

## *Sale of Goods Act 1930*

- Sale of Goods Act is **a mercantile law**.
- Initially, this was part of Indian Contract Act itself.
- Later, this was deleted in Contract Act, and separate Sale of Goods Act was passed in 1930.
- Sale of Goods Act is **complimentary to Contract Act**.
- **Basic provisions of Contract Act apply to contract of Sale of Goods Act** also. Basic requirements of contract i.e. Offer and acceptance, legally enforceable agreement, mutual consent, parties competent to contract; free consent, lawful object, consideration etc. apply to contract of Sale of Goods Act also.

### ***Basic Obstacles in a Sale***

Every sale has five basic obstacles:

- No need
- No money
- No hurry
- No desire
- No trust

The law relating to sale of goods is contained in the Sale of Goods Act, 1930. It has to be read as part of the Indian Contract Act, 1872 [Sections 2(5) and (3)].

### ***Contract of Sale of Goods***

According to Section 4, a contract of sale of goods is a contract whereby the seller:

- (i) transfers or agrees to transfer the property in goods,
- (ii) to the buyer,
- (iii) for a money consideration called the price.

### ***Essential Elements of a contract of sale of goods***

The following are thus the essentials of a contract of sale of goods:

- (i) **Bilateral contract**: It is a bilateral contract because the property in goods has to pass from one party to another. A person cannot buy the goods himself.
- (ii) **Transfer of property**: The object of a contract of sale must be the transfer of property (meaning ownership) in goods from one person to another.
- (iii) **Goods**: The subject matter must be some goods.
- (iv) **Price or money consideration**: The goods must be sold for some price, where the goods are exchanged for goods it is barter, not sale.
- (v) **Essential elements of a valid contract** - All essential elements of a valid contract must be present in a contract of sale.

## *Distinction between Sale and Agreement to Sell*

<i>Basis</i>	<i>Sale</i>	<i>Agreement to Sell</i>
<b>Transfer in property in goods</b>	Property in the goods sold passes to the buyer at the time of contract so that he becomes the owner of the goods.	Ownership does not pass to the buyer at the time of the contract, but it passes only when it becomes sale on the expiry of certain time or the fulfilment of some conditions subject to which the property in the goods is to be transferred.
<b>Type of Contract</b>	Sale is an executed contract	An agreement to sell is an executory contract
	Sale is contract plus conveyance.	An agreement to sell is a contract pure and simple
<b>Loss</b>	Loss falls on the buyer, even though the goods are with the seller.	If goods are destroyed by accident, the loss falls on the seller.
<b>Breach</b>	If seller commits a breach by refusing to deliver the goods, the buyer has not only a personal remedy against him but also the other remedies which an owner has in respect of goods themselves such as a suit for conversion or detinue, etc	If seller commits a breach, the buyer has only a personal remedy against the seller, namely, a claim for damages

## *Distinction between Sale and Bailment*

<i>Basis</i>	<i>Sale</i>	<i>Bailment</i>
<b>Definition</b>	Contract involving transfer of the possession and ownership (title) of a good or property, or the entitlement to a service, in exchange for money or value.	A "bailment" is a transaction under which goods are delivered by one person (the bailor) to another (the bailee) for some purpose, upon a contract that they be returned or disposed of as directed after the purpose is accomplished.
<b>Transfer of ownership</b>	Ownership passes from seller to buyer.	No transfer of ownership involved.
<b>Return of goods</b>	There is generally no return of goods, unless breach of terms of contract.	There is <b>NECESSARILY</b> return of goods after specified time or accomplishment of an event.

## *Distinction between Sale and Hire- Purchase*

<i>Basis</i>	<i>Sale</i>	<i>Hire Purchase</i>
Transfer of property	"Sale", is a contract by which property in goods passes from the seller to the buyer for a price.	A "hire purchase agreement" is basically a contract of hire, but in addition, it gives the hirer an option to purchase the goods at the end of the hiring period.
Parties	Parties involved in the transaction are called Seller and Buyer.	Parties involved in the transaction are called Hire Vendor and Hire Purchaser.
Position	Buyer becomes the owner immediately.	Hirer is merely a bailee of goods and ownership remains vested in the bailor i.e Hire-Vendor.
Right of termination	Buyer cannot terminate the contract and is bound to pay the price.	Hirer may terminate the contract by returning the goods to its owner without any liability to pay remaining installment.
Buyer's Insolvency	Risk of loss falls on the Seller. Since the ownership has already transferred.	If buyer becomes insolvent, seller has right to take back goods
Passing of title by buyer	Buyer can pass good title to bonafide purchaser.	Hirer does not become owner of the goods until he has exercised his option to buy, he cannot pass any title even to an innocent and bona fide purchaser.
Remedy to the owner	Buyer cannot decline to take delivery of the goods.	If the hirer declines to take delivery of the goods, the remedy of the owner will be damages for non-hiring and not for rent for the period agreed.

[By Jyoteep Arora (B.Com, CA, CS & CMA)]

## *Sale and Contract for Work and Labour*

The distinction between a "sale" and a "contract for work and labour" becomes important when question of passing of property arises for consideration.

However, these two are difficult to distinguish. The test generally applied is that if as a result of the contract, property in an article is transferred to one who had no property therein previously for a money consideration, it is a sale, where it is otherwise it is a contract for work and labour.

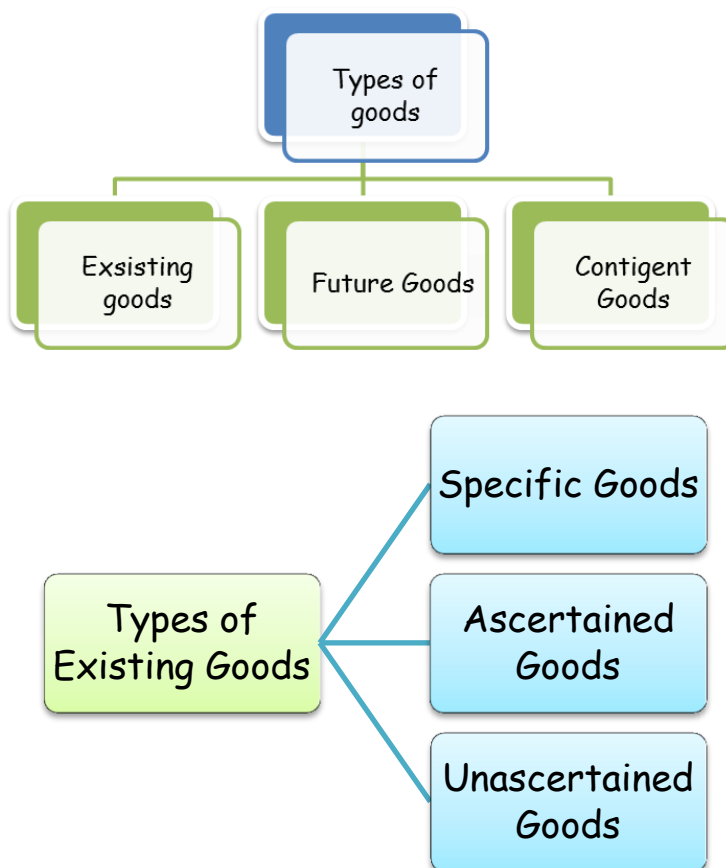
### ***Subject matter of Contract of Sale of Goods***

The subject matter of the contract of sale is essentially **GOODS**

According to Section 2(7) of the Sale of Goods Act,

- "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.
- **Actionable claims** and money are **not goods** and cannot be bought and sold under this Act.
- **An actionable claim** is what a person cannot make a present use of or enjoy, but what can be recovered by him by means of a suit or an action. Thus, a debt due to a man from another is an actionable claim and cannot be sold as goods, although it can be assigned.
- Under the provisions of the Transfer of Property Act, 1882, goodwill, trade marks, copyrights, patents are all goods, so is a ship.
- **Money** means current money, i.e., the recognised currency in circulation in the country, but not old and rare coins which may be treated as goods.

### ***Types of Goods***



**EXISTING GOODS**

- Existing goods are goods which are either **owned or possessed** by the seller at the time of the contract. Sale of goods possessed but not owned by the seller would be by an agent or pledgee
- Existing goods are **specific goods** which are **identified** and agreed upon at the time of the contract of sale. Ascertained goods are either specific goods at the time of the contract or are ascertained or identified to the contract later on i.e. made specific.
- Generic or unascertained goods are goods which are not specifically identified but are **indicated by description**. If a merchant agrees to supply a radio set from his stock of radio sets, it is a contract of sale of unascertained goods because it is not known which set will be delivered. As soon as a particular set is separated or identified for delivery and the buyer has notice of it, the goods are ascertained and become specific goods.

**FUTURE GOODS**

- Future goods are goods **to be manufactured or produced or acquired** by the seller after the making of the contract of sale
- A agrees to sell all the mangoes which will be produced in his garden next season. This is an agreement for the sale of future goods. [Section 2(6)]

**CONTINGENT GOODS**

- Where there is a contract for the sale of goods, the acquisition of which by the seller **depends upon a contingency** which may or may not happen—such goods are known as contingent goods.
- Contingent goods fall in the class of future goods.
- A agrees to sell a certain TV set provided he is able to get it from its present owner. This is an agreement to sell contingent goods. In such a case, if the contingency does not happen for no fault of the seller, he will not be liable for damages.
- Actual sale can take place **only of specific goods** and property in goods passes from the seller to buyer at the time of the contract, provided the goods are in a deliverable state and the contract is unconditional
- There can be an agreement to sell only in respect of future or contingent goods

***Effect of Perishing of Goods***

In a contract of sale of goods, the goods may perish before sale is complete. Such a stage may arise in the following cases:

**(i) Goods perishing before making a contract**

Where in a contract of sale of specific goods, the goods without the knowledge of the seller have, at the time of making the contract perished or become so damaged as no longer to answer to their description in the contract, the contract is void. This is based on the rule that mutual mistake of fact essential to the contract renders the contract void. (Section 7)

If the seller was aware of the destruction and still entered into the contract, he is estopped from disputing the contract. Moreover, perishing of goods not only includes

loss by theft but also where the goods have lost their commercial value.

### (ii) Goods perishing after agreement to sell

Where there is an agreement to sell specific goods, and subsequently the goods without any fault of any party perish or are so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided. The provision applies only to sale of specific goods.

If the sale is of unascertained goods, the perishing of the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver. (Section 8)

### Price

- No sale can take place without a price. Thus, if there is no valuable consideration to support a voluntary surrender of goods by the real owner to another person, the transaction is a gift, and is not governed by the Sale of Goods Act.
- Therefore, price, which is money consideration for the sale of goods, constitutes the essence for a contract of sale. It may be money actually paid or promised to be paid. If a consideration other than money is to be given, it is not a sale.

### *Modes of Fixing Price (Sections 9 and 10)*

The price may be fixed:

- At the time of contract by parties themselves
- May be left to determined by the course of dealings between the parties
- May be left to be fixed in some way stipulated in the contract
- May be left to be fixed by some third party

**Failure in fixing price by third party** - Where the contract states that the price is to be fixed by a third-party and such third-party fails to do so, the contract is void. But if the buyer has already taken the benefit of the goods, he must pay a reasonable price for them. If the third-party's failure to fix the price is due to the fault of the seller or buyer, then that party is liable for an action for damages.

**Price** - Where nothing is said by the parties regarding price, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case. Generally, the market price would be a reasonable price.

### *Conditions and Warranties (Sections 12-17)*

- The parties are at liberty to enter into a contract with any terms they please. As a rule, before a contract of sale is concluded, certain statements are made by the parties to each other. The statement may amount to a stipulation, forming part of the contract or a mere expression of opinion which is not part of the contract.
- If it is a statement by the seller on the reliance of which the buyer makes the contract, it will amount to a stipulation. If it is a mere commendation by the seller

of his goods it does not amount to a stipulation and does not give the right of action.

- The stipulation may either be a condition or a warranty.
- Section 12 draws a clear distinction between a condition and a warranty. Whether a stipulation is a condition or only a warranty is a matter of substance rather than the form of the words used. A stipulation may be a condition though called a warranty and vice versa.

## Conditions

If the stipulation forms the very basis of the contract or is essential to the main purpose of the contract, it is a condition. The breach of the condition gives the aggrieved party a right to treat the contract as repudiated. Thus, if the seller fails to fulfill a condition, the buyer may treat the contract as repudiated, refuse the goods and, if he has already paid for them, recover the price. He can also claim damages for the breach of contract.

## Warranties

If the stipulation is collateral to the main purpose of the contract, i.e., is a subsidiary promise, it is a warranty.

The effect of a breach of a warranty is that the aggrieved party cannot repudiate the contract but can only claim damages. Thus, if the seller does not fulfil a warranty, the buyer must accept the goods and claim damages for breach of warranty.

Section 11 states that the stipulation as to time of payment are not to be deemed conditions (and hence not to be of the essence of a contract of sale) unless such an intention appears from the contract. Whether any other stipulation as to time (e.g., time of delivery) is of the essence of the contract or not depends on the terms of the contract.

## Difference between condition and warranty

Basis	Condition	Warranty
1) Nature	It is of <u>fundamental</u> nature	It is of <u>subsidiary</u> nature
2) Value	Condition is <u>essential</u> to the main purpose of the contract, it is a condition.	Warranty is <u>collateral</u> to the main purpose of the contract
3) Breach	The breach of the condition gives the aggrieved party a right to treat the contract as <u>repudiated</u> .	The effect of a breach of a warranty is that the aggrieved party cannot repudiate the contract but can only <u>claim damages</u> .
4) Treatment	The breach of condition <u>may be treated</u> as a breach of warranty.	The breach of warranty <u>cannot</u> be treated as a breach of condition.

*When condition sinks to the level of warranty (i.e. condition becomes warranty)*

In some cases a condition sinks or descends to the level of a warranty. The first two cases depend upon the will of the buyer, but the third is compulsory and acts as estoppel against him.

- a) A condition will become a warranty where the buyer waives the condition; or
- b) A condition will sink to the level of a warranty where the buyer treats the breach of condition as a breach of warranty; or
- c) Where the contract is indivisible and the buyer has accepted the goods or part thereof, the breach of condition can only be treated as breach of warranty. The buyer can only claim damages and cannot reject the goods or treat the contract as repudiated.

Sometimes the seller may be excused by law from fulfilling any condition or warranty and the buyer will not then have a remedy in damages.

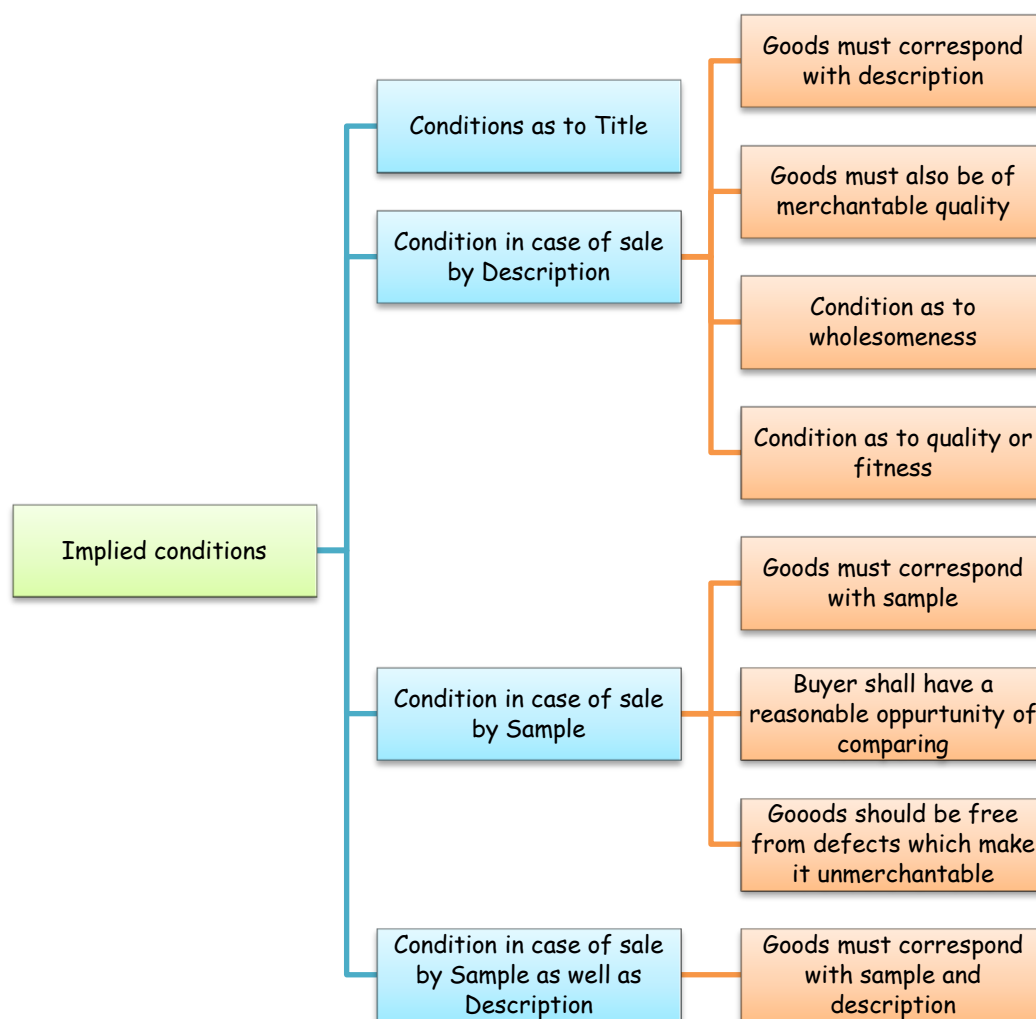
*Implied Conditions*

Different implied conditions apply under different types of contracts of sale of goods, such as :

- sale by description,
- sale by sample,
- sale by description as well as sample.

The condition, as to title to goods applies to all types of contracts, subject to that there is apparently no other intention.





## ***Implied Conditions as to title***

There is an implied condition that the **seller**, in an actual sale, **has**

- the right to sell the goods, and,
- in an agreement to sell, he will have a right to sell the goods at the time when property is to pass.
- As a result, if the title of the seller turns out to be defective, the buyer is entitled to reject the goods and can recover the full price paid by him.

In *Rowland v. Divall (1923) 2 K.B. 500*, 'A' had bought a second hand motor car from 'B' and paid for it. After he had used it for 6 months, he was deprived of it because the seller had no title to it. It was held that 'B' had broken the condition as to title and 'A' was therefore, entitled to recover the purchase money from 'B'

## ***Implied conditions under a sale by description***

In a sale by description there are the following implied conditions:

**(a) Goods must correspond with description:** It is provided under Section 15 of the Act that when there is a sale of goods by description, there is an implied condition that the goods shall correspond with description.

In a sale by description, the buyer relies for his information on the description of the goods given by the seller, e.g. in the contract or in the preliminary negotiations.

Where 'A' buys goods which he has not seen, it must be sale by description, e.g., where he buys a 'new Fiat car' from 'B' and the car is not new, he can reject the car.

Even if the buyer has seen the goods, the goods must be in accordance with the description (Beale v. Taylor(1967) All E.R. 253).

**(b) Goods must also be of merchantable quality:** If they are bought by description from dealer of goods of that description. [Section 16(2)] Merchantable quality means that the goods must be such as would be acceptable to a reasonable person, having regard to prevailing conditions. They are not merchantable if they have defects which make them unfit for ordinary use, or are such that a reasonable person knowing of their condition would not buy them. 'P' bought black yarn from 'D' and, when delivered, found it damaged by the white ants. The condition of merchantability was broken.

But, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. If, however, examination by the buyer does not reveal the defect and he approves and accepts the goods, but when put to work, the goods are found to be defective, there is a breach of condition of merchantable quality.

The buyer is given a right to examine the goods before accepting them. But a mere opportunity without an actual examination, however, cursory, would not suffice to deprive him of this right.

**(c) Condition as to wholesomeness:** The provisions, (i.e., eatables) supplied must not only answer the description, but they must also be merchantable and wholesome or sound. 'F' bought milk from 'A' and the milk contained typhoid germs. 'F's wife became infected and died. 'A' was liable for damages. Again, 'C' bought a bun at 'M's bakery, and broke one of his teeth by biting on a stone present in the bun. 'M' was held liable.

**(d) Condition as to quality or fitness for a particular purpose:** Ordinarily, in a contract of sale, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied. But there is an implied condition that the goods are reasonably fit for the purpose for which they are required if:

- (i) the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill and judgement, and
- (ii) 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 no such condition if the goods are bought under a patent or trade name.

In **Priest v. Last (1903) 2 K.B. 148**, a hot water bottle was bought by the plaintiff, a draper, who could not be expected to have special skill knowledge with regard to hot water bottles, from a chemist, who sold such articles stating that the bottle will not stand boiling water but was intended to hold hot water. While being used by the plaintiff's wife, the bottle bursted and injured her. Held, the seller was responsible for damages as the bottle was not fit for use as a hot water bottle.

In **Grant v. Australian Knitting Mills (1936) 70 MLJ 513**, 'G' a doctor purchased woollen underpants from 'M' a retailer whose business was to sell goods of that description. After wearing the underpants, 'G' developed some skin diseases. Held, the goods were not fit for their only use and 'G' was entitled to avoid the contract and claim damages.

### ***Implied conditions under a sale by sample (Section 17)***

In a contract of sale by sample:

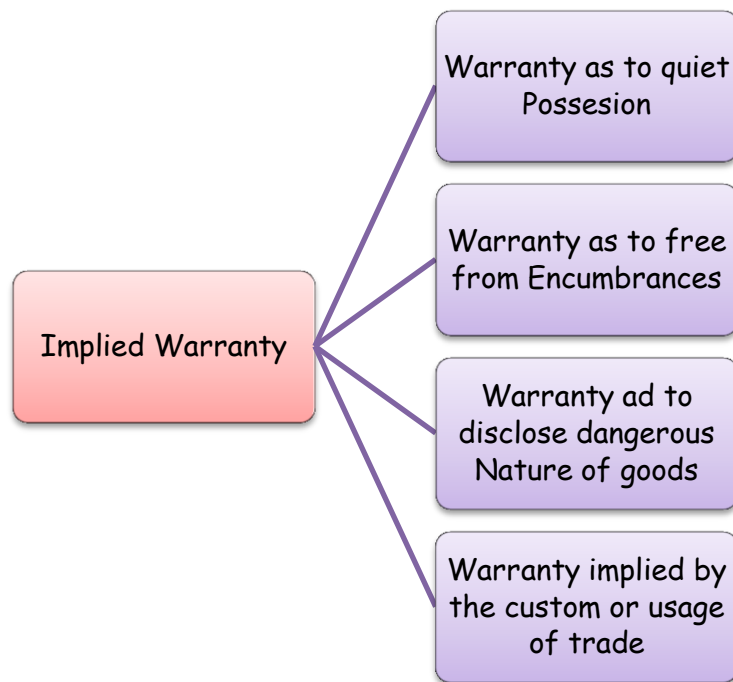
- a) there is an implied condition that the bulk shall correspond with the sample in quality;
- b) there is another implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
- c) it is further an implied condition of merchantability, as regards latent or hidden defects in the goods which would not be apparent on reasonable examination of the sample. "Worsted coating" quality equal to sample was sold to tailors, the cloth was found to have a defect in the fixture rendering the same unfit for stitching into coats. The seller was held liable even though the same defect existed in the sample, which was examined.

### ***Implied conditions in sale by sample as well as by description***

In a sale by sample as well as by description, the goods supplied must correspond both with the samples as well as with the description. Thus, in **Nichol v. Godts (1854) 158 E.R. 426**, there was a sale of "foreign refined rape-oil having warranty only equal to sample". The oil tendered was the same as the sample, but it was not "foreign refined rape-oil" having a mixture of it and other oil. It was held that the seller was liable, and the buyer could refuse to accept

### ***IMPLIED WARRANTIES***

Implied warranties are those which the law presumes to have been incorporated in the contract of sale in spite of the fact that the parties have not expressly included them in a contract of sale. Subject to the contract to the contrary, following are the implied warranties in a contract of sale:



- (i) **Warranty as to quiet possession:** Section 14(b) of the Sale of Goods Act provides that there is an implied warranty that the buyer shall have and enjoy quiet possession of goods. If the buyer's possession is disturbed by anyone having superior title than that of the seller, the buyer is entitled to hold the seller liable for breach of warranty.
- (ii) **Warranty as to freedom from encumbrances:** Section 14(c) states that in a contract of sale, there is 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. But if the buyer is aware of any encumbrance on the goods at the time of entering into the contract, he will not be entitled to any compensation from the seller for discharging the encumbrance.
- (iii) **Warranty to disclose dangerous nature of goods:** If the goods are inherently dangerous or likely to be dangerous and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger.
- (iv) **Warranties implied by the custom or usage of trade:** An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

### **Doctrine of Caveat Emptor – Section 16**

- The term "caveat emptor" is a Latin word which means "let the buyer beware".
- This principle states that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires.
- If he buys goods for a particular purpose, he must satisfy himself that they are fit for that purpose.
- Section 16 states that "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".

- It is not the seller's duty to give to the buyer the goods which are fit for a suitable purpose of the buyer. If he makes a wrong selection, he cannot blame the seller if the goods turn out to be defective or do not serve his purpose.

### **Case Law: Ward v. Hobbs, (1878) 4 A.C. 13**

Where certain pigs were sold by auction and no warranty was given by seller in respect of any fault or error of description. The buyer paid the price for healthy pigs. But they were ill and all but one died of typhoid fever. They also infected some of the buyer's own pigs. It was held that there was no implied condition or warranty that the pigs were of good health. It was the buyer's duty to satisfy himself regarding the health of the pigs.

### **Exceptions to the doctrine of Caveat Emptor:**

- (1). Where the seller makes a false representation and the buyer relies on it.
- (2). When the seller actively conceals a defect in the goods which is not visible on a reasonable examination of the same.
- (3). When the buyer, relying upon the skill and judgement of the seller, has expressly or impliedly communicated to him the purpose for which the goods are required.
- (4). Where goods are bought by description from a seller who deals in goods of that description.

### **Passing of Property or Transfer of Ownership (Sections 18-20)**

The sole purpose of a sale is the transfer of ownership of goods from the seller to the buyer. It is important to know the precise moment of time at which the property in the goods passes from the seller to the buyer for the following reasons:

- a) The general rule is that risk follows the ownership, whether the delivery has been made or not. If the goods are lost or damaged by accident or otherwise, then, subject to certain exceptions, the loss falls on the owner of the goods at the time they are lost or damaged.
- b) When there is a danger of the goods being damaged by the action of third parties, it is generally the owner who can take action.
- c) The rights of third parties may depend upon the passing of the property if the buyer resells the goods to a third-party, the third-party will only obtain a good title if the property in the goods has passed to the buyer before or at the time of the resale. Similarly, if the seller, in breach of his contract with the buyer, attempts to sell the goods to a third party in the goods, has not passed to the buyer, e.g., where there is only an agreement to sell.
- d) In case of insolvency of either the seller or the buyer, it is necessary to know whether the goods can be taken over by the official assignee or the official receiver. It will depend upon whether the property in the goods was with the party adjudged insolvent.

Thus in this context, ownership and possession are two distinct concepts and these two can at times remain separately with two different persons.

### ***Passing of property in specific goods***

In a sale of specific or ascertained goods, the property in them passes to the buyer as and when the parties intended to pass. The intention must be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case.

Unless a contrary intention appears, the following rules are applicable for ascertaining the intention of the parties:

- (a) 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. Deliverable state means such a state that the buyer would be bound to take delivery of the goods. The fact that the time of delivery or the time of payment is postponed does not prevent the property from passing at once. (Section 20)
- (b) 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 in a deliverable state, the property does not pass until that thing is done and the buyer has notice of it. (Section 21) A certain quantity of oil was brought. The oil was to be filled into casks by the seller and then taken away by the buyer. Some casks were filled in the presence of buyer but, before the remainder could be filled, a fire broke out and the entire quantity of oil was destroyed, Held, the buyer must bear the loss of the oil which was put into the casks (i.e., put in deliverable state) and the seller must bear the loss of the remainder (**Rugg v. Minett (1809) 11 East 210**).
- (c) Where there is a sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do something with reference to the goods for the purpose of ascertaining the price, the property to the goods for the purpose of ascertaining the price, does not pass until such act or thing is done and the buyer has notice of it. (Section 22)
- (d) When goods are delivered to the buyer "on approval" or "on sale of return" or other similar terms the property therein passes to the buyer:
  - (i) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction
  - (ii) if he does not signify his approval or acceptance but retains the goods without giving notice of rejection, in such a case—(a) if a time has been fixed for the return of the goods, on the expiration of such time; and (b) if no time has been fixed, on the expiration of a reasonable time.

### ***Ownership in unascertained goods***

The property in unascertained or future goods does not pass until the goods are ascertained.

Unascertained goods are goods defined by description only, for example, 100 quintals of wheat; and not goods identified and agreed upon when the contract is made.

Unless a different intention appears, the following **rules** are applicable **for ascertaining the intention** of the parties in regard to passing of property in respect of such goods:

- a) The property in **unascertained or future goods sold by description** passes to the buyer when 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. Such assent may be expressed or implied and may be given either before or after the appropriation is made. (**Section 23**)
- b) If there is a sale of a **quantity of goods out of a large quantity**, for example, 50 quintals of rice out of a heap in B's godown, the property will pass on the appropriation of the specified quantity by one party with the assent of the other.
- c) Delivery by the seller of the goods **to a carrier** or other buyer **for the purpose of transmission** to the buyer in pursuance of the contract is an appropriation sufficient to pass the property in the goods.
- d) The property in goods, whether specific or unascertained, does not pass if the seller reserves the right of disposal of the goods. Apart from an express reservation of the right of disposal, the seller is deemed to reserve the right of disposal in the following two cases:
  - (i) where goods are **shipped or delivered to a railway administration for carriage** by railway and by the bill of lading or railway receipt, the goods are deliverable to the order of the seller or his agent.
  - (ii) when the **seller sends the bill of exchange** for the price of the goods to the buyer for this acceptance, together with the bill of lading, the property in the goods does not pass to the buyer unless he accepts the bill of exchange.

### ***Passing of Risk (Section 26)***

The general rule is that goods remain at the seller's risk until the ownership is transferred to the buyer. After the ownership has passed to the buyer, the goods are at the buyer's risk whether the delivery has been made or not. For example, 'A' buys goods of 'B' and property has passed from 'B' to 'A'; but the goods remain in 'B's warehouse and the price is unpaid. Before delivery, 'B's warehouse is burnt down for no fault of 'B' and the goods are destroyed. 'A' must pay 'B' the price of the goods, as he was the owner. The rule is **resperit domino- the loss falls on the owner**.

But the parties may agree that risk will pass at the time different from the time when ownership passed. For example, the seller may agree to be responsible for the goods even after the ownership is passed to the buyer or vice versa.

**In Consolidated Coffee Ltd. v. Coffee Board, (1980 3 SCC 358)**, one of the terms adopted by coffee board for auction of coffee was the property in the coffee knocked down to a bidder would not pass until the payment of price and in the meantime the goods would remain with the seller but at the risk of the buyer, In such cases, risk and property passes on at different stages.

**In Multanmal Champalal v. Shah & Co., AIR (1970) Mysore 106**, goods were despatched by the seller from Bombay to Bellary through a public carrier. According to the terms of the contract, the goods were to remain the property of the seller till the price was paid though the risk was to pass to the buyer when they were delivered to public carrier for despatch. When the goods were subsequently lost before the payment of the price (and the consequent to the passing of the property to the buyer), the Court held that the loss was to be borne by the buyer.

It was further held in the same case that the buyer was at fault in delaying delivery unreasonably and therefore on that ground also he was liable for the loss, because such loss would not have arisen but for such delay.

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

### ***Transfer of Title by Person not the Owner (Section 27-30)***

The general rule is that only the owner of goods can sell the goods. Conversely, the sale of an article by a person who is not or who has not the authority of the owner, gives no title to the buyer. The rule is expressed by the maxim; "*Nemo Dat Quod Non Habet*" i.e. no one can pass a better title than he himself has. As applied to the sale of goods, the rule means that a seller of goods cannot give a better title to the buyer than he himself possess. Thus, even a bona fide buyer who buys stolen goods from a thief or from a transferee from such a thief can get no valid title to them, since the thief has no title, nor could he give one to any transferee.

#### ***Example:***

- 1) A, the hirer of goods under a hire purchase agreement, sells them to B, then B, though a bona fide purchaser, does not acquire the property in the goods. At most he can acquire such an interest as the hirer had.
- 2) A finds a ring of B and sells it to a third person who purchases it for value and in good faith. The true owner, i.e. B can recover from that person, for A having no title to the ring could pass none the better.

### ***Exception to the General Rule***

The Act while recognizing the general rule that no one can give a better title than he himself has, laid down important exceptions to it. Under the exceptions the buyer gets a better title to the goods than the seller himself. These exceptions are given below:

- a) ***Sale by a mercantile agent:*** A buyer will get a good title if he buys in good faith from a mercantile agent who is in possession either of the goods or documents of title to the goods with the consent of the owner, and who sells the goods in the ordinary course of his business.
- b) ***Sale by a co-owner:*** A buyer who buys in good faith from one of the several joint owners who is in sole possession of the goods with the permission of his co-owners will get good title to the goods.
- c) ***Sale by a person in possession under a voidable contract:*** A buyer buys in good faith from a person in possession of goods under a contract which is voidable, but has not been rescinded at the time of the sale.
- d) ***Sale by seller in possession after sale:*** Where a seller, after having sold the goods, continues or is in possession of the goods or of the documents of title to the goods and again sells them by himself or through his mercantile agent to a person who buys in good faith and without notice of the previous sale, such a buyer gets a good title to the goods.



- e) ***Sale by buyer in possession:*** If a person has brought or agreed to buy goods obtains, with the seller's consent, possession of the goods or of the documents of title to them, any sale by him or by his mercantile agent to a buyer who takes in good faith without notice of any lien or other claim of the original seller against the goods, will give a good title to the buyer. In any of the above cases, if the transfer is by way of pledge or pawn only, it will be valid as a pledge or pawn.
- f) ***Estoppel:*** If the true owner stands by and allows an innocent buyer to pay over money to a third-party, who professes to have the right to sell an article, the true owner will be estopped from denying the third-party's right to sell.
- g) ***Sale by an unpaid seller:*** Where an unpaid seller has exercised his right of lien or stoppage in transit and is in possession of the goods, he may resell them and the second buyer will get absolute right to the goods.
- h) ***Sale by person under other laws:*** A pawnee, on default of the pawnee to repay, has a right to sell the goods, pawned and the buyer gets a good title to the goods. The finder of lost goods can also sell under certain circumstances. The Official Assignee or Official Receiver, Liquidator, Officers of Court selling under a decree, Executors, and Administrators, all these persons are not owners, but they can convey better title than they have.

### ***Performance of the Contract of Sale***

It is the duty of the seller and buyer that the contract is performed. The duty of the seller is to deliver the goods and that of the buyer is to accept the goods and pay for them in accordance with the contract of sale.

Unless otherwise agreed, payment of the price and the delivery of the goods are concurrent conditions, i.e., they both take place at the same time as in a cash sale over a shop counter.

### ***Delivery (Sections 33-39)***

Delivery is the voluntary transfer of possession from one person to another. Delivery may be actual, constructive or symbolic. Actual or physical delivery takes place where the goods are handed over by the seller to the buyer or his agent authorised to take possession of the goods. Constructive delivery takes place when the person in possession of the goods acknowledges that he holds the goods on behalf of and at the disposal of the buyer. For example, where the seller, after having sold the goods, may hold them as bailee for the buyer, there is constructive delivery. Symbolic delivery is made by indicating or giving a symbol. Here the goods themselves are not delivered, but the "means of obtaining possession" of goods is delivered, e.g, by delivering the key of the warehouse where the goods are stored, bill of lading which will entitle the holder to receive the goods on the arrival of the ship.

### ***Rules as to delivery***

The following rules apply regarding delivery of goods:

- a) Delivery should have the effect of putting the buyer in possession.
- b) The seller must deliver the goods according to the contract.

- c) The seller is to deliver the goods when the buyer applies for delivery; it is the duty of the buyer to claim delivery.
- d) Where the goods at the time of the sale are in the possession of a third person, there will be delivery only when that person acknowledges to the buyer that he holds the goods on his behalf.
- e) The seller should tender delivery so that the buyer can take the goods. It is no duty of the seller to send or carry the goods to the buyer unless the contract so provides. But the goods must be in a deliverable state at the time of delivery or tender of delivery. If by the contract the seller is bound to send the goods to the buyer, but no time is fixed, the seller is bound to send them within a reasonable time.
- f) The place of delivery is usually stated in the contract. Where it is so stated, the goods must be delivered at the specified place during working hours on a working day. Where no place is mentioned, the goods are to be delivered at a place at which they happen to be at the time of the contract of sale and if not then in existence they are to be delivered at the place at which they are manufactured or produced.
- g) The seller has to bear the cost of delivery unless the contract otherwise provides. While the cost of obtaining delivery is said to be of the buyer, the cost of the putting the goods into deliverable state must be borne by the seller. In other words, in the absence of an agreement to the contrary, the expenses of and incidental to making delivery of the goods must be borne by the seller, the expenses of and incidental to receiving delivery must be borne by the buyer.
- h) If the goods are to be delivered at a place other than where they are, the risk of deterioration in transit will, unless otherwise agreed, be borne by the buyer.
- i) Unless otherwise agreed, the buyer is not bound to accept delivery in instalments.

### ***Acceptance of Goods by the Buyer***

Acceptance of the goods by the buyer takes place when the buyer:

- a) intimates to the seller that he has accepted the goods; or
- b) retains the goods, after the lapse of a reasonable time without intimating to the seller that he has rejected them; or
- c) does any act on the goods which is inconsistent with the ownership of the seller, e.g., pledges or resells. If the seller sends the buyer a larger or smaller quantity of goods than ordered, the buyer may:
  - (i) reject the whole; or
  - (ii) accept the whole; or
  - (iii) accept the quantity be ordered and reject the rest.
- d) If the seller delivers with the goods ordered, goods of a wrong description, the buyer may accept the goods ordered and reject the rest, or reject the whole.

- e) Where the buyer rightly rejects the goods, he is not bound to return the rejected goods to the seller. It is sufficient if he intimates the seller that he refuses to accept them. In that case, the seller has to remove them.

### ***Instalment Deliveries***

When there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and either the buyer or the seller commits a breach of contract, it depends on the terms of the contract whether the breach is a repudiation of the whole contract or a severable breach merely giving right to claim for damages.

### ***Suits for Breach of Contract***

- Where the property in the goods has passed to the buyer, the seller may sue him for the price.
- Where the price is payable on a certain day regardless of delivery, the seller may sue for the price, if it is not paid on that day, although the property in the goods has not passed.
- Where the buyer wrongfully neglects or refuses to accept the goods and pay for them, the seller may sue the buyer for damages for non-acceptance.
- Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue him for damages for non-delivery.
- Where there is a breach of warranty or where the buyer elects or is compelled to treat the breach of condition as a breach of warranty, the buyer cannot reject the goods. He can set breach of warranty in extinction or diminution of the price payable by him and if loss suffered by him is more than the price he may sue for the damages.
- If the buyer has paid the price and the goods are not delivered, the buyer can sue the seller for the recovery of the amount paid. In appropriate cases the buyer can also get an order from the court that the specific goods ought to be delivered.

### ***Anticipatory Breach***

Where either party to a contract of sale repudiates the contract before the date of delivery, the other party may either treat the contract as still subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

In case the contract is treated as still subsisting it would be for the benefit of both the parties and the party who had originally repudiated will not be deprived of:

- a) his right of performance on the due date in spite of his prior repudiation; or
- b) his rights to set up any defence for non-performance which might have actually arisen after the date of the prior repudiation.

### ***Measure of Damages***

The Act does not specifically provide for rules as regards the measure of damages except by stating that nothing in the Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law they are entitled

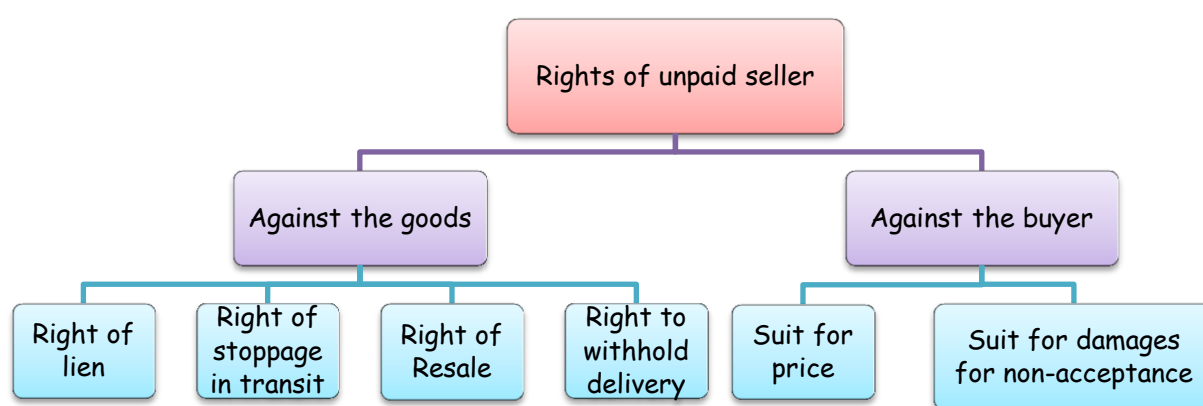
to the same. The inference is that the rules laid down in Section 73 of the Indian Contract Act will apply.

### **Unpaid Seller (Sections 45-54)**

The seller of goods is deemed to be unpaid seller:

- a) When the whole of the price has not been paid or tendered; or
- b) When a conditional payment was made by a bill of exchange or other negotiable instrument, and the instrument has been dishonoured.

### **Rights of an Unpaid Seller against the Goods**



**An unpaid seller's right against the goods are:**

- a) A lien or right of retention
- b) The right of stoppage in transit
- c) The right of resale
- d) The right to withhold delivery

**(a) Right of Lien** - An unpaid seller in possession of goods sold, may exercise his lien on the goods, i.e., keep the goods in his possession and refuse to deliver them to the buyer until the fulfilment or tender of the price in cases where:

- (i) the goods have been sold without stipulation as to credit; or
- (ii) the goods have been sold on credit, but the term of credit has expired; or
- (iii) the buyer becomes insolvent.

The lien depends on physical possession. The seller's lien is *possessory lien*, so that it can be exercised only so long as the seller is in possession of the goods. It can only be exercised for the non-payment of the price and not for any other charges.

A lien is lost.

- (i) When the seller 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;

(ii) When the buyer or his agent lawfully obtains possession of the goods; (iii) By waiver of his lien by the unpaid seller.

**(b) *Stoppage in transit (Sections 50-52)*** The right of stoppage in transit is a right of stopping the goods while they are in transit, resuming possession of them and retaining possession until payment of the price. The right to stop goods is available to an unpaid seller

- (i) when the buyer becomes insolvent; and
- (ii) the goods are in transit.

The buyer is insolvent if he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due. It is not necessary that he has actually been declared insolvent by the court.

The goods are in transit from the time they are delivered to a carrier or other bailee like a wharfinger or warehousekeeper for the purpose of transmission to the buyer and until the buyer takes delivery of them.

The transit comes to an end in the following cases:

- (i) If the buyer obtains delivery before the arrival of the goods at their destination;
- (ii) If, after the arrival of the goods at their destination, the carrier acknowledges to the buyer that he holds the goods on his behalf, even if further destination of the goods is indicated by the buyer;
- (iii) If the carrier wrongfully refuses to deliver the goods to the buyer.

If the goods are rejected by the buyer and the carrier or other bailee holds them, the transit will be deemed to continue even if the seller has refused to receive them back.

The right to stop in transit may be exercised by the unpaid seller either by taking actual possession of the goods or by giving notice of the seller's claim to the carrier or other person having control of the goods. On notice being given to the carrier, he must redeliver the goods to the seller who must pay the expenses of the redelivery.

The seller's right of lien or stoppage in transit is not affected by any sale on the part of the buyer unless the seller has assented to it. A transfer, however, of the bill of lading or other document of seller to a bona fide purchaser for value is valid against the seller's right.

**(c) *Right of re-sale (Section 54)***: The unpaid seller may re-sell:

- (i) where the goods are perishable;
- (ii) where the right is expressly reserved in the contract;
- (iii) where in exercise of right of lien or stoppage in transit, the seller gives notice to the buyer of his intention to re-sell, and the buyer, does not pay or tender the price within a reasonable time.

If on a re-sale, there is a deficiency between the price due and amount realised, he is entitled to recover it from the buyer. If there is a surplus, he can keep it. He will not have these rights if he has not given any notice and he will have to pay the buyer profit, if any, on the resale.

**(d) *Rights to withhold delivery***: If the property in the goods has passed, the unpaid seller has right as described above. If, however, the property has not passed, the

unpaid seller has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit.

### ***Rights of an unpaid seller against the buyer (Sections 55 and 56)***

An unpaid seller may sue the buyer for the price of the goods in case of breach of contract where the property in the goods has passed to the buyer or he has wrongfully refused to pay the price according to the terms of the contract.

The seller may sue the buyer even if the property in the goods has not passed where the price is payable on a certain day.

Under Section 56, the seller may sue the buyer for damages or breach of contract.

Thus an unpaid seller's rights against the buyer personally are:

- a) a suit for the price.
- b) a suit for damages.

### ***Auction Sales (Section 64)***

A sale by auction is a public sale where goods are offered to be taken by bidders. It is a proceeding at which people are invited to compete for the purchase of property by successive offer of advancing sums.

Section 64 lays down the rules regulating auction sales. 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. The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made, any bidder may retract his bid.

A right to bid may be reserved expressly by or on behalf of the seller. Where such right is expressly so reserved, the seller or any other person on his behalf may bid at the auction. 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. Any sale in contravention of this rule may be treated as fraudulent by the buyer. The sale may be notified to be subject to a reserved price. Where there is such notification, every bid is a conditional offer subject to its being up to the reserve price. Where an auctioneer inadvertently knocks down to a bidder who has bid less than the reserved price, there is no contract of sale. If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

### ***Trading Contracts Involving Rail or Sea Transit***

In the case of a contract for the sale of goods which are to be shipped by sea a number of conditions are attached by the parties or by custom and practice of merchants. Some of the important types of such contracts are given below:

- a) ***F.O.B. (Free on Board)***: Under an F.O.B. contract, it is the duty of the seller to put the goods on board a ship at his own expenses. The property in goods passes to the buyer only after the goods have been put on board the ship, and they are at buyer's risk as soon as they are put on board the ship, usually named by the buyer. The seller must notify the buyer immediately that the goods have

been delivered on board, so that the buyer may insure them. If he fails to do so the goods shall be deemed to be at seller's risk during such sea transit.

- b) **F.O.R. (Free on Rail):** Similar position prevails in these contracts as in the case of F.O.B. contracts.
- c) **C.I.F. or C.F.I. (Cost Insurance and Freight):** A CIF contract is a contract for the sale of insured goods lost or not lost to be implemented by transfer of proper documents. In such types of contracts, the seller not only bears all the expenses of putting the goods on board the ship as in an F.O.B. contract, but also to bear the freight and insurance charges. He will arrange for an insurance of the goods for the benefit of the buyer. On the tender of documents, the buyer is required to pay and then take delivery. He has a right to reject the goods if they are not according to the contract.
- d) **Ex-Ship:** Here the seller is bound to arrange the shipment of the goods to the port of destination, and to such further inland destination as the buyer may stipulate. The buyer is not bound to pay until the goods are ready for unloading from the ship and all freight charges paid. The goods travel at the seller's risk, but he is not bound to insure them.