UNIT – 2

1. Conditions & warranties

Like any other contract, a contract of sale of goods may have various terms or stipulations. Such stipulations, depending on their effect have been termed either conditions or warranties under the Act. Section 12 of the Act deals with "Condition and warranty". Sub- section (1) states that a stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. Sub-section (2) further explains that 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. For Example: In a contract between Mohammed Asim and Anantkumar Foods, Asim contracted to deliver 100 kgs of potatoes. However, what was actually delivered were onions. This failure on the part of Asim is not merely a breach of one of the terms of the contract, but in fact, it was a total failure on his part to perform the contract. Hence, the requirement to deliver potatoes was "essential" to the main purpose of the contract and was therefore a condition. Thus, in the given case, Anantkumar Foods has a right to treat the contract as repudiated on the basis of the breach of "condition". A warranty, on the other hand, as explained under sub-section (3) 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.Thus, a warranty is a stipulation that is not essential to the main purpose of the contract but is only of secondary importance. For Example: The newly formed Bilkis Transport Company Limited placed an order with M/s Super Motors for the purchase of three cargo trucks. The money for the same was paid in advance. The company was assured by Super Motors that the trucks will be delivered within 30 days. Accordingly, the company accepted orders for transporting material after a month. However, the trucks were delayed by more than a month. This resulted in a loss of business to the company. In an action filed against Super Motors, the company was successful in prosecuting its claim for damages. Consider another example where a lady orders for a red sari, it being agreed between her and the seller that it will be sent by a registered parcel, and that she will pay the price by 15th January, the day of her marriage. In this illustration, the stipulations regarding the colour of the sari as well as the date of supply are essential to the main purpose of the contract and are conditions whereas stipulations regarding the time of payment of the price and the mode of despatch of the goods are not essential to the main purpose of the contract and are only collateral, they are warranties.Sub-section (4) further provides that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation in a contract is a condition or warranty or neither, depends upon the construction of the contract in each case.[1] For example, A agrees to supply a suit to B by 15th November, which the latter wants to wear on the day of his marriage to be held on 16th November, the time of the delivery of the suit is a condition. On the other hand, if the suit which A agrees to deliver to B by 15th November is required by the buyer to be used in the following winter season, the time of delivery is a warranty. The court has to look to the intention of the parties by referring to the terms of the contract and he surrounding circumstances to judge whether a stipulation is a condition or a warranty.A stipulation may be a condition, though called a warranty in the contract.

[1] Dudhia Forest Co-op. Labourers & Artisans Co. Ltd. V. Mohammed Saiyed & Abdul Rehman's Ci. 1980 (21) Guj LR 272.

Stipulations as to time

Chapter II of the Sale of Goods Act, 1930 deals with the "Formation of the Contract" and is divided into five segments. The fifth segment is titled "Conditions and warranties". This segment begins with section 11 titled "stipulations as to time". It reads as follows:

> 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.

Clearly, the general rule stated in Section 11 is that the time of payment of the price is not deemed to be of the essence of the contract. Therefore, if the buyer makes a delay in the payment of the price, the seller cannot avoid the contract on that account but he can only claim compensation for the same.[2] The parties are, however, free to express a different intention in their contract. They may make the time of the payment of the price as the essence of the contract. Where the time is of the essence of the contract and the same has been extended, the extended date is also of the essence of the contract.[3]Where the time for the performance of the contract has not been agreed to under the contract, one of the parties cannot unilaterally fix the same as being of the essence of the contract, and therefore repudiate the contract on non-performance at the time so fixed.[4] Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. In the case of a contract of supply of human albumin within one year commencing from a particular month, time can be said to be of essence.[5]

Consequences of the breach of a Condition or a Warranty

Section 12 (2) states that the breach of a condition by one party entitles the other to treat the contract as repudiated. This is so because a condition is a stipulation essential to the main purpose of the contract. Consider again the example of a lady ordering for a sari. Say she orders for a red sari asking the seller to deliver it by 15th January so that she can wear it on 16th on the occasion of her wedding but the seller instead supplies a black sari in place of a red sari or supplies the sari on 18th January, there is a breach of condition; the lady buyer can treat the contract as repudiated.

Section 12 (3), on the other hand, states that upon the breach of a warranty by one party, the other party is entitled to claim damages rather than avoiding the contract. Thus, for example, the buyer agrees to pay the price in advance by 15th December, and the goods are to be delivered on 15th January, but the buyer makes payment late, say on 25th December, the seller's remedy in such a case is to claim compensation, because, according to sec. 11, the time of payment of price is generally deemed to be a warranty.

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[2] American Pipe Co. v. State of U.P. AIR 1983 Cal. 186.
[3] Orissa Textile Mills Ltd. V. Ganesh das AIR 1961 Pat. 107, at p. 109.
[4] National Coop. Sugar Mills Ltd. V. Albert & Co. 1981 2 MLJ 343.
[5] Andard Mount, London, Ltd. V. Curewell India Ltd. AIR 1985 Del 45.

Breach of Condition by the Seller; Recourses of the Buyer

Where a condition in a contract of sale has been breached by the seller, the buyer has been given the option under the Act to any of the following recourses:

i. He may treat the contract as repudiated;[6] or
ii. He may waive that condition altogether;[7] or
iii. He may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.[8]

Ordinarily, the buyer's remedy, on a breach of condition by the seller, is treating the contract as repudiated and rejecting the goods. However, the buyer is not bound to exercise this right. If the buyer so likes, he may elect to give up his right of rejecting the goods and waive the condition altogether. In such a case, the erstwhile condition will be deemed to be non-existent. So, by exercising the option of waiving the condition altogether, the buyer accepts the goods without bringing any action against the seller.

Another option open to the buyer is to treat the breach of condition as a breach of warranty and thereby have a smaller remedy of claiming compensation. In such a case, he accepts the goods instead of rejecting them and can claim damages as if there was a breach of warranty only. For example, A agrees to supply B 1000 bags of first quality wheat, at the rate of Rs. 100/- per bag but instead supplies only second quality wheat, the price of which is Rs. 90/- per bag. This is a breach of condition by the seller and the buyer can reject the goods, but if the buyer so likes, he may treat it as a breach of warranty, accept the second quality wheat and claim compensation at the rate of Rs. 10/- per bag.

Section 13 (2) lays down that in the case of a contract of sale which is not severable, and the buyer has accepted the goods or part thereof, the only option available to the buyer is to treat the breach of condition 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. The idea behind the provision is that when the buyer has a choice of either accepting or rejecting goods and he chooses to accept them, his right of rejection can no more be exercised. Mere taking delivery of the goods by the buyer does not necessarily mean the acceptance of them. According to Section 42, the buyer is deemed to have accepted the goods:

i. When he intimates to the seller that he has accepted them; or
ii. When the goods have been delivered to him and he does an act in relation to them which is inconsistent with the ownership of the seller, for example, on receiving a watch sent by the seller, he pledges it, sells it or starts using the same; or
iii. When, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

[6] S. 12 (2).
[7] S. 13 (1).
[8] Ibid.

There may be cases where due to impossibility or otherwise, the fulfilment of a condition or warranty is excused by law. In such a case, there is no liability for the non-performance of the condition or the warranty, as the case may be. This is provided under section 13 (3). Reference may also be made to section 56, Indian Contract Act, for impossibility of performance and sections 62-67, Indian Contract Ac, regarding contracts which need not be performed.

Liability of the Seller under Law of Torts

Apart from the right to reject the goods or to claim compensation under the Sale of Goods Act for breach of a condition or warranty on the part of the seller, the buyer also has the right to claim compensation under the law of torts, if owing to the negligence of the seller, some dangerous goods have been delivered to the buyer which cause harm to him. In the case of Clarke v Army & Navy Cooperative Society Ltd.,[9] the plaintiff purchased a tin of disinfectant powder from the defendant. The lid of the tin being defective, when the plaintiff tried to open it in the normal way, its contents flew towards her face and injured her eyes. The fact of the defect in the tins was known to the seller at the time of sale. It was held that the seller was guilty of negligence in not giving due warning to the buyer about the said defect and was, therefore, liable to compensate the buyer.

Romer L.J. observed:[10]

> "I think that, apart from any question of warranty, there is a duty cast upon a vendor, who knows of the dangerous character of goods which he is supplying, and also knows that the purchaser is not, or may not be aware of it, not to supply the goods without giving some warning to the purchaser of the danger."

Implied Conditions and Warranties

Stipulations in a contract of sale, either in the form of a condition or a warranty, may either be provided expressly by the parties in the contract or they may be impliedly there in every contract of sale of goods. Such implied stipulations are covered under sections 14 to 17. These implied stipulations are binding in every contract of sale, unless they are repugnant with any express stipulations agreed to by the parties.[11]

Implied Conditions

[9] 1903 1 KB 155.
[10] Ibid at p. 166.
[11] S. 16(4).

1. Implied Condition as to title- Sec. 14 (a): In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is 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.
   Generally, a person who is the owner of the goods or who is owner's agent may sell the goods. If a person has no title to the goods or otherwise does not have a right to dispose of certain goods, the buyer of such goods has a right to reject them and to claim back the price if the same has already been paid and refuses to pay if the price has not been paid till then. In the case of Rowland v Divall,[12] the plaintiff purchased a motor car from the defendants and used the same for several months. The defendant had no title to the car and, therefore, the plaintiff was compelled to give it up to the true owner. The plaintiff sued the defendant to recover back the price which he had already paid. It was held that even though the buyer had used the car for some months, he was entitled to recover back the whole of the price paid by him. Want of title to the goods is not the only factor because of which the seller may not have a right to sell the goods. If a vendor can be stopped by process of law from selling, he has not the right to sell. For example in the case of Niblett v Confectioners Materials Co.,[13] the seller sold to the buyers tins of condensed milk c.i.f. from New York to London. Some of the tins were bearing the labels marked "Nissly Brand" which was the trademark of a third person, Nestle Co. At the instance of the Nestle Co. the Commissioner of Customs detained the goods. The buyers had to remove those labels before taking delivery of those tins of condensed milk. Having suffered a loss, by selling the tins of condensed milk without proper labels at a lower price, the buyers sued the sellers to claim compensation. The Court of Appeal held that the sellers had made a breach of condition that they had a right to sell the goods and as such they were bound to pay damages for the loss suffered by the buyer.

2. Implied Condition in Sale by Description- Sec. 15: When there is a contract for sale of goods by description, there is an implied condition that the goods supplied shall correspond with the description. Hence, it is the responsibility of the seller that the goods must correspond with the description. In other words, the goods could be recognized or identified as the seller had described them to be. In case the goods do not correspond with the description, there is a breach of implied condition and the buyer has a right to reject the goods. Say for example, the internet website of a leading photocopying company offered a "2003 Machine", in new condition and with original parts. Mr. Manzoor placed an order for the same, for his shop. When the machine arrived, it was found that the stand was partly broken, the glass was not original and a few switches were not functioning. Mr. Manzoor was entitled to reject the machine since the goods (viz., the photocopy machine) did not correspond with the description on the website. As stated by Lord Blackburn:

[12] 1923 2 KB 500.
[13] 1921 3 KB 387.

> If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it.[14]

The description may be regarding the class or kind of the goods, e.g., First quality wheat or B-30 sugar or long staple cotton, weight or measurements of the goods or the condition of the goods sold or the type of packing, etc. It is not enough that some description of the goods has been given, what is necessary is that the description was of the essence of the contract in the sense that the buyer must have relied on the description for the identity of the goods to be supplied by the seller. The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone.[15]Goods may be sold by description even though they have been seen and identified at the time of making the contract, provided they are not sold as a specific thing but as corresponding to a given description. After an amendment in the English sale of Goods Act, 1893 by the Supply of Goods (Implied Terms) Act, 1973, it has been provided that " sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

In Varley v Whipp,[16] there was a contract for the sale of a second hand reaping machine which the buyer had not seen. The seller described it as a new machine a year before and having cut only 50 to 60 acres. After delivery, the buyer found that the machine was not in accordance with the description given by the seller. It was held that the buyer was entitled to reject the machine. In Acors Ltd. V E.A. Ronaasen & Sons,[17] the seller agreed to supply a quantity of staves of timber which were to be of half inch thickness. Some of the staves were not of the required thickness. It was held by the House of Lords that the buyers were entitled to reject the goods. Lord Atkin observed:

> If the written 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 minutemeasurements, does half an inch mean about half inch. If the seller wants a margin he must, and in my experience does, stipulate for it.

In Re Moore & Co. Ltd. And Laundauer & Co.,[18] it was held that the mode of packing may constitute a part of the description of the goods. Here the seller agreed to supply 3,000 tins of canned fruit which were to be packed in case, each case containing 30 tins. When the goods were tendered some of the cases contained 30 tins each and some others only 24 tins. It was held that since the goods supplied did not correspond with the description, the buyers were entitled to reject the whole of the goods. Reference here may be made to section 37 (3) which provides that where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different

[14] Bowes v Shand 1877 2 App. Cas. 455, at p. 480.
[15] Varley v Whipp 1900 1 QB 513, at p. 516, per Channel J.
[16] 1900 1 QB 513.
[17] 1933 AC 470.
[18] 1921 All ER 466.

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.

In Manbre Saccharine Co. v Corn Products Co.,[19] there was a contract for the sale of starch inbags, each bag containing 280 lbs. but the starch was shipped partly in 220 lbs. bags and partly in 140 lbs. bags. It was held that the size of the bag constituted a part of the description of the goods and the size of the bag could be important to the purchase because of the sub-contract or otherwise. Similarly, in the case of Jormal Kasturchin v Vora Hassanalli Khanbhai[20], under the contract, tea was to be supplied to the buyer inchests, each chest containing 80 lbs. and the seller tenders chests of tea, each chest containing 76 lbs. It was held to be a breach of contract which entitles the buyer to reject the goods. In Antony Thomas v Ayupunni Mani,[21] there was a contract for the supply of cashew nuts, one if the terms of the contract being that bad nuts shall not exceed twenty per cent of the total. When the goods were supplied, the bad nuts exceeded the stipulated percentage. It was held that the stipulation regarding the proportion of the bad nuts made a basic element of the description of the goods, the seller had made a breach of the implied condition contained in section 15 and the buyer was, therefore, entitled to reject the goods and claim back the part of the price already paid by him. Date of the arrival of the ship at its destination may also be a part of the description of the goods to be supplied. In Macpherson Train & Co. Ltd. V Howard Ross & Co. Ltd.,[22] there was a contract for the supply of the Australian quick frozen peaches. One of the clauses in the contract was "Shipment and destination: Afloat per S.S. Morton Bay due London approximately June 8". The ship actually was due in London on June 19 and in fact arrived there on June 21. It was held that the words "due approximately June 8" was a condition of the contract and the seller having made its breach, the buyers were entitled to reject the goods.

3. Implied Condition in Sale by sample as well as Description- Sec. 15: When 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. Sometimes there may be a difference between the sample shown and the description of the goods. In such a case, the fact that the goods supplied conform to the sample but do not agree with the description entitle the buyer to reject the goods because the fundamental condition in every contract is that the goods should correspond to the description. In Wallis v Pratt,[23]there was a contract of sale by sample of seed described as "English sainfoin". The seed was sown and when the crop was ready, it was discovered that the seed supplied and the sample shown were not of "English sainfoin" seed but of "giant sainfoin" seed. It was held that there was a breach of condition and the buyer was entitled to recover damages. In Nichol v Godts,[24] there was a sale of "foreign refined rape oil, warranted only equal to the samples." The oil supplied though corresponded with the sample, was adulterated with hemp oil. The

[19] 1919 1 KB 198.
[20] AIR 1934 Sau. 79.
[21] AIR 1960 Kerala 176.
[22] 1955 2 All ER 445.
[23] 1911 AC 394.
[24] 1854 10 Ex. 191: RR 523.

jury found that the admixture was not commercially known as "foreign refined rape oil" and, therefore, it was held that since the oil supplied was not in accordance with the description, the buyer was entitled to reject the same.

Two Implied Conditions, being exceptions to the rule of Caveat Emptor

The rule of Caveat Emptor- Sec. 16:

Section 16 incorporates the maxim dominant in mercantile law which is caveat emptor. It translates as "buyer beware". The section provides that as a general rule, 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. This is, however, subject to the provisions of the Act and any other law for the time being in force. According to this rule, the buyer himself should be careful while purchasing the goods and he should himself ascertain that the goods suit his purpose. If the goods are subsequently found to be unsuitable for his purpose, he cannot blame the seller for the same, as there is no implied undertaking by the seller that he shall supply such goods as to suit the buyer's purpose. For example, A purchases a horse from B. A needs the horse for riding but he does not mention this to B. The horse is not suitable for riding but is suitable only for being driven in a carriage. A can neither reject the horse nor can he claim any compensation from B.In re Andrew Yule & Co.,[25]the buyer ordered for hessian cloth without specifying the purpose for which he wanted the same. It was infact needed for packing. Because of unusual smell, it was unsuitable for the purpose. It was held that the buyer had no right to reject the same, even if it did not suit his purpose.

The following two implied conditions are exceptions to the rule of caveat emptor.

4. Implied Condition as to quality or fitness - Section 16 (1): If the following requirements are satisfied, there is considered to be an implied condition from the side of the seller that the goods supplied shall be reasonably fit for the purpose for which the buyer wants them: (i)The buyer, while purchasing the goods, expressly or by implication, makes known to the seller the particular purpose for which the goods are required by him, so as to show that the buyer relies on the seller's skill or judgment; 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). Thus, if in the case of Andrew Yule & Co.,[26]the buyer had informed the seller that he needed the hessian cloth for packing purpose, he could reject the cloth if he found that the same was unsuitable for that purpose. The purpose may be made known to the seller expressly or by implication. When the goods can be used only for one purpose, the purpose need not be told to the seller as he is deemed to know the same. In Raghava Menon v Kuttappan Nair,[27] the plaintiff purchased a wrist watch from the defendant. The watch did not give satisfactory service inspite of the fact that the seller had tried to set it right a number of times. The buyer sued the seller for the replacement of the watch or

[25] AIR 1932 Cal. 879.
[26] Ibid.
[27] AIR 1962 Kerala 318.

the refund of the price. It was held that the seller was bound to replace the watch or, in the alternative, to pay back its price. It was observed that "the plaintiff is a layman and he approaches a fairly reputed firm like the defendant dealing in watches and purchases a watch from them, not for any special purpose, but for the common purpose of knowing the correct time. In such a case, section 16 (1) of the sale of Goods Act must apply, because the buyer makes known to the seller, by implication, the purpose for which he purchases the watch and also relies on the seller's skill or judgment."[28] In Priest v Last,[29] the plaintiff went to the defendant, a chemist, and asked for a hot-water bottle. The defendant sold him an American rubber bottle. The plaintiff had purchased the bottle for his wife and while she was using, it burst and injured her. The court held that the buyer's purpose was clear when he demanded a bottle for hot water for hot water, thus the implied condition as to fitness is not met in this case. In Chaproniere v Mason,[30] the buyer purchased a bun from a bakery, and as he tried to bite it, his teeth struck on a stone in the bun as a consequence of which one of his teeth was broken and an abcess formed in the jaw. Such a bun was held to be unsuitable for the purpose of eating, i.e., the purpose for which the buyer had purchased the same. Moreover, the fact that the buyer had purchased the bun from a particular bakery was sufficient to show that the buyer had relied on the seller's skill and judgment. In Frost v Aylesbury Diary Co.,[31] the plaintiff purchased milk from a milk dealer for his family's use. The milk contained typhoid germs, the plaintiff's wife was infected by it and died. Here the purpose for which the milk was to be used was, by implication, made known to the seller. Since the milk was unfit for human consumption, there was a breach of implied condition for which the defendant was held liable. In Grant v Australian knitting Mills Ltd.,[32] the plaintiff purchased two underwears from a retailer who dealt in that type of goods. The underwears contained certain chemicals and he contracted dermatitis by wearing them. It was held by the Privy Council that the buyer had made known to the seller, impliedly, the purpose for which he wanted the garments and relied on the seller's skill or judgment. There was a breach of implied condition that the goods shall be reasonably fit for a certain purpose and the seller was held liable to the buyer in damages.

It may be noted that this implied condition provides that the goods shall be suitable for a particular purpose. It does not mean, however, that they shall be suitable for every buyer. If they are generally suitable for a normal buyer and would not have caused any harm to him but cause harm to a particular buyer due to that buyer's over sensitiveness, the seller cannot be blamed for the same. For example, in the case of Griffith's v Peter Conway Ltd.,[33] the plaintiff bought a Harristweed coat and caught dermatitis by using it. It was found that the plaintiff had caught the disease as her skin was abnormally sensitive and a normal wearer would not have been affected by using the coat. Therefore, held that the plaintiff could not claim any compensation because there was no implied condition that the goods shall suit an abnormal buyer like the plaintiff.

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[28] Ibid, at p. 320.
[29] 1903 2 KB 148.
[30] 1905 21 TLR 633.
[31] 1905 1 KB 608.
[32] 1936 AC 85.
[33] 1939 1 All ER 685.

The implied condition of fitness is applicable not only to the goods which are sold but also to the goods which are supplied under the contract of sale. In Gedding v Marsh,[34] the defendant supplied some bottles of mineral water to the plaintiff. The bottles were not the subject-matter of sale as the empty bottles had to be returned after the contents had been consumed. One of the bottles being defective burst in the plaintiff's hand and injured her. Although the bottles were not sold and they were not to become the buyer's property, it was held that there was, nevertheless, an implied condition that both the bottle and their contents were reasonably fit for the purpose for which they were required, and the sellers were liable to the plaintiff to compensate her for breach of the implied condition.

Proviso:

The proviso to section 16 (1) provides that when the buyer buys an article by specifying its patent or other trade name, there is no implied condition of the fitness of the goods for any particular purpose. Since the buyer defines the goods by mentioning the trade name, the seller's only responsibility is that the goods shall be of the same trade name as demanded by the buyer. In Chanter v Hopkins,[35]the buyer's order to the seller said: "Send me your patent hopper and apparatus to fit up my brewing copper with your smoke-consuming furnace." The seller supplied the buyer the furnace and the apparatus asked for but the same was found to be not fit for the purpose of the buyer's brewery. It was held that the seller had supplied what was ordered and he was entitled to recover its price from the buyer.

The proviso is applicable when the buyer buys by mentioning a trade name and does not at all rely on the skill and judgment of the seller as to the fitness of the goods for any particular purpose. If the buyer mentions the trade name but still relies on the skill and judgment of the seller as regards the stability of the goods for any particular purpose, the implied condition of fitness is applicable in such a situation. In Baldry v Marshall,[36] the plaintiff, who wanted to purchase a motor car, approached the defendants, who were motor car dealers. The plaintiff told the defendants that he wanted a comfortable car suitable for touring purposes. The defendants recommended their "Bugatti car" for the purpose and also showed a specimen of the same. The plaintiff thereupon ordered for n "Eight-cylinder Bugatti car", which was supplied. The car having been found to be uncomfortable and also unsuitable for touring purposes, the plaintiff claimed to reject the car and recover back the purchase money paid by him. It was held that he was entitled to do so as the plaintiff while ordering the car by its trade name was still relying on the recommendation of the seller as regards the suitability of the car for the specific purpose.

[34] 1920 1 KB 668.
[35] 51 RR 650.
[36] 1925 1 KB 260.

5. Implied Condition of Merchantable quality- S. 16 (2): This section contains another implied condition which is by way of an exception to the rule of caveat emptor. It has been noted in section 15 that when the goods are bought by description, there is an implied condition that the goods supplied shall answer that description. According to this sub section, there is a further implied condition in such a case and that is that the goods supplied shall be of merchantable quality. Where-

    (i) the goods are bought by description,[37]
    (ii) from a seller who deals in the 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. The term 'merchantable quality' has not been defined in the Act. In England, however, this term is defined by section 62 (1A) Sale of Goods Act, after the amendment introduced by the Supply of Goods (implied Terms) Act, 1973 as follows: "Goods of any kind are of merchantable quality within the meaning of this Act if they are as 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 the other relevant circumstances. In the case of Bristol Tramways v Fiat Motors Ltd,[38] the term has been defined in the following words: It means that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article, whether he buys for his own use or to sell again. It is not sufficient that the goods are marketable or saleable (that is, no doubt, the dictionary meaning of the word) for, in the statutory sense, the significance of the word 'merchantable' is relative, the test being, are the goods merchantable or not under the particular description in the contract?[39] If the goods are not saleable in the market as the goods of a certain description, they are not of merchantable quality.

    In Grant v Australian Knitting Mills Ltd.,[40] the underwears contained certain chemicals which could cause skin disease to a person wearing them next to skin, it was held that because of such a defect the underwears were not of merchantable quality.

    Even when the goods are purchased by their trade name and the implied condition as to their quality or fitness is not there, another implied condition as to merchantable quality could still be invoked. In Wilson v Cockerell & Co Ltd.,[41] the plaintiff ordered a consignment of "coalite" from the defendant. The coalite supplied contained some explosive substance, and when used in the plaintiff's fire-place, it resulted in the explosion and caused damage to the plaintiff's property. It was held that since the goods were purchased under a trade name, the implied condition as to quality or fitness was not there, but there was a breach of implied condition as to merchantable

[37] English Law was similar to Indian Law, but after an amendment in the (English) Sale of Goods Act by the Supply of Goods (implied Terms) Act, 1973, there is an implied condition of merchantable quality, whether the goods are sold by description or not.
[38] 1910 2 KB 831 at p. 8441, per Farwell LJ.
[39] A.M.N. Khoyee & Co. v Gordon Woodroffe & Co. AIR 1937 Mad. 40, at 42.
[40] 1936 AC 85.
[41] 1954 1 QB 598.

quality and the defendant was liable for the same. In Morelli v Fitch and Gibbons,[42] the plaintiff asked for and purchased a bottle of "Stone's Ginger Wine" from the seller. While the buyer was trying to open the bottle with a corkscrew, the bottle broke due to some defect and his hand was cut. It was held that in this case there was a sale of goods by description, the bottle was not of merchantable quality and the buyer was entitled to claim damages. In Shivallingappa Shankarappa Mendse v Balakrishna and son,[43] the buyer ordered for the best quality 'toor dhal'. The dhal was loaded in rain and by the time it reached the destination, it became damaged by moisture. It was held that since the damaged toor dhal could not be sold as that of best quality as it was no longer of merchantable quality, the buyer having taken the delivery as the seller refused to take them back, he was entitled to claim damages from the seller. In Summer Permain Co. v Webb & Co. ltd.,[44]it has been held that merchantable does not mean that the goods are saleable under the law of another country. There the defendant sold "Webb's Indian Tonic Water" which was to be shipped to Argentina for re-sale. The tonic water contained salicylic acid. The sale of articles of food or drink containing salicylic acid was banned by the Argentine law. The buyers sued the sellers contending that as the goods could not be sold in Argentina, they were not of merchantable quality. It was held that the sellers could not be made liable for the breach of implied condition as the goods were not rendered unmerchantable merely because they were not legally saleable in Argentina.

Condition Negatived when the goods examined by the buyer- proviso:

Section 41 of the Act entitles the buyer to have an opportunity to examine the goods before he can be called upon to accept them. Such an opportunity will enable the buyer to ascertain whether the goods are in conformity with the contract. Merely taking of the delivery of the goods by the buyer does not imply that he has accepted them. If the buyer has not previously examined the goods, he can do so even after taking the delivery and reject them if he finds that they are not in conformity with the contract. If the buyer has been afforded an opportunity and the buyer does not avail of it, he is deemed to have waived his right of examining the goods. Now coming to the proviso to section 16 (2). It says where the buyer has examined the goods, there shall be no implied condition of merchantability as regards defects which such examination ought to have revealed. This means that the defect should have been a patent defect. In case of latent defects, the buyer is still protected inspite of the fact that he has examined the goods. To exclude the working of implied condition of merchantability, it is not necessary that the buyer's examination of the goods must be a thorough one. Even if he examines them cursorily, the implied condition is not applicable. Thus, in Thornett and Fehr v Beers and Sons,[45] there was a sale of a number of barrels of vegetable glue. The buyers having an opportunity to examine the barrels examined them only from outside for want of time. The buyers subsequently found that the glue was not of merchantable quality and this defect could have been discovered if the

[42] 1928 2 KB 636.
[43] AIR 1962 Mad. 426.
[44] 1922 1 KB 55.
[45] 1919 1 KB 486.

barrels had been examined properly from inside. In an action by the buyers for damages for breach of implied condition as to merchantable quality by the sellers, it was held that since the buyers had examined the goods and the defect in the goods was a patent one, they were not entitled to sue the sellers for the same. Implied condition is negative on examination if the defect is a patent one. In case of latent defects, the implied condition of merchantability continues inspite of the examination of the goods by the buyer. In AMN Khoyee & Co v Gorden Woodroffe & Co.,[46]there was a contract for the sale of skins which were to be of "fair average quality". The goods, whentendered, were inspected, approved and accepted.There were certain defects which could not be revealed at the time of delivery by such an examination in their dry salted state. Defects were discovered when the skins were 'put to work', i.e., 'put into water'. It was held that even though the buyers had examined the goods, they were entitled to claim damages for the breach of implied condition of merchantability as the skins were not of merchantable quality. Similarly, if the defect in the underwears purchased by the plaintiff could not be discovered when they were purchased and it could be known when they were put to use the defectbeing a latent one, the buyers could claim compensation when they caused him skin disease and thus were found to be of unmerchantable quality.[47]

6. Implied Condition in a Sale by sample- S. 17: This section states that a contract of sale is by sample when there is a term in the contract, express or implied to that effect. The purpose 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, it may be difficult or impossible to express in words.[48]

   According to section 17 (2), there are three implied conditions in a contract of sale by sample:

   (i) The first implied condition is that the bulk shall correspond with the sample in quality. A contract of sale by sample implies an undertaking by the seller that the goods to be supplied will be similar to the sample. If the goods supplied do not correspond with the sample, it amounts to a breach of implied condition by the seller and the buyer, in such a case, is entitled to reject the goods. If the buyer, instead of rejecting, accepts the goods or a part thereof when the contract is not severable, then his only remedy is to claim damages because in such acase, the breach of a condition is to be treated only as a breach of warranty.[49]

   (ii) Another implied condition in a sale by sample is that the buyer shall have a reasonable opportunity of comparing the bulk with the sample to satisfy himself that the goods supplied are in accordance with the sample. If the seller does not afford an opportunity to the buyer to

[46] AIR 1937 Mad. 40.
[47] Grant v Australian knitting Mills Ltd 1936 AC 85.
[48] Drummond v Van Ingen 1887 12 AC 284 at p. 297 per lord Macnaghten.
[49] S. 13 (2).

compare the bulk with the sample at a proper and convenient time, the buyer has a right to repudiate the contract. The right to inspect the goods need not always be exercised before taking the delivery of the goods. If the buyer could not examine the goods before taking the delivery, e.g., the goods were sent in sealed parcels through rail and the buyer had taken the delivery in the form in which they arrived, the buyer may exercise his right of inspection after taking the delivery. Of course, he must examine the goods within a reasonable time after taking the delivery failing which he will be deemed to have accepted the goods as they are. If on exercising this right of examining the goods, the buyer finds that the goods are not in conformity with the sample, he may reject them.

(iii) The third implied condition in a sale by sample is that the goods shall be free from any defect, rendering them unmerchantable which would not be apparent on reasonable examination of the sample. It means that it is not enough that the goods correspond with the sample. It is further necessary that the goods should not have been rendered unmerchantable because of some latent defect in the sample. If the buyer takes the delivery of the goods after examining and satisfying himself that they correspond to the sample, he subsequently discovers that because of certain latent defect in them, the goods are unmerchantable, he can still reject them or bring an action against the seller to claim compensation. In Godley v Perry,[50]a retailer purchased from a wholesaler a number of toy catapults in a sale by sample. The retailer sold one of those catapults to a boy and when the boy tried to play with it, it broke into pieces because of manufacturing defect therein and the boy was injured. The retailer was held bound to pay compensation to the boy and in his turn he sued the wholesaler to claim indemnity from him. It was found that the retailer had examined the sample and a reasonable examination on his part could not reveal this defect. It was held that under these circumstances, the wholesaler was bound to indemnify the retailer for the loss suffered by the latter. In Mody v Gregson,[51] the defendants agreed to manufacture and supply 2,500 pieces of grey shirting according to the sample and each such piece was to weigh seven pounds. The goods when manufactured and delivered were found to be according to the sample but they contained china clay to the extent of 15% of their weight which had been added to increase their weight. The presence of such a defect could not be discovered on the reasonable examination of the sample and the same had rendered the goods unmerchantable. The seller was held liable for the same. In Drummond v Van Ingen,[52] the plaintiffs, who were worsted cloth manufacturers, agreed to supply "mixed worsted coatings" as per certain samples to the defendants who were cloth merchants. The goods when supplied corresponded to the

[50] 1960 1 All ER 36.
[51] LR 4 Ex. 49.
[52] 1887 12 AC 284.

samples but were subject to a defect because of which they were found to be unsuitable for being converted into coats. The same defected existed in the sample also but that was not discoverable by an ordinary and usual examination which could be made for such type of cloth. The buyers had to dispose of the cloth by auction at aloss. In an action for price by the plaintiffs, the defendants counterclaimed for damages. It was held that the sellers were responsible for there was a breach of an implied stipulation that the cloth should be merchantable worsted coating.

Implied Warranties

1. Implied Warranty of quiet possession- S. 14 (b) : In a contract of sale unless the circumstances of the case show a different intention, there is an implied warranty that the buyer shall have and enjoy possession of the goods. It means that the buyer's possession of the goods will not be disturbed. In Niblett v Confectioners Materials Co.,[53] the sellers had consigned tins of condensed milk bearing the labels 'Nissly Brand" which was the trademark of one "Nestle Co". Since the sellers had no right to sell the goods with such labels, the buyers were not allowed to have the possession of the goods unless the labels had been removed. The buyers, having received the goods without labels, suffered loss as the same had to be sold for a lower price. It was held that there was not only breach of the condition that the seller has a right to sell the goods, there was also a breach of implied warranty of quite possession and, therefore, the sellers were bound to compensate the buyers. If the seller sells goods which he does not have a right to sell and a third person claiming a superior title brings an action against the buyer to recover the goods, the buyer can sue his seller for the breach of this implied warranty. In Mason v Burningham,[54] the plaintiff purchased a second hand typewriter for 20 pounds from the defendant. She thereafter spent a sum of 11-10 pound sh. For getting it overhauled and putting it in order. Unknown to the parties the typewriter was a stolen one and the plaintiff was compelled to return the same to its owner. In an action by the plaintiff against the defendant, it was held that the defendant had made a breach of warranty implied in a contract of sale of goods that the buyer shall have and enjoy quite possession of the goods. The plaintiff was entitled to recover not only the sum of 20 pounds, the price for the typewriter, but also the sum of 11-10 pond sh., the amount spent on overhauling, as the same was the loss arising naturally in the usual course of things.

[53] 1949 2 KB 545.
[54] 1921 3 KB 387.

2. Implied Warranty against Encumbrances- S. 14 ©: there is implied warranty that the goods sold shall be free from any charge or encumbrance in favour of any third party. If there is acharge or encumbrance on the goods sold and the buyer has to discharge the same, he is entitled to get compensation for the same from the seller. If the charge or encumbrance of the goods is known to the buyer at the time of the contract of sale, he becomes bound by the same and does not have any right to claim compensation for discharging the same.

Exclusion of Implied terms and Conditions

Section 62 provides that those rights, duties or liabilities which might arise under a contract by implication of law may be negative or varied-

(i) By express agreement between the parties, or
(ii) By course of dealing between the parties, or
(iii)By usage, if the usage is such as to bind both parties to the contract.

Parties are free to make any agreement they like and "there is no rule of law to prevent parties from making any bargain they please".[55] As regards conditions and warranties, section 16 (4) lays down that an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. This means that when the parties expressly agree to such stipulation and the same is inconsistent with the implied conditions and warranties, the express conditions or warranties will prevail and the implied ones, mentioned in sections 14 to 17 would be negative. Ward v Hobbs,[56] explains a similar provision of English Law, where the liability was negative by a contract between the parties. There the plaintiff purchased a herd of pigs from the defendant. The pigs were sold "with all faults". The pigs had been suffering from typhoid fever. Those pigs and some other pigs, which got infected with the disease died. It was held by the House of Lords that the defendant was not liable for the loss to the plaintiff.

[55] Calcutta Co. v De Mattos 1863 32 L.J.Q.B. 322, 329, per Lord Blackburn.
[56] 1878 4 AC 13.