

Thus, in case of sale by description the seller is bound to deliver the goods of merchantable quantity and in such cases, the doctrine of caveat emptor does not apply.

3. **Conditions as to wholesomeness :** It is a part of the condition as to merchantability. This condition is applicable in cases of eatables i.e., foodstuffs and other goods which are used for human consumption. In such cases, in addition to the principal condition as to merchantability, another implied condition is that the goods must be wholesome i.e., sound, pure and fit for consumption at the time of sale.
4. **Conditions implied by customs :** The implied conditions as to 'fitness' and 'merchantability' are applicable only if certain requirements are fulfilled. However, the implied condition as quality or fitness for a particular purpose may be attached by the *custom or usage of trade* {section 16 (3)}. This is so because the parties enter into an agreement with reference to those known usages. A custom may provide that a particular defect will amount to unfitness and the buyer can reject the goods. But the customs must not be unreasonable and also not be inconsistent with the express terms of the contract.
5. **Sale under a patent or trade name :** 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 that the goods shall be reasonably fit for any particular purpose{(provsio to Sec. 16(1)}.
6. **Consent obtained by fraud:** Where the consent of the buyer, in a contract of sale, is obtained by the seller by fraud or where the seller knowingly conceals a defect which could not be discovered on a reasonable examination i.e., where there is latent defect in the goods, the doctrine of caveat emptor does not hold good.

REVIEW QUESTIONS

1. Define the term 'contract of sale'. State the essentials and legal rules for a valid contract of sale.
2. Explain the difference between a contract of sale and an agreement to sell. When does an agreement to sell ripen into sale?
3. Explain (a) Goods (b) Price (c) Document of title to goods.
4. How is contract of sale made? State briefly the necessary formalities of such a contract with examples.
5. Define the term 'condition'. Explain the implied conditions in a contract of sale as provided in the Sale of Goods Act, 1930.
6. Define the term 'warranty'. Explain and illustrate the implied warranties in a contract of sale as provided in the Sale of Goods Act, 1930.
7. Explain the rule of 'caveat emptor'. Discuss the cases in which the rule of caveat emptor does not apply.
8. Distinguish between (a) condition and warranty (b) Sale and pledge (c) Sale and bailment (d) Sale and Hire purchase (e) Future goods and contingent goods.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons for your answers:

1. A dealer in radios gives a 'Philips' radio to a customer on the terms that Rs. 1000 should be paid by him immediately and Rs. 200 more in two monthly equal instalments. It was further agreed that if the radio is found defective the customer may return it within a week but not later. The customer makes default in paying the last instalment. Can the radio dealer take back the radio on his default?

{Hint. No, the radio dealer cannot take back the radio on default by the customer because it is a contract of sale and not of hire purchase.}

2. A agrees to sell B 10 bags of wheat Kalyan (superior) out of 100 bags lying in his godown for Rs. 6,500. The wheat is completely destroyed by fire. Can B compel A to supply the wheat as per agreement?

{Hint. Yes, B can compel A, because the goods forming the subject-matter of the contract in question are unascertained goods, the perishing of which does not affect the contract. A must supply the wheat from elsewhere or pay damages for the breach.}

3. P agrees to sell Q to his two motor cars on the terms that the price was to be fixed by R. Q takes the delivery of one car immediately. R refuses to oblige P and Q and fixes no price. P asks for the return of the car already delivered whereas Q insists on the delivery of the second car to him for a reasonable price of both the cars. Decide the case.

{Hint. The case is governed by Section 10 which provides that if the third party refuses to fix the prices, the contract becomes void except as to part of goods delivered and accepted as regards which the buyer must pay a reasonable price. Thus as regards the car already delivered, P cannot ask for its return and must accept a reasonable price for that. As regards the second car, Q cannot insist on its delivery to him since the contract has become void.}

4. Worsted coating of quality equal to sample was sold to tailors who could not stitch it into coats owing to some latent defect in its texture. The tailors had examined the cloth before effecting the purchase. Are they entitled to damages?

{Hint. In a contract of sale by sample there is an implied condition that the goods shall be free from any latent or hidden defect (Sec.17). As this implied condition is broken in the instant case, the tailors are entitled to recover damages.}

5. Soda-water was supplied by S to B in bottles. B was injured by the bursting of one of the bottles. Can B claim damages from S?

{Hint. B can claim damages from S for the injury as the bottle is not of merchantable quality and there is a sale of goods by description. (Refer to Condition as to Merchantability.)}

6. M was shopping in a self-service super market. He picked up a bottle of orange squash from a shelf. While he was examining it, the bottle exploded in his hand and injured him. Can M claim damages for the injury?

{Hint. M cannot claim damages because a warranty or condition as to merchantability does not arise unless there is a sale. As there was no sale (since M may decide not to buy and put back the bottle in the shelf), there was no implied condition.}

7. A agrees to supply to B a certain quantity of timber of half-inch thickness. The timber actually supplied varies in thickness from one-third inch to five-eighth inch. The timber is merchantable and commercially fit for the purpose for which it was ordered. B rejects the timber. Is his action justified?

{Hint. Yes, B is entitled to reject the goods. The facts of the given case are similar to *Arcos Ltd, vs E.A. Ronaasen & Son, 1933, A.c.470*, in which case Lord Atkin observed: "If the contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less, when you descend to minute measurements, does half an inch mean about half inch. If the seller wants a margin he must, and in my experience does, stipulate for it".}

8. A lady, who knew that her skin was abnormally sensitive, bought a tweed coat and developed skin trouble by using it. She did not disclose to the seller that her skin was abnormally sensitive. Is the seller liable for breach of implied condition as to fitness or quality?

{Hint. The implied condition as to fitness or quality is with regard to the suitability of the goods to a normal buyer. If the buyer is suffering from an abnormality and does not inform the seller about the same, this implied condition does not apply. Hence in the given case there is no breach of implied condition as to fitness and as such the seller is not liable. (*Griffiths vs Peter Conway Ltd., (1939)*.)}

PERFORMANCE OF CONTRACT OF SALE

CHAPTER OUTLINE

PERFORMANCE OF CONTRACT OF SALE

- **DELIVERY OF GOODS**
- **RULES REGARDING DELIVERY**
- **TRANSFER OF PROPERTY/PASSING OF PROPERTY**
- **TRANSFER OF POSSESSION AND RISK**
- **TRANSFER OF TITLE BY NON-OWNERS**
- **RIGHTS AND DUTIES OF BUYERS**
- **RIGHTS OF UNPAID SELLER**
- **RIGHTS AGAINST GOODS**
- **UNPAID SELLER'S LIEN**
- **RIGHT OF STOPPAGE IN TRANSIT**
- **RIGHT OF WITHHOLDING DELIVERY**
- **AUCTION SALES**
- **FOR CF, CIF, FOB- CONTRACTS**

- (c) **Delivery of goods contracted for mixed with other goods:** Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole consignment {Sec.37(3)}.
11. **Instalment deliveries {Sec.38}:** Unless otherwise agreed, the seller is not entitled to deliver the goods by instalments and if he does so, the buyer is not bound to accept the goods {Sec.38 (1)}. The parties may, however, agree that the goods are to be or may be delivered by instalments.
12. **Delivery to carrier or wharfinger {Sec.39}:** Where, in pursuance of a contract of sale, goods are delivered to a carrier for the purpose of transmission to the buyer or to a wharfinger for safe custody, delivery of goods to them is prima facie deemed to be a delivery of the goods to the buyer {Sec.39(1)}.

RULES REGARDING DELIVERY

1. Mode of delivery.
2. Delivery and payment are concurrent conditions.
3. Effect of part delivery.
4. Buyer to apply for delivery.
5. Place of delivery.
6. Time of delivery.
7. Manner of delivery.
8. Expenses of delivery.
9. Delivery of wrong quantity.
10. Instalment deliveries.
11. Delivery to carrier or wharfinger.
12. Goods delivered at a distant place.
13. Examining the goods on delivery.
14. When acceptance is complete on delivery.
15. When acceptance is complete on delivery.
16. Liability of buyer for neglecting or refusing delivery of goods.

TRANSFER OF PROPERTY, POSSESSION AND RISK

There are three stages in the performance of a contract of sale of goods by seller, viz., (a) the transfer of property in the goods, (b) the transfer of possession of the goods (i.e., delivery), and (c) the passing of the risk.

Significance of transfer of ownership

It is important to know the precise moment of time at which the property in goods passes from the seller to the buyer for the following reasons:

1. **Risk follows ownership:** Unless otherwise agreed, risk follows ownership whether delivery has been made or not and whether price has been paid or not. Thus the risk of loss as a rule lies on the owner. But if delivery has been delayed through the fault of either the buyer or the seller, the goods are at the risk of the party at fault. Thus 'risk' and 'property' go together.
2. **Owner to take action against third parties:** When the goods are in anyway damaged or destroyed by the action of third parties, it is only the owner of the goods who can take action against them.
3. **Insolvency of the seller or the buyer:** In the event of insolvency of either the seller or the buyer, the question whether the Official Receiver or assignee can take over the goods or not depends on whether the property in the goods has passed from the seller to the buyer.
4. **Seller's right to suit for price:** The seller can sue for the price, unless otherwise agreed only if the goods have become the property of the buyer.

Passing of Property

1. **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.
2. **Intention of the parties:** Where there is a contract for the sale of specific or ascertained goods, the property in them passes to the buyer at the time parties intend it to pass {Sec. 19(1)}. 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 cases {Sec.19(2)}.

Where the intention of the parties as to the time when the property in the goods is to pass to the buyer cannot be ascertained from the contract, the rules contained in Secs. 20 to 24 apply {Sec. 19(3)}. These rules are as follows:

Specific Goods (Secs. 20 to 22): The rules relating to transfer of property in specific goods are as follows:

- (1) **Passing of property at the time of contract :** When 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. Deliverable state means such a state that the buyer would under the contract be bound to take delivery of them.
- (2) **Passing of property delayed beyond the date of contract:**
 - (i) **Goods not in a deliverable state:** Where there is a contract for the sale of specific goods not in a deliverable state i.e., the seller has to do something to the goods to put them into a deliverable state, the property does not pass until such thing is done and the buyer has notice of it (Sec. 21).
 - (ii) **When the price of goods is to be ascertained by weighing, etc. :** Where there is a contract for the sale 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 (Sec.22).

Unascertained goods (Sec.23) : Where there is contract for the sale of unascertained goods, the property in the goods does not pass to the buyer until goods are ascertained (Sec. 18). Until goods are ascertained there is merely an agreement to sell.

Delivery to Carrier: A seller is deemed to have unconditionally appropriated the goods to the contract where he delivers them to 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 [Sec.23(2)]: The delivery to the carrier may be absolutely for the buyer or seller.

1. **Absolutely for the buyer:** Where the bill of lading or railway receipt is made out in the name of the buyer and is sent to him, the presumption is that no right of disposal has been reserved by the seller in respect of those goods. The ownership in such a case passes from the seller to the buyer.
2. **Absolutely for the seller:** Where the bill of lading or railway receipt is taken in the seller's or his agent's name and is sent to the agent of the seller to be delivered to the buyer on the fulfilment of certain conditions, the seller is deemed to have reserved the right of disposal of the goods. In such a case the ownership does not pass to the buyer until the necessary conditions are fulfilled and the documents of title are delivered to the buyer.
3. **Goods sent on Approval or 'on Sale or Return' (Sec.24) :** Where goods are delivered to the buyer on approval or 'on sale or return' or other similar term, the property there in passes to the buyer : (i) When he signifies his approval or acceptance to the seller; (ii) When he does any other act adopting the transaction. If the seller delivers the goods to the buyer 'on sale or return' on the terms that the goods were to remain his property until settled or paid for, the property would not pass to the buyer until these terms are complied with. (iii) If he does not signify his approval or acceptance to the seller but retain the goods without giving notice of rejection, beyond the time fixed for the return of the goods, or if no time has been fixed, beyond a reasonable time (Sec. . . . The question as to what is a 'reasonable time' is a question of fact.

TRANSFER OF TITLE BY NON-OWNERS

The general rule as to transfer of title is that only the owner of goods can transfer a good title. The rule is expressed by the maxim "*Nemo dat quod non habet*", which means that "*no one can give what he himself has not*".

A. Exceptions Under the Sale of Goods Act, 1930

1. **Estoppel:** Section 27 provides that by his conduct the owner of the goods may be precluded from denying the seller's authority to sell.

Illustration: Where A, who had unlawfully acquired the goods of B, sells them to C in the presence of B. Here it remains silent, then he will be precluded from denying A's authority to sell the said goods.

2. **Sale by a mercantile agent (Sec.27) :** As a rule, a mercantile agent having an authority to sell goods conveys a good title to the buyer provided the following conditions are fulfilled: (a) The sale must be made by a mercantile agent. (b) He must be in possession of the goods. (c) He must be in possession of the goods with the consent of the owner.

- (d) He must be acting in the ordinary course of business of a mercantile agent, and
- (e) The buyer must have acted in good faith and had not at the time of the contract of sale notice that the seller had no authority to sell.
3. **Sale by one of several joint owners (Sec.28):** Section 28 of the Sale of Goods Act recognises yet another exception i.e., sale by one of several joint owners with the permission of the other co-owners.
 4. **Sale by a person in possession of goods under a voidable contract (Sec.29):** When the seller of goods has obtained their possession under a voidable contract, but the contract has not been rescinded at the time of the sale, the buyer acquired a good title to the goods, provided he buys them in good without notice of the seller's defect of title.
 5. **Sale by seller in possession after sale {Sec.30(1)}:** Where a seller, having sold goods, continues to be possession are of the goods or of the documents of title to the goods and sells them either himself or through a mercantile agent to a person who buys them in good faith and without notice of the previous sale, the buyer gets a good title. It is important to note, however, that the possession of the seller must be as seller and not as hirer or bailee.
 6. **Sale by an unpaid seller {Sec.54 (3)} :** Where an unpaid seller who had exercised his right of lien or stoppage in transit resells the goods, the buyer acquires a good title to the goods as against the original buyer.

B. Exceptions as provided in Other Laws

7. Sale by a *Finder of lost goods* (Sec.71 of the Indian Contract Act).
8. Sale by a *Pawnee* in case where pawnor makes default in payment.
9. Sale by a *Official Assignee* or *Official Receiver* in case of insolvency of individual or any *liquidator* of a company.
10. Execution Sales: Under Order 21 of Civil Procedure Code, *Officers of Court* can sell goods and convey the title to the buyer.
11. Sale by *Executors* and *Administrators*
12. *Purchase in Market Overt* : Market-Overt means "open public and legally constituted market". Where goods are sold in market overt, the buyer acquires good title to them though the seller may not be having a good title, the goods are sold in accordance with the custom of the market, and the buyer acts in good faith and has no reason to believe that the ownership of the seller to goods was whatsoever defective or non-existent.
13. Under the Negotiable Instruments Act, a *holder in due course* gets a better title than what his endorser had.

Rights of the Buyer

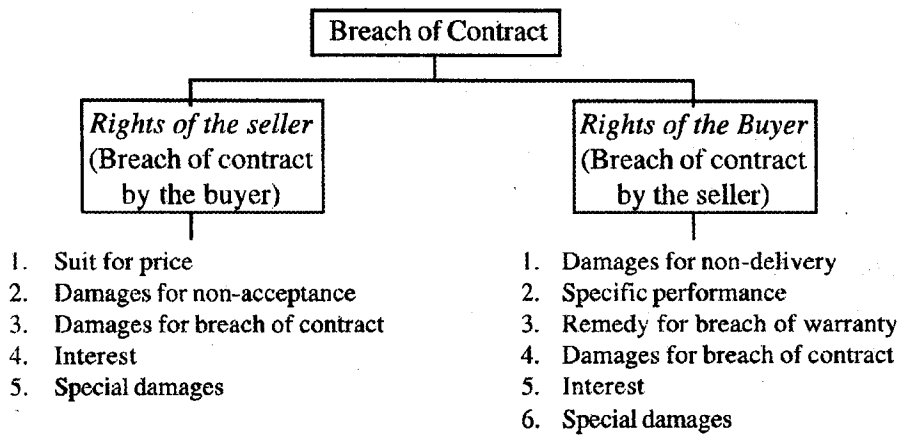
1. The first right of the buyer is to *have delivery of the goods* as per the term of the contract. (Sec.37)
2. Right to *reject the goods* for defective delivery short/excess supply: {Sec.37 (1) (2)}.
3. The buyer of goods is *not bound to accept delivery of the goods in instalments* and can repudiate the contract , unless otherwise agreed. {Sec.38 (1)}.

4. Right to *Notice of Insurance*; {Sec.39 (3)}.
5. Right to *Examine the goods delivered* (Sec.41);
6. Right to *sue for breach of contract*:
 - (a) *Suit for Damages* (Sec. 57);
 - (b) *Suit for Price*;
 - (c) Right to a *suit for Specific Performance* (Sec.58);
 - (d) Right to *repudiate of contract* before due date (Sec.60);
 - (e) *Suit for Interest* {Sec. 61(2) (b)};
 - (f) *Suit for breach of warranty* (Sec.59).

Duties of the Buyer

1. To take delivery of, and pay for, the goods (Sec.31);
2. To apply for delivery (Sec.35) ;
3. To demand delivery at a reasonable hour{Sec.36(4)};
4. To take risk of deterioration (Sec.40);
5. Liability of buyer for neglecting or refusing delivery of goods (Sec.44);
6. Duty to accept instalment delivery and pay for it. (Section 38 (2));
7. Duty to intimate the seller where he rejects the goods. (Section.43.);
8. Duty to pay damages for non-acceptance (Sec.56);
9. Deliver the goods to carrier or wharfinger;
10. Examine the goods delivered;
11. Acceptance of goods delivered ;
12. Liability of buyer for refusing deliver: If the buyer neglects or refuses to take delivery within a reasonable time, he is liable to the seller for loss and charges for the care and custody of the goods (Sec. 44).

Buyer's liability in case Rejection of Goods (Sec.43): Unless otherwise agreed where goods are delivered to the buyer and he rejects them, he is not bound to return them to the seller. It is sufficient if he intimates to the seller that he has rejected the goods, and he may charge for keeping them. Where the neglect or refusal of the buyer to take delivery amounts to repudiation of the contract, the seller may sue for price and for damages.



RIGHTS OF UNPAID-SELLER

A seller is deemed to be an 'unpaid seller' (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 condition has not been fulfilled by reason of the dishonour of the instrument, or otherwise (Sec.45)

The Sale of Goods Act has expressly given two kinds of rights to an unpaid seller of goods, namely.

1. Against the Goods

- | | |
|---|---|
| (a) When the property in the goods has passed | <ul style="list-style-type: none"> * Right of lien * Right of stoppage in transit * Right of resale |
| (b) When the property in the goods has not passed | <ul style="list-style-type: none"> * Right of withholding delivery * Right of lien * Right of stoppage in transit * Right of resale |

2. Against the Buyer Personally

- (i) Right to sue for Price
- (ii) Right to sue for damages
- (iii) Right to sue for interest

Unpaid Seller's Right Against the Goods

The unpaid seller has right (i) against the goods and (ii) against the buyer personally. The unpaid seller had right against the goods whether the property in the goods has passed to the buyer or not.

- (a) **Unpaid seller's lien:** The unpaid seller had a particular or special lien on the goods for the price while he is in possession.

- (b) **Stoppage in transit:** The unpaid seller had right of stopping the goods in transit after he has parted with the possession of them in case of the insolvency of the buyer.
- (c) **Right of resale:** The unpaid seller had a right of resale under certain conditions
- (d) **Right of withholding delivery:** Where the property in goods has not passed to the buyer, the unpaid seller has, besides his other remedies, a right of withholding delivery of the goods.

Unpaid Seller's Lien

'Lien' means a right in which a creditor has to retain possession of goods until payment of the price. Lien depends on actual possession and not on title. *'Unpaid seller's lien' is possessory lien as well as a particular lien.* The unpaid seller is entitled to a lien in the following three cases:

- (i) **No stipulation as to credit:** The unpaid seller has a lien where the goods have been sold without any stipulation as to credit.
- (ii) **Expiry of credit period:** The unpaid seller has a lien where the goods have been sold without any stipulation as to credit.
- (iii) **Insolvency of buyer:** The unpaid seller has a lien where the buyer becomes insolvent.

The unpaid seller may exercise his right of lien notwithstanding that he is possession of the goods as an agent or bailee for the buyer (Sec.47). Where the unpaid seller has made a part delivery, he may exercise his right of lien on the remainder, unless he has waived the lien (Sec.48).

Termination of lien: The unpaid seller of goods loses his lien in the following cases:

- (i) **Delivery to carrier:** The unpaid seller loses his lien when he delivers the goods to a carrier for the purpose of transmission to the buyer without reserving the right of disposal of the goods. The ordinary rule is that a delivery to common carrier for conveyance is delivery of possession to the buyer, the carrier being the buyer's agent. But the seller may reserve the right of disposal of the goods.
- (ii) **Lawful possession by buyer:** The unpaid seller loses his lien where the buyer or his agent lawfully obtains possession of the goods.
- (iii) **Waiver:** The unpaid seller loses his lien, when he waives his lien expressly or impliedly (Sec.49).

Right of Stoppages in Transit

When the buyer becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit i.e., he may resume possession of the goods so long as they are in course of transit and may retain them until payment or tender of the price (Sec.50). Thus the right of stoppage in transit can be exercised by the unpaid seller, when the buyer becomes insolvent, the seller has parted with the possession and the buyer has not obtained possession.

Duration of transit: The right of stoppage in transit can be exercised by the unpaid seller while the goods are in transit. The Sale of Goods Act lays down the following rules for determining whether the goods are in transit or the transit is at an end: