that of the vendor, so that the possession of the vendee may be disturbed. In the words of Scrutton, L.J.-

"The defendants impliedly warranted that they had then the right to sell them. In fact they could have been restrained by injunction from selling them, because they were infringing the rights of third person. If a vendor can be stopped by process of law from selling he has not the right to sell".

Q.3. Discuss sale by sample with the help of relevant cases.

Ans. Section 17 of the Sale of Goods Act puts three conditions into every contract of sale by sample:

(i) that the bulk shall correspond with the sample in quality.

(ii) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample,

(iii) that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

If a buyer purchases the goods on the basis of sample and finds that the goods are defective which was not apparent on reasonable examination of the sample, the buyer has got the right to reject the goods on discovering the defect later. Further, even on partial defects on some of the goods, the buyer can reject the entire quantity of goods.

In the case, *Prabhu Dayal v. Bhagwan Sahai*, AIR 1955 NVC 4067 Raj, the goods were found defective which was purchased on the basis of sample and it was unmerchantable too. Here, the buyer was justified in not accepting the goods on delivery. Here, the buyer has not committed any breach of contract and the seller is not entitled to any damages which he may have suffered on release of the goods.

Section 41 gives the buyer an opportunity to examine the goods which have been delivered and it was not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

If the buyer rejects the goods after inspection due to its non-conformity with the samples and if he has already paid for the goods then he can recover the price as money had and received for his use.

When there is a dispute which arises from indifferent supply of goods (regarding quality), it would be the duty of the seller to prove that the goods were of the quality contracted for (*Beharilal Baldeo Prasad, Re*), AIR 1975 Mad 271.

Q. 4. Define 'ascertained goods' and differentiate it with 'unascertained goods'.

Ans. "Goods must be ascertained-Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

The Supreme Court in the case, *Badri Prasad v. State of Madhya Pradesh*, MANU/SC/0079/1969 : (1971) 3 SCC 23, defined the term 'ascertained goods' as follows-

"It is true that trees which are agreed to be cut before sale or under the contract of sale are "goods" for the purposes of the Sale of Goods Act. But before they cease to be "proprietary" right or interest in proprietary rights within the meaning of sections 3 and 4(a) of the Act they must be felled under the contract. It will be noticed that under clause 1 of the contract the plaintiff was entitled to cut teak trees of more than 12 inches girth. It has to be ascertained which trees fell within that description. Till this was ascertained, they were not "ascertained goods" within section 19 of the Sale of Goods Act. Clause 5 of the contract contemplated that stumps of trees after cutting had to be 2 inches high. In other words, the contract was not to sell the whole of the trees. In these circumstances property in the cut timber would only pass to the plaintiff under the contract at the earliest when trees are felled. But before that happened the trees had vested in the State."

Unascertained goods are distinct from specific or ascertained goods in that sense that future goods include those goods which are not in existence yet or goods which have not been acquired so far by the seller. It may also be said that future goods for purposes of passing of property can never be distinct.

Unascertained goods are not defined by the Sale of Goods Act but they fall under following categories-

1st-Goods, which are to be manufactured or grown by the seller which are necessarily future goods,

2nd- Generic goods, e.g. 20 tonnes of sugarcane or similar goods which must also be future goods where the seller does not own sufficient goods of the description in question to appropriate the contract, and

3rd-An unidentified part of a specific whole, e.g. 1000 tonnes of sugarcane out of a particular lot of 5000 tonnes of sugar cane.

Q.5.Explain the meaning of 'Buyer is without Title when sale is by a person who is not the Owner of the Title'

Ans. The buyer doesn't get the title if the goods have been sold by a finder or a thief.

In the case *Farquharson Bros. v. King & Co.*, (1902) AC 325 (335-36), the Judges said-"if a person leaves a watch or a ring on a seat in the park or on a table at a cafe, and it ultimately gets into the hands of a bona fide purchaser, it is no answer to the true owner to say that it was his carelessness and nothing else, that it enabled the finder to pass it off as his own".

Other examples:

(a)Delivery of goods by A on sale or return to B, upon the condition that they are to remain the property of A until the price is paid. B sells them to C without paying A for them. C purchases in good faith and without notice of A's title. Here, A can recover the goods or their value from C [*Edwards v. Vaughan*, (1910) 26 TLR 545 (CA)].

(b)A stolen horse was sold at a public auction, the fact of theft being known neither to the auctioneer nor to the buyer [*Leo v. Bayer*, (1856) 18 CB 599: 107 RR 424].

(c)A, the bus owner appointed B to ply his bus for hire. Then A handed over B a letter which was to be delivered to the Magistrate to obtain a permit for hiring the bus. B fraudulently altered the letter into one addressed to the District Superintendent of Police requesting him to transfer the bus in his own (B's) name. After this, he sold the bus to stranger. Here, the buyer does not obtain any title against the real owner (*Mohambaram v. Ram Narayan*).

(d)A sold goods to the plaintiff, but was allowed to keep possession of them upon payment of a weekly rent, and an undertaking to deliver them upon demand. He subsequently sold them to the defendant. He thereby determined the bailment of the goods to him, and the defendant, though he bought in good faith, acquired no title against the plaintiff. (*Cooper v. Willomatt*)

In all the abovementioned cases the buyer could not get a good title.

Q.6.Can a buyer reject the goods after delivery if he finds that the supplied goods do not commensurate with the quality agreed at the time of contract? Explain it

Ans. Section 41, of the Sale of Goods Act speaks about rights of buyer to examine the goods which he has not examined previously.

"1. Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for purpose of ascertaining whether they are in conformity with the contract."

Right to Examine the Goods-It is very genuine on the part of buyer to examine the goods what he has purchased or proposed to purchase. As per sub-section (1) in cases where there has been no previous examination of the goods, 'the mere fact that the buyer has taken delivery of them does not amount to an acceptance until he has had a sufficient period for examining them to see whether they are or are not in accordance with the contract. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract, at the same time no complete and final acceptances so as to irrevocably vest the property in the buyer can take place before he has exercised or waived that right.

This section gives buyer a right to examine the goods and not a right to repudiate the contract. The right of inspection could only arise either when the consignee had taken the delivery from the carrier or when the goods were tendered for delivery to the buyer.

In the case, *Ruttonjey v. Jamnadas*, (1882) 6 Bom 692, it was observed that reasonable opportunity of examination is all that the Act requires: it is buyer's business to verify, not the seller's to supply further proof, that the goods are according to contract. What is a reasonable time in which the buyer should examine the goods when they are available to him for inspection is a question of fact to be judged on facts and circumstances of each case. The Bombay High Court while projecting the facts stated the principles. The facts of the case were that the defendant agreed to purchase from the plaintiff, 100 bales 'fully good fair Kishli Cotton', to be delivered from 15th March to 1st April, 1881. On 30th March, the plaintiffs sent the defendant a letter enclosing a sampling order, which was received by the defendant's agent at 11.30 a.m. that day. The defendant got samples taken of the cotton, and a dispute having arisen as to the quality and classification of the cotton, the plaintiffs wrote to the defendant on 31st March asking him to attend with the surveyor at 1 p.m. on that day to survey the cotton as, otherwise an ex parte survey would be held. It being a mail day, the defendant's surveyor could not attend at the appointed hour, and the plaintiffs had an ex parte survey held by their own surveyors, and they pronounced the cotton to be of the description contracted for. Shortly afterwards the defendant asked for a survey by a letter which reached the plaintiffs at 2.19 p.m. on that day.

The plaintiff did not comply with the application, and called upon the defendant to take delivery of the goods.

The plaintiffs filed a suit for breach of contract. It was defendant's plea that no reasonable opportunity was given to them to examine the goods, as there was no joint survey, and that the time allowed by the plaintiffs for examination of the cotton was not sufficient. It was held by the court that the defendant had reasonable opportunity within the meaning of this section.

Latham, J. said as-

The rule in the section 38 of the Contract Act agrees with the rule of English law laid down in Benjamin's Sale of Goods,¹ but there is little authority as to what is a reasonable opportunity of inspection.....in the present case the sampling order was delivered to the defendant by 11.30 a.m. on the 30th March, and he had till 1 p.m. on the 31st March, before any refusal by the plaintiffs to allow a further examination is alleged. Now Vizbookanda Atmaram seems to have been certainly dilatory in his examination, he not having compared the samples with the standards till past noon on the 31st and it seems to me that a period of over 24 hours gave a reasonable opportunity to see whether the cotton offered was the cotton which the plaintiffs were bound by their contract to deliver.

1. 2nd Edn., pp. 573 and 576.

Then we have to go further and to say that the purchase is entitled to continue inspecting and examining until there are expiration of the period for delivery? I find no authority for this and in many cases it would be unreasonable to place no limit on the inspection. Is a purchaser at liberty to open and taste every bottle of wine in a lot sold, or in the present case to pass every pound of cotton through an expert's hands? There must be some limit, and I think that a reasonable opportunity is the limit alike for vendor and purchaser and that such a reasonable opportunity had been had by 1 p.m. on 31st March. The goods need not be in the seller's actual possession, control is enough.¹

Q.7. When it can be said that the goods have been accepted by the buyer? Explain it with the help of relevant cases.

Ans. Section 42 of the Sale of Goods Act define the acceptance of goods which says that a buyer accepts the goods as soon as he intimates it to the seller that he has accepted the goods.

From the section, it appears that buyer may accept the goods even before they are delivered, by intimating to the seller that he accepts them, as he may do by actually selecting the goods, or directing delivery to be made to third parties. (Cusack v. Robinson, (1861) 1 B&S 299).

Just to take delivery does not amount to acceptance and this is particularly the case where delivery is made to a carrier. If, however, after delivery the buyer deals with the goods in a manner inconsistent with the ownership of the seller, he thereby accepts them, nor does it signify that he so deals with them before the time which he has for examining them has elapsed.

In the case Hardy & Co. v. Hilliers & Fowler, (1923) 2 KB 490 (498) (CA), the corresponding section of English (Section 35) was discussed by Atkin, L.J. as follows-

"One of the acts upon the doing of which the buyer is deemed to have accepted the goods is that he intimates to the seller that he has accepted them. I think it is plain that such an intimation may be made before he has had a reasonable opportunity of examination and if such an intimation is made then it appears to me that without more the section operates and he is deemed to have accepted them. In the same way, when he does an act in relation to the goods which is inconsistent with the ownership of the seller, the section must be treated as coming into operation notwithstanding that the reasonable opportunity of examining them has not expired; as for instance where a man having had goods delivered to him turns them, or part of them, at once into his mill and uses them in the manufacture. In the present case the Tribunal of Appeal have found that the buyer had not had a reasonable opportunity of examination until 23rd March, a date which is subsequent to the act relied on by the sellers as being inconsistent with their ownership, but that finding is, in my opinion, immaterial.

Therefore, we have here to face the problem whether the act of the buyers in reselling and dispatching the goods was inconsistent with the ownership of the sellers. If it was, they must be deemed to have accepted them. I should like to point out, in reference to that provision, that all the words of the section must have effect given to them. The words are 'when the goods have been delivered to him'-that is to the buyer-'and he does any act' of the kind specified. That means that the buyer must have got delivery before he does the act. (J&J Cunningham Ltd. v. Robert A Munro & Co., (1922) 28 Comp Cas 42)

1. Pollock and Mulla, the Contract and Specific Relief Act, 11th Edn., 1994, p. 515; also cited Arunachalam Chettiar v. Krishna Aiyar, (1925) 49 Mad LJ 530.

Time for Rejection

By contract, the parties may limit the time within which the buyer must determine whether to accept or reject the goods and if after the expiration of such a limit, or if no time be fixed, he does not reject, within a reasonable time, he is deemed to have accepted them. We can understand it further, where it was considered that whether a buyer had goods for a reasonable time, and hence had lost his right to reject them, the nature of the particular defect and the speed with which it might have been discovered were irrelevant, since section 42 was directed solely to what was a reasonably practical interval between a buyer receiving the goods and his ability to return them, while keeping it in mind regarding desirability of finality in commercial transactions.

Q. 8. Distinguish between payment by bill and payment by Credit Card

Ans. Payment by Bill - Conditional Payment.-If a seller has taken a negotiable security as an absolute payment is no longer an unpaid seller, and therefore has no rights against the goods. [Cawasjee v. Thompson, (1845) 3 MIA 422: 5 Moore CP 165: 70 RR 27]

If under the contract, the bankers arrange for a banker's commercial credit in favour of the seller for payment of the price of goods then the opening of the credit would normally be only conditional payment and in the event of the banker's default in honouring the credit the seller is entitled to claim the price from the buyer and his remedies against the goods would revive [Man (Ed&F) Ltd. v. Nigerian Sweets & Confectionery Co. Ltd., (1977) 2 Lloyd's Rep 50].

In Charge Card Service Ltd., (1988) All ER 702 (707) (CA), it was held that there is no general principle of law, that whenever a method of payment was adopted involving a risk of non-payment by a third party, it was presumed that the acceptance of payment through the third party was conditional on his making (third party) the payment and if he failed to pay the original obligation of the purchaser remained. So, each method of payment has to be considered in the light of the consequences and other circumstances attending that type of payment. In the modern times, payment through Credit Card has started and in new circumstances, it becomes necessary to consider whether such payment should be treated as absolute or conditional in the light of consequences of such payment and not according to any general principle.

Payment by Credit Card.-In the transactions, where credit card is used, there is an underlying contractual scheme which predates the individual contracts of sale. In this scheme, sellers agree to accept the card payment worth the price of goods and the buyers commit the credit card company to pay the sellers/suppliers.

Here, there are two separate contracts-first, between the credit card company and the seller and second, between the credit card company and the card holder in the first case, the credit card company agrees to reimburse the amount what the buyer has incurred on purchasing the goods and in the latter case, the card holder agrees to reimburse the credit company what it has paid to seller.

It is a tacit assumption that the legal consequences will be regulated by the separate contractual obligations between the seller and the credit company when a credit card is tendered and accepted. Credit card system is beneficial for both sellers and card holders. Sellers attract customers by agreeing credit cards as the buyer can purchase the things even when he has no cash since he had to be paid the due amount to the credit card company on a later date. At the same time card holder is free from carrying cash.

Q.9.Discuss the position of unpaid seller regarding stoppage of goods in transit if the buyer turns insolvent.

Ans. Section 50 empowers the unpaid seller to stop the goods in transit if the buyer becomes insolvent before paying the price of goods. It says-

"Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller, who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

The essentials of this section are-first - the seller should be unpaid; second - the buyer should have become insolvent, third - the property should have passed to the buyer, for if the seller reserves the right of disposal, the goods remain his property, and therefore under his lien and last and most important that the goods should be in the course of transit out of the above four, first three can be ascertained very easily but about the fourth i.e. the goods is in the transit or not is little difficult to ascertain sometime. Sometimes the goods may be with the carrier but not in transit. If there is some middle man and the middleman is seller's agent and the goods lying with him then the goods are very much in the possession of the seller and if the middleman holds the goods on behalf of buyer then it has already gone to buyer's possession. If the seller holds the goods as an independent contractor i.e. in his own right as a carrier or bailee, that there is transit in law and that there is question of stoppage in transit. It is not necessary that the goods should be actually moving. In the case, *Berndson v. Strang*, (1868) LR 3 Ch App 588 (591) Lord Cairns had said-

"If they arrive injured and damaged in bulk or quality, the right to stop in transitu is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive, and to claim some moneys which have been paid by the under writers to the purchasers of the goods in respect of their loss by the non-arrival of their property."

Q.10.What are damages available for non-acceptance of goods and breach of contract? Explain it with the help of relevant cases

Ans. Damages for non-acceptance.-If, the buyer wrongfully neglects or refuses to accept and pay for the goods then, the seller may sue him for his wrongful conduct. Section 56 says-

"Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance."

We can understand the above section with the help of some cases-

(a)In the case, *Boorman v. Nash*, (1829) 9 B&C 145: 32 RR 607, the goods were deliverable by instalments, and the buyer refuses to accept one or other instalments. It was held that the differences in prices is to be reckoned on the day that a particular instalment was to be delivered.

(b)In the case *Union of India v. Kesar Singh*, AIR 1978 J&K 102, the military authorities were to receive the supply of cots as per the contract but when it reached to them, they refused to accept some supplies. In breach of their contract, the J&K High Court allowed Rs. 4 per cot to supplier as damages being the profit which the supplier would have earned under his contract of supply.

(c)In the case *Lazenby Garages Ltd. v. Wright*, (1976) 2 All ER 770, a dealer who was dealing in second hand car, purchased a car for £ 1325. Then decided to resale the car to the defendant for £ 1670, but the defendant finally did not take the car. Then the dealer sold it to another buyer for £ 1770 but even then brought an action against the defendant to recover £ 345 as damages, being the difference between his purchase price and the resale price to the defendant. Although, the Court of Appeal agreed in principle for damages but since, as a matter of fact, they had suffered no loss, they were entitled to no compensation.

There is a case *Jamal, A.K.A.S. v. Moola Dawood Sons & Co.*, (1916) 43 IA 6: ILR (1916) 43 Cal 493, where it was held that if a seller does not resell the goods and his loss is aggravated by the falling market, he can recover the enhanced loss. Here the plaintiff contracted to sell to the defendants 23,500 shares to be delivered and paid for on December 30, 1911. The shares were tendered on the stipulated date, but the defendants declined to take delivery or to pay for them. The shares could have fetched a sum of Rs. 1,09,218 less than their price under the contract. But the plaintiff sold the shares only after February when the market was again rising and he realized only Rs. 79,862 less than the price under the contract.

The defendants contended that they should be held liable to pay the loss of only Rs. 79,862. But, he was held liable for Rs. 1,09,218. Lord Wrenbury explained the principles of law as follows-

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss subsequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.

Damages for breach of contract

In the case *Stoczina Gdanska SA v. Latvian Shipping Co.*, (1998) 1 All ER 883 HL, the question arose before the House of Lords whether damages for breach of contract can be recovered and also unpaid instalments upto the date of breach.

Here, the contract was to design and build a number of ships. The contract was so designed that the payment was to be done in four instalments - first 5% of total payment at the outset, second 20% when the keel was laid, third 25% on successful launching and 50% on delivery.

The property was to pass on delivery. The supplier had the right to rescind the contract on default in payment of instalments. The buyer failed to pay the second instalment. The supplier terminated the contract and brought an action to recover the unpaid second instalment and also damages for breach of contract. The House of Lords accepted the proposition that the seller had the right to recover damages and that did not affect the right to the unpaid instalment. The fact that the buyers got nothing was not the same thing as a total failure of consideration. Their Lordship held that the contract between both the parties was not simply to require the sellers to deliver the vessels, but rather the sellers were obliged to design and build the vessels. If the contract was to an end before the passing of property, the consideration provided by the sellers would not have totally failed and they would remain entitled to claim instalments and also damages for breach. The fact that the buyers had not received any benefit under the contract did not mean that the consideration provided by the sellers had totally failed.

TABLE OF CASES

A

A.P. Tobacco Growers Coop. Union Ltd. v. Anjaneya Tobacco Co., (1998) 5 Andh LT	112, 116
Abdul Aziz v. Jogendra Krishna Roy, (1917) ILR 44 Cal 98	43, 50
Agricultural Market Committee v. Shalimar Chemical Works Ltd., (1997) 5 SCC 516:	
AIR 1997 SC 2502	12, 13, 43, 45, 46, 48
Alco Chem. Ltd. v. Hyderabad Chemical and Pharmaceutical Works Ltd., (2003) 3 Banking Cases 508 (AP)	112, 120
Aldridge v. Johnson, (1857) 26 LJQB 296	12, 15
Aluminum Industries Ltd. v. Minerals and Metals Trading Corporation of India Ltd.,	
AIR 1998 Mad 239	43, 49
Aluminum Industries v. Romalpa, (1976) 2 All ER 552	43, 46
Ambalavana Chettiar v. Express Newspapers Ltd., MANU/SC/0052/1967 : AIR 1968 SC 741	97, 110
Ancona v. Rogers, (1876) 1 Ex D 285 (CA)	75, 79
Andhra Cotton Mills Ltd. v. Sri Lakshmi Ganesh Cotton Ginning Mill, (1996) 1 ALT 537 AP	112, 120
Andrews v. Singer, (1934) 1 KB 17: (1933) All ER Rep 479 CA	121, 122
Anguis v. McLachlan, (1883) 23 Ch D 330	96, 101
Arunachalam Chettiar v. Krishna Aiyar, (1925) 49 Mad LJ 530	91, 134
Asfar & Co. Ltd. v. Blundell, (1896) 1 QB 123	13, 19
Aswan Engineering Establishment Co. v. Lupine Ltd., (1987) 1 WLR 1: (1987) 1 All ER 135	22, 37
Azemar v. Casella, (1867) 2 CP 431	22, 30

B

Badri Prasad v. State of Madhya Pradesh, MANU/SC/0079/1969 : (1971) 3 SCC 23	43, 44, 131
Badri Prasad v. State of Madhya Pradesh, MANU/SC/0030/1965 : AIR 1966 SC 58: (1965) 3 SCR 381	43, 47
Baldry v. Marshall, (1925) 1 KB 260: (1924) All ER Rep 155	22, 25, 34
Barrow Lane and Ballard v. Phillips, (1929) 1 KB 574	13, 18
Bartlett v. Holmes, (1853) 13 CB 630: 93 RR 658	76, 84
Behari Lal Baldeo Prasad (in re:), MANU/TN/0137/1955 : AIR 1955 Mad 271	22, 39, 131
Berdison v. Strang, (1868) LR 3 Ch App 588 (591)	96, 102, 136
Bhagwat Narain Tendulkar v. Goa Coop. Marketing and Supply Federation Ltd.,	
(1998) 2 Mah LJ 703 (Bom)	43, 46
Bilasiram Thakurdas v. Gubbay, (1915) ILR 43 Cal 305	111, 113

Bird v. Brown, (1850) 4 Ex 786	97, 105
Bishopsgate Motor Finance Corpn. Ltd. v. Transport Brakes Ltd., 1902 AC 325 (326)	61, 63
Bloxam v. Sanders, 4 B&C 941 (948): 28 RR 525	96, 99
Bolton v. L&YR Co., (1935) 62 IA 89: 58 Mad 670: 154 IC 1097: AIR 1935 PC 67	75, 81
Boorman v. Nash, (1829) 9 B&C 145: 32 RR 607	136
Bourne v. Noruich Crematorium Ltd., (1967) 1 WLR 691	12, 16
Boyter v. Thomson, (1995) 3 All ER 135 HL	22, 35
Bradley v. H. Newson Sons & Co., (1919) AC 16 (53)	112, 118
Browes v. Shand, (1877) 2 App Cas 455	22, 24
Buchanan Jardine v. Hamlist, (1981) SLT 60	22, 34
C	
C.I.T. v. Hind Construction Ltd., MANU/SC/0265/1971 : (1972) 4 SCC 460	12, 14
Capital and Counties Bank Ltd. v. Warriner, (1896) 12 TLR 216	61, 73
Car & Universal Finance Co. v. Caldwell, (1963) 2 All ER 547 (550)	61, 68
Carles Fedorspid & Co. S.A. v. Charles Tueiga & Co. Ltd., (1957) 1 Lloyd's Rep 240 (255)	43, 54
Castle v. Swarder, (1861) 6 H&N 828: 123 RR 860 Ex Ch	75, 80
Champanhac & Co. Ltd. v. Waller & Co. Ltd., (1948) 2 All ER 724	22, 40
Champion v. Short, (1807) 1 Camp 53: 10 RR 631	76, 85
Chanter v. Hopkins, (1838) 4 M&W 339 (404): 8 LJ Ex 14	121, 122
Charge Card Services Ltd. (in re:), (1988) All ER 702 (707) (CA)	96, 98, 135
Charles Rickards Ltd. v. Oppenheim, (1950) 1 All ER 420 CA	76, 94
China Pacific SA v. Food Corporation of India, (1982) AC 939	76, 93
City & Industrial Development Corpn. of Maharashtra Ltd. v. Nagpur Steel & Alloys Ltd., AIR 1992 Bom 55	22, 26
City Fur Manufacturing Co. v. Fureenbond (Brokers) London Ltd., (1937) 1 All ER 799	61, 73
Coffee Board v. Famous Coffee & Tea Works, MANU/TN/0156/1965 : AIR 1965 Mad 14	122, 125
Cointal v. Myham & Sons, (1913) 2 KB 220	121, 124
Comptoir d' Achat et de Vented du Boernbod Belge S/A v. Luis de Ridder Limitada, 1949 AC 293	44, 59
Consolidated Coffee Ltd. v. Coffee Board Bangalore, MANU/SC/0398/1980 : (1980) 3 SCC 358: AIR 1980 SC 1468	122, 125
Cooper v. Willomatt, (1845) 1 CB 672: 68 RR 798	60, 63, 132

Coventry Shepherd & Co. v. Great Eastern Rly. Co., 304 (4th Edn.), (Sir Rupert Cross on Evidence)	61, 65
Cowasjee v. Thompson, (1845) 3 MIA 422: 5 Moore CP 165: 70 RR 27	96, 98, 135
Cunliffe v. Harrison, (1851) 6 Ex 903 (906)	76, 85
Cusack v. Robinson, (1861) 1 B&S 299	76, 92, 134

D

Dayabhai Dipchand v. Maniklal Vribhukan, 8 BHC AC 133	75, 78
Demby Hamilton & Co. Ltd. v. Barden (Endeavour Wines) Ltd., (1949) 1 All ER 435	44, 59
Dixon v. Fletcher, (1837) 3 M&W 146: 49 RR 543	75, 78
Doodeward v. Spence, (1908) 5 CLR 406	12, 16
Drummond & Sons v. Van Ingen, (1887) 12 App Cas 284	22, 39
Dudhia Forest Co-op. Labourers & Artisans Society Ltd. v. Mohammed Saiyed and Abdul Rehman's Co., (1980) 21 GLR 272	76, 85
Dwarka Das Ajodhya Prasad v. Ram Ratan, MANU/UP/0634/1922 : AIR 1922 All 458	43, 47

E

E.&S. Ruben Ltd. v. Faire Bros., (1949) 1 KB 254	22, 39
Edan v. Dudfield, (1841) 1 QB 302: 55 RR 258	75, 80
Edwards v. Brewer, (1837) 2 M&W 375, 46 RR 626	96, 97
Edwards v. Vaughan, (1910) 26 TLR 545 (CA)	60, 62, 132
Elphick v. Barnes, (1880) 5 CPD 321	43, 56
Emperor v. Kuverji Kavasji, MANU/MH/0111/1940 : AIR 1941 Bom 106: (1941) 43 Bom LR 95	43, 53
Ernest Beck & Co. v. K.K. Syzman Owski & Co., (1924) AC 43	121, 123
Evans v. Truman, (1963) 2 All ER 547 (550)	61, 67

F

Farquharson Bros. v. King & Co., (1902) AC 325 (335-36)	60, 62, 132
Folkes v. King, (1923) 1 KB 282 CA	61, 65
Folkes v. R., (1923) 1 KB 282 (305)	61, 66
Four Point Garage Ltd. v. Carter, (1985) 3 All ER 12	75, 79
Freeth v. Burr, (1874) LR 9 CP 208	76, 87

G

G.I.P. Rly. Co. v. Hanmandas, ILR (1889) 14 Bom 57	96, 103
Garnac Gain Co. Inc. v. HMF Faure and Fairclough Ltd., (1968) AC 1130 (1140)	112, 118
Gill & Duffus S.A. v. Berger & Co. Inc., (1984) 1 All ER 438 (445-446): 1984 AC 382 (394)	22, 29
Godley v. Perry, (1960) 1 All ER 36	22, 35

Godts v. Rose, (1855) 17 CB 229: 104 RR 668	75, 80
Gordon v. Whitehouse, (1856) 4 WR 231	111, 113
Goverdhanlal v. Bakhtawarlal, AIR 1955 NUC (Raj) 4063	43, 51
Grant v. Australian Knitting Mills, (1936) AC 85: 105 LJ PC 6:	
154 LT 18: 52 TLR 38: MANU/PR/0089/1935 : AIR 1936 PC 34	22, 28, 33, 35
Grenon v. Lachmi Narain, (1896) 4 Cal 8 LR 23 IA 119	75, 83
Griffiths v. Perry, (1859) 1 E&E 680 (688): 177 RR 397	96, 99
Grimoldby v. Wells, (1875) LR 10 CP 391	76, 93
Gunn v. Bolckow Vaughan, (1875) LR 10 Ch App 491 (501)	96, 97

H

Haivela Investments Ltd. v. Royal Trusts Co. of Canada (CI) Ltd., (1986) AC 207	121
Hardy & Co. v. Hillerns & Fowler, (1923) 2 KB 490 (498) (CA)	76, 92, 134
Harlington & Leinster Enterprises Ltd. v. Christopher Hill Fine Art Ltd., (1990) 1 All ER 737 CA	22, 29, 35
Harlow and Jones Ltd. v. Panex International Ltd., (1967) 2 Lloyd's Rep 509	76, 94
Harrison v. Knowles and Foster, (1917) 2 KB 606: (1918-19) All ER Rep 306	22, 25
Hartley v. Hymans, (1920) 3 KB 475 (484)	21, 23, 24
Harvela Investments Ltd. v. Royal Trusts Co. of Canada (CI) Ltd., (1986) AC 207	121, 125
Hayman v. Flewker, (1863) 32 LJCP 132	61, 66
Head and Tattersall, (1871) LR 7 Ex 7	43, 56
Healey v. Howlett & Sons, (1917) 116 LT 591: (1917) 1 KB 337	43, 53
Heap v. Motorists Advisory Agency Ltd., (1883) 11 QBB 776	61, 64
Honck v. Muller, (1881) 7 QBD 92 (100)	76, 87
Hop and Malt Exchange and Warehouse Co. Ex P Briggs (in re:), 1866 R1 Eg 483: 35 LJ Ch 320: 14 LT 39	61, 70
Howell v. Evans, (1926) 134 LT 570	76, 87
Hurry v. Mangles, (1808) 1 Camp 452: 10 RR 727	75, 80

I

Instalment Supply Ltd. v. STO, MANU/SC/0359/1974 : (1974) 4 SCC 739	13, 16
---	--------

J

J.&J. Cunningham Ltd. v. Robert A Munro & Co., (1922) 28 Com Cas 42	76, 92, 134
J.L. Lyons & Co. v. May & Baker Ltd., (1923) 1 KB 685	76, 93
J.V. Gokal & Co. v. Assistant Collector of Sales Tax, AIR 1965 SC 1954	8, 10
Jackson v. Union Marine Insurance Co., (1874) LR 10 CP 125 Ex Ch	76, 84
Jai Bhavani Timber v. State of Madhya Pradesh, MANU/MP/0055/1992 :	

AIR 1992 MP 250	122, 126
Jamal v. Moala Dawood Sons & Co., (1916) 1 AC 175	112, 115
Jamal, A.K.A.S. v. Moola Dawood Sons & Co., (1916) 43 IA 6: ILR (1916) 43 Cal 493	111, 113, 137
James v. Griffin, (1837) 2 M&W 623: 6 LJ Ex 241	96, 104
Jenner v. Smith, (1869) 4 CP 270	43, 54
Jones v. Bright, (1829) 5 Bing 533	22, 32
Jones v. Padgett, (1902) 2 IR 585	22, 31
Jones v. Tarleton, (1842) 9 M&W 675: 60 RR 863	96, 102
Juggernath Khan v. Maclachlai, (1881) 6 Cal 681	75, 82

K

K.L. Johar & Co. v. Dy. CTO, MANU/SC/0348/1964 : AIR 1965 SC 1082	13, 17, 129
Karsales (Harrow) Ltd. v. Wallis, (1956) 1 WLR 936 CA	121, 122
Kemp v. Falk, (1882) 7 App Cas 573 (586)	75, 81, 96, 101, 106, 108
Kidar Nath Bihari Lal v. Shimbhu Nath-Mandu Mal, (1926) 8 Lah 198: 99 IC 812	75, 78
Kingdom v. Cox, (1848) 5 CB 522 (526)	76, 85
Kirkhum v. Altenborough, (1897) 1 QB 201	43, 45
Kotu Mal v. Bihari Lal, AIR 1921 Lah 355	112, 118
Kunwar Bhan-Sukha Nand v. Ganpat Rai-Ram Jiwan, (1926) 7 Lah 442: 94 IC 304	75, 78
Kursell v. Timber Operators and Contractors Ltd., (1926) 135 LT 223	43, 49

L

Laidler v. Burlinson, (1837) 2 M&W 602, 610, 46 RR 717	43, 53
Lake v. Simmons, (1927) AC 487 (501-02)	61, 70
Lazenby Garages Ltd. v. Wright, (1976) 2 All ER 770	111, 113, 137
Lee v. Butler, (1893) 22 QB 318: (1893) 62 LJ QB 591	13, 17, 129
Lee v. Griffen, (1861) 30 LJ QB 252	12, 15
Leo v. Bayes, (1856) 18 CB 599: 107 RR 424	60, 62, 132
Levy v. Green, (1859) 1 E&E	76, 86
Lexmead (Basingstoke) Ltd. v. Lewis, (1981) 55 Aust LJ 753	112, 117
Litt v. Cowley, (1816) 7 Taunt 169: 17 RR 482	96, 101, 107
Loeschman v. Williams, (1815) 4 Camp 181: 16 RR 772	43, 57
Longbottom & Co. Ltd. v. Bass, Walker & Co., (1922) WN 245 (246)	96, 97
Loon Karan Sohan Lal v. Firm John & Co., MANU/UP/0102/1967 : AIR 1967 All 308	43, 53
Lowther v. Harris, (1927) 2 KB 393: (1926) All ER Rep 352	61, 65

Lyons v. Honffnung, (1890) 15 App Cas 391 PC 96, 104

M

M.S. Madhusoodhanan v. Kerala Kaumudi (P) Ltd., AIR 2004 SC 909:
(2004) 9 SCC 204: (2003) 117 Comp Cas 19 13, 19

Man (Ed&F) Ltd. v. Nigerian Sweets & Confectionery Co. Ltd.,
(1977) 2 Lloyd's Rep 50 96, 98, 135

Manchester Liners Ltd. v. Rea Ltd., (1922) 2 AC 74 22, 33

Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co., (1926) 50 Bom
360:
53 IA 92: 94 IC 824: AIR 1926 PC 38 96, 101

Manior Narottam Das Dharamshi v. Barjatya Traders, 21(2) GLR 89 76, 88

Marten v. Whale, (1917) 2 KB 480 61, 73

Martindale v. Smith, (1841) 1 QB 389: 55 RR 285 21, 23

Martinean v. Kitching, (1872) LR 7 QB 436 44, 58

Marwar Tent Factory v. Union of India, MANU/SC/0354/1989 : (1990) 1
SCC 71: AIR 1990 SC 1753 112, 119

Mason v. Burningham, (1949) 2 All ER 134 112, 117

Mc Ewan v. Smith, (1849) 2 HLC 309: 81 RR 166 97, 108

McEntire v. Crossley Bros. Ltd., (1895) AC 457 (467) 43, 45, 47

McEwan v. Smith, 166 (1849) 2 HLC 309: 81 RR 166 108

Mercantile Bank of India Ltd. v. Central Bank of India Ltd., 1938 AC 287 61, 64

Milgate v. Kebble, (1841) 3 Man & Gr 100: 60 RR 475 75, 79

Millett v. Van Heek & Co., (1921) 2 KB 369 CA 112, 119

Mohambaram v. Ram Narayan, (1935) 69 MLJ 691: 158 IC 535:
MANU/TN/0077/1935 : AIR 1935 Mad 850 60, 63, 132

Moore & Co. v. Landauer & Co., (1921) 2 KB 519 CA 22, 28

Morelli v. Fitch & Gibbons, (1928) 2 KB 636 22, 36

Morton v. Lamb, (1797) 7 TR 125: 4 RR 395 75, 77

Morvi Mercantile Bank Ltd. v. Union of India, MANU/SC/0064/1965 : AIR
1965 SC 1954 8, 11

N

Nagnath Kaulwar & Sons v. Govindram Shyamsunder,
MANU/MH/0282/2004 : AIR 2004 Bom 271 75, 83

National Traders v. Hindustan Soap Works, MANU/TN/0137/1959 : AIR
1959 Mad 112 112, 118

Newtons of Wembley Ltd. v. Williams, (1964) 3 All ER 332 CA 61, 73

Niblett v. Confectioner's Materials Co., (1921) 3 KB 387: (1921) All ER
Rep 459 CA 22, 27, 130

Nicholson v. Bradfield Union, (1866) LR 1 QB 620 76, 86

O

Oppenheimer v. Attenborough & Sons, (1908) 1 KB 221: (1904) All Rep 1016	61, 66
Oppenheimer v. Frazee and Wyatt, (1907) 2 KB 50 CA	61, 67
Orissa Textile Mills v. Ganesh Das, MANU/BH/0027/1961 : AIR 1961 Pat 107 (109)	22, 23
Oxendale v. Wetherell, (1829) B&C 386: 33 RR 207	76, 87

P

P.P. Looke v. N.S. Mathew, (1967) 11 Comp LJ 146	76, 84
Pacific Motor Auctions Pvt. Ltd. v. Motor (Hire Finance) Ltd., (1965) 2 All ER 105 (PC): (1965) 2 WLR 881	61, 72
Parchim (in re:), (1918) AC 157	3
Pattison v. Robinson, (1816) 5 M&S 105 (110)	76, 84
Pearl Mill Co. v. Ivy Tannery Co., (1919) 1 KB 78	76, 84
Peter Darlington Partners Ltd. v. Gescho Co. Ltd., (1964) 1 Lloyd's Rep 149	22, 38
Pfizer Corp. v. Ministry of Health, (1857) 7 E&B 885: 26 LJQB 296	12, 14
Phaggu Mal v. Babu Lal, (1913) 35 All 325: 19 IC 254	76, 93
Phillips v. Brooks, (1919) 2 KB 243	61, 71
Pignataro v. Gilroy & Sons, (1957) 1 Lloyd's Rep 230 (240)	43, 54
Poeahontas Fuel Co. v. Ambatielos, (1922) 27 Com Cas 148	121, 123
Prabhu Dayal v. Bhagwan Sahai, AIR 1955 NUC 4067 (Raj)	22, 39, 131

R

R. v. England, (1864) 4 B&S 782: 33 LJQB 195	12, 14
R.D. Goyal v. Reliance Industries Ltd., MANU/SC/1025/2002 : (2003) 1 SCC 81	12, 15
Rawland v. Divall, (1923) 2 KB 500 CA	130
Reese River Silver Mining Co Ltd v. Smith., (1869) LR WHL 64: 39 LJ Ch 849	61, 69
Regent OHG Aisenstadt and Barig v. Francesco of Jermyn Street Ltd., (1981) 3 All ER 327	76, 85
Reuter v. Sala, (1866) LR 1 QB 620	76, 86
Roservear China Clay Co. ex p., (1879) 11 Ch D 560	96, 105
Rowland v. Divall, (1923) 2 KB 500 CA	22, 27
Rugg v. Minett, (1809) 11 East 210: 10 RR 475	43, 51
Ruttonjey v. Jamnadas, (1882) 6 Bom 692	76, 90, 133

S

Sanwick v. Sothern, (1839) 48 RR 704	43, 52
Scarf v. Jardine, (1862) 7 AC 345: 51 LJQB 612	61, 69

Seedain Suppliers Syndicate v. H.P. State Coop. Marketing and Development Federation Ltd., (1995) AIHC 373 (HP)	112, 120
Shankar Das v. Bhanna Ram, AIR 1926 Lah 606	43, 48
Shoshi Mohun Pal Chowdhry v. Nobo Kristo Poddar, (1878) 4 ILR Cal 801	43, 52
Shree Bajrang Jute Mills Ltd. v. State of Andhra Pradesh, AIR 1966 SC 376	76, 88
Sitaram Srigopal v. Daulati Devi, MANU/SC/0035/1979 : (1979) 4 SCC 351	111, 115
Sivayya v. Ranganayakulu, (1935) 62 IA 89: 58 Mad 670 154 IC 1097: AIR 1935 PC 67	75, 81
Smith v. Chance, (1819) 2 B & Ald 753 (755)	75, 82
Smith v. Wheatcroft, (1878) 9 Ch D 230 (233)	61, 71
Somes v. British Empire Shipping Co., (1860) 8 HLC 338: 30 LJ QB 229	96, 100
Sramajibi Stores v. Union of India, AIR 1982 Del 76	122, 127
Staffs Motor Guarantee Ltd. v. British Wagon Co. Ltd., (1934) 2 KB 305: (1934) All ER Rep 322	61, 66, 72
State of Andhra Pradesh v. Kone Elevators (India) Ltd., (2005) 3 SCC 389	12, 13
Steel Bros. & Co. v. Dayal Khatao & Co., ILR (1923) 47 Bom 924	121, 124
Stephens v. Wilkinson, (1831) 2 B&Ad 320	97, 110
Sterns Ltd. v. Vickers Ltd., (1923) 1 KB 78 CA	44, 58
Stoczina Gdanska SA v. Latvian Shipping Co., (1998) 1 All ER 883 HL	111, 114, 137
Sudbrook Trading Estates Ltd. v. Eggleton, (1983) 1 AC 444: (1982) 3 WLR 315	13, 20
Summer Permain & Co. v. Webb & Co., (1922) 1 KB 55	22, 36
T	
Tarling v. Baxter, 6 Barn & Cress 360: 5 LJKB 164: (1827) 30 RR 355	43, 47, 50
Tata Iron & Steel Co. Ltd., Bombay v. S.R. Sarkar, MANU/SC/0270/1960 : AIR 1961 SC 65	8, 10
Thornelt v. Haines, (1846) 15 M&W 367 (372)	121, 125
U	
Underwood Ltd. v. Burgh Castle & Cement Syndicate, (1922) 1 KB 343: (1921) All ER Rep 551	43, 49
Union of India v. Kesar Singh, AIR 1978 J&K 102	111, 113, 136
Union of India v. West Punjab Factories Ltd., MANU/SC/0039/1965 : AIR 1966 SC 395	75, 79
V	
Varley v. Whipp, (1900) 1 QB 513 (516)	22, 28
Vishnu Sugar Mills Ltd. v. Food Corporation of India, MANU/BH/0005/1987 : AIR 1987 Pat 22 (31)	75, 78

W

Wait v. Baker, (1848) 2 Ex 1, 7: 76 RR 469	43, 55
Wallis v. Russell, (1902) 2 IR 585	22, 31
Ward v. Hobbs, (1878) 4 App Cas 13	22, 31
Wardar's (Import and Export) Co. Ltd. v. W. Norwood & Sons Ltd.	43, 55
Whitehead v. Anderson, (1842) 9 M&W 518: 60 PR 819	96, 104, 106
Williams v. Williams, (1882) 29 Ch D 659 (664-665)	12, 16
Withers v. Reynolds, (1831) 2 B&AD 882: 36 RR 782	76, 87
Word v. Turner, 2 Ves Sr 431, 1 Dick 170	75, 79

Z

Zagury v. Furnell, (1809) 2 Camp 240: 11 RR 704	43, 52
Zila Parishad, Muzaffarnagar v. Udai Veer Singh, AIR 1980 All 64	122, 126

Section Index

Section Pages	Section Pages
1 8	24 45, 47, 56
2 8, 9	25 42, 57
2(3) 49, 50	26 42, 58, 59
2(7) 15	27 62, 63, 65
2(9) 65	28 63, 67
2(14) 48	29 67
3 11, 12, 44, 131	30 63, 71
4 13	30(1) 60, 63, 72
4(a) 44, 131	30(2) 60, 63, 73
5 12, 17	31 74, 76, 77
6 12, 18	32 74, 77
7 12, 18, 77	33 74, 78
8 12, 19	34 74, 81
9 12, 19, 20	35 74, 81
10 20	36 74, 82, 83
11 21, 23	36(2) 83
12 21, 24	37 74, 84
12(2) 25	37(1) 86
12(3) 25	38 74, 86
13 21, 26	39 75, 87, 88
13(2) 26	40 59, 75, 89
14 21, 26	41 39, 75, 90, 131, 132
15 21, 28, 30	42 75, 91, 92, 134, 135
16 21, 30, 32, 33	43 75, 93
16(1) 32	44 75, 76, 93
16(2) 32, 35	45 95, 97

16(3) 32, 38
16(4) 38
17 21, 38, 39, 130
18 42, 44, 47
19 42, 44, 45, 131
19(1) 48
19(2) 46
20 45, 47, 48, 50, 125
21 42, 51
22 42
22 51
23 42, 52, 55

Sale of Goods

Section Pages

51(6) 105
51(7) 105
52 96, 106
53 96, 107
54 96, 109
54(2) 110
55 111, 112
55(1) 51
56 111, 112, 113, 136
57 111, 112, 114
58 111, 112, 116
59 111, 112, 116, 118

45(2) 93
46 95, 97, 99
47 95, 100
48 95, 100
49 95, 101
50 95, 102, 136
51 95, 102, 103
51(1) 103
51(2) 104
51(3) 104
51(4) 104
51(5) 105

Section Pages

60 111, 112, 118
61 111, 112, 119
61(2) 120
62 121, 122
63 121, 122, 124
64 121, 122, 124, 125
64(2) 125
64(3) 125
64A 121, 122, 126, 127
64B 122
65 121, 122, 127
66 121, 122

...

© Universal law Publishing Co.