Unit-3

Unpaid Seller and his rights

Unpaid Seller: Definition

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

a) When the whole of the price has not been paid or tendered;
b) When a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.[1]

Seller includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for the price.[2]

Rights of an Unpaid Seller

An Unpaid seller has two-fold rights, viz:

a) Rights of unpaid seller against the goods; and
b) Rights of unpaid seller against the buyer personally.

Rights of Unpaid Seller against the Goods

Notwithstanding that the property in the goods may have passed to the buyer, an unpaid seller can exercise the following rights against the goods:[3]

a) Right of lien on the goods for the price while he is in possession of them;
b) Right of stoppage of goods in transit after he has parted with the possession of them and the buyer has become insolvent;
c) Right of re-sale.

Even if the property in the goods has not passed to the buyer, the unpaid seller has right of withholding delivery of the goods and this right would be similar to and co-extensive with the right of lien or stoppage in transit where the property has passed to the buyer.[4]

a) Right of Lien(Ss. 47-49)

Lien is the right to retain possession of goods and refuse to deliver them to the buyer until the price due in respect of them is paid or tendered. By way of exercise of this right the seller can refuse to deliver the goods to the buyer until the payment of the price even though the ownership in the goods has already passed to the buyer. By a

[1] S. 45 (1).
[2] S. 45 (2)
[3] S 46 (1).
[4] S. 46 (2).

mere exercise of this right, the contract of sale is not rescinded.[5] According to section 47, this right can be exercised in the following situations:

- Where the goods have been sold without any stipulation as to credit, i.e.., the sale of the goods has been on cash basis. According to section 32, if there is no agreement to the contrary, the payment of the price and the delivery of the goods are concurrent conditions. It means that if the goods have not been sold on credit, the seller expects that the buyer shall pay the price against the goods. The seller can refuse to deliver them to the buyer, or in other words, he can exercise the right of lien over the goods, if the buyer is not ready and willing to pay the price in exchange for the goods. The position in this regard has been thus stated by Bayley B:[6]

  > "the general rule of law is, where there is a sale of goods, and nothing is specified as to delivery or payment, although everything may have been done so as to divest the property out of the vendor, and as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until payment of the price."

- Where the goods have been sold on credit, but the term of credit has expired. In such a case, the seller can exercise the right of lien on the expiry of the period of credit. Even though originally the seller had agreed to sell them on credit but now since the price has become payable because of the expiry of the period of credit, the seller can refuse to part with the goods until he is paid for them. For example, on 1st January, A sells a horse to B, the buyer having a right to take the delivery at any time he likes and the price is payable on 1st March. If the buyer has not taken the delivery of the horse by 1st March and he demands the delivery after this date, the seller can refuse to part with the horse until the buyer pays for them.

- Where the buyer becomes insolvent. Even though the seller had sold the goods on credit and the period of credit has not yet expired but the buyer has become insolvent, the seller's right of lien can be exercised. For example, the goods are sold on 1st January and the period of credit extends upto 1st March, if the buyer becomes insolvent on 15th January and he had not yet taken the delivery of the goods, the seller may exercise his right of lien if the buyer demands delivery at any time after 15th January although originally he had agreed to deliver the goods to the buyer on credit. By the insolvency of the buyer during the period of credit, the right of lien which may have been suspended earlier for the period of credit is revived and the credit granted earlier comes to an end.

[5] S. 54 (1).
[6] Miles v Gorton 1834 2 C&M 504, at p. 511.

The buyer is insolvent, according to section 2 (8) when he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due whether he has committed an act of insolvency or not.

The right of lien can be exercised if the seller is still in possession of the goods even though his capacity is not that of the seller but only that of an agent or bailee of the buyer.[7] There is constructive delivery of the goods to the buyer as stated in section 33, but since the seller is still in possession of the goods, although his capacity is only that of a bailee of the buyer, he can exercise the right of lien. For example, the seller sells his goods on 1st January and the buyer instead of taking the delivery of the goods requests the seller to keep goods in his warehouse till 1st March, the buyer agreeing to pay the warehouse charges for the two months, the seller can exercise his right of lien in respect of such goods.

The basis of the right is the non-payment of price and therefore if the buyer is willing to pay the price, there is no question of exercise of the right of lien. It may be noted that the right of lien is a right which can be exercised only for the non-payment of the price. If some other charges, for example, the warehouse charges are due to the seller, he cannot exercise the right of lien. For the recovery of such charges, the seller's only remedy is a personal action against the buyer.

In Eduljee v Café John Bros.,[8] the seller sold a refrigerator to a buyer for Rs. 120 and it was further agreed that the seller will put that in order at acost of Rs. 320. The buyer took the delivery of the refrigerator and admitted that it was working satisfactorily. Subsequently, two of its parts were delivered to the seller for further repairs. The seller now refused to deliver back those two parts to the buyer claiming a lien on them until the amount originally due had been paid. It was held that once the delivery of the refrigerator had been made to the buyer, the right of lien had come to an end and the same could not be revived by the seller again getting the possession of those goods.

In M/s Jain Mills & Electrical Stores v State of Orissa,[9] the counsel for the appellants argued that as the appellants are shown to be unpaid seller, in exercise of their right to lien under sections 46 and 47 of the Act, they are entitled to the return of the goods. From section 46 (1) (a) it is seen that notwithstanding that the property in the goods has passed to the buyer, the unpaid seller of goods has, as such, by implication of law, a lien on the goods for the price while he is in possession of them. The plaint 'A' Schedule goods were despatched by rail to the defendants and the defendants received the same after 30th March, 1973. The lien ceases to subsist the moment the seller loses possession of the goods. So, in the present case, in view of the admitted facts that the possession of the plaint 'A' Schedule goods was delivered to the

[7] S. 47 (2).
[8] AIR 1943 Nag. 249.
[9] AIR 1991 Ori. 117.

defendant on or about 30th March, 1973, the plea of the appellants that they are entitled to the return of goods in exercise of their right of lien as unpaid sellers is without any basis and, therefore, merits no consideration.

Lien and Part Delivery- According to section 48, if the seller has delivered a part of the goods, he can exercise his right of lien over the remainder unless the part delivery was made under such circumstances as to show that he had waived the right of lien. Sometimes delivery of the part may operate as delivery of the whole and in such a case, it may be presumed that the seller has waived his right of lien over the goods which have not yet been delivered. Whether such waiver is there or not depends upon the question, whether the parties intended to separate the part delivered from the remainder or not. If, for example, out of 100 bags of wheat which were to be supplied by the seller to the buyer, 20 have already been delivered to the buyer, the seller may exercise his right of lien over the other 80 bags. If, however, the buyer gets the whole of the goods weighed but takes only a part of them, the delivery of the part of the goods in such a case would operate as delivery of the whole and the seller's right of lien over the remaining goods would come to an end.[10] Similarly, if an essential part of the machinery has been delivered by the seller to the buyer, the seller cannot exercise his right of lien over the remaining parts.

Termination of lien

The unpaid seller's right of lien may be lost in any of the following ways:

1. By payment of price: The right of lien comes to an end when the seller ceases to be an unpaid seller, i.e., when the buyer pays or tenders the price to the seller. It has been noted under section 47 (1) that the unpaid seller is entitled to exercise his right of lien until payment or tender of the price in respect of certain goods, the payment or tender of the price, therefore, terminates the seller's right to retain the goods. Merely obtaining the decree does not mean the payment of the price and, therefore, section 49 (2) states that an unpaid seller, having a lien on the goods, does not lose his lien by reason only that he has obtained a decree for the price of the goods.
2. By delivery to the carrier: Since the right of lien is a right to retain the possession so long as the seller continues in possession, the right would obviously come to an end when the seller loses the possession. The seller loses the possession when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods. If the seller has reserved the right of disposal, i.e., a right of not delivering the goods to the

[10] Hammond v Anderson, 1803 1 B&PNR 69.

buyer until he fulfils the required condition, generally that condition being the payment of the price, the seller can exercise his right of lien.

3. By the buyer obtaining possession of the goods: When the buyer or his agent lawfully obtains the possession of the goods the right of lien comes to an end. If the buyer at the time of the contract of sale is already in possession of the goods, although as a bailee for the seller, the seller cannot exercise the right of lien in respect of those goods. If the buyer once obtains the possession, the right of lien comes to an end, and such a right cannot be exercised even if the seller again gets back the possession of those goods. Thus, where a refrigerator after being sold was delivered to the buyer and since it was not functioning properly, the buyer delivered two of its parts to the seller for repairs, it was held that the seller could not exercise his lien over those parts.[11]
4. By waiver: Unpaid seller's right of lien is also lost by waiver thereof. According to section 46 (1) (a), an unpaid seller gets his right of lien by implication of law. A party to a contract may waive his rights, expressly or impliedly, according to section 62. Section 49 (1) (c) expressly provides that the right of lien comes to an end by waiver thereof. Such a waiver may be presumed when the seller allows a period of credit to the buyer, or delivers a part of the goods to the buyer or his agent under the circumstances which show that he does not want to exercise his right of lien or, when the seller assents to a sub-sale which the buyer may have made.
5. By Disposition of the goods by the buyer: According to section 53, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods by the buyer. This general rule is subject to the following two exceptions:
    - When the seller himself assents to a sub-sale or other disposition of the goods by the buyer;
    - When the buyer having lawfully obtained possession of document of title to the goods transfers the same to a transferee in good faith and for consideration and he transfer is by way of 'sale'.

    In the above stated two exceptional cases, the unpaid seller's right of lien comes to an end.

b) Right of stoppage in transit (Ss. 50-52)

When the goods have already been delivered to a carrier for being transmitted to the buyer, the carrier at the seller's request is to deliver the goods back to the seller and not to deliver to the buyer even though the buyer might have got the possession of document of title to the goods. Under such a right, therefore, the unpaid seller regains the possession of the goods after they had once been delivered to a carrier for the

[11] Eduljee v Café John Bros AIR 1943 Nag. 249.

purpose of transmission to the buyer. The exercise of this right, according to section 54 (1), does not result in the rescission of the contract or revesting of the property in the goods in the seller. It only means that the seller after getting back the goods from the carrier has a right to retain them until the buyer pays for them. If the buyer still fails to pay, the unpaid seller may even resell those goods.

For the purpose of exercise of this right, the following conditions are to be satisfied:

- Seller should be an unpaid seller as defined in section 45.
- The buyer should be insolvent within the meaning of section 2 (8), i.e., a person who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not.
- The goods should be in transit.

The goods are in transit from the moment they are delivered to a carrier for the purpose of transmission to the buyer. It is, however, necessary that the carrier must have got the possession of the goods in his capacity as a carrier. The carrier might take the goods for transmission in different capacities:

- The carrier may be the buyer's agent. When the possession has been received by the carrier as the buyer's agent, there is no question of exercise of right of stoppage in transit because when the buyer or his agent has received possession of the goods, the seller cannot exercise any right in respect of them;
- The carrier may be the seller's agent. If the carrier is the seller's agent, then the seller himself is deemed to be in constructive possession of the goods and he can exercise even the right of lien in respect of them;
- The carrier may be neither the buyer's agent nor the seller's agent but may be holding the goods as a carrier. If he is in possession of the goods in that capacity then the right of stoppage in transit can be exercised by the seller.

Duration of transit

The right of stoppage in transit can be exercised so long as the goods are in transit. It becomes important, therefore, to know as to what is the duration of transit, i.e., when the transit begins and when it comes to an end. Section 51 provides rules regarding the same. According to sub-section (1), the goods are deemed to be in the course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer. The transit continues until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee. It means that so long as the goods are with a carrier, the transit continues. The position was thus explained by Cave, J.[12]

[12] Bethell v Clark 19 QBD 553, at p. 561.

> "in all cases of stoppage in transit, it is necessary first of all to ascertain what is the transitus or passage of the goods from the possession of the vendor to that of the purchaser. The moment that the goods are delivered by the vendor to a carrier to be carried to the purchaser the transitus begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser and no longer as carrier only, the transitus is at an end. The destination may be fixed by the contract of sale or by directions given by the purchaser to the vendor. But, however, fixed, the goods have arrived at their destination and the transitus is at end, when they have got into hands of someone who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor."

In Schotmans v Lancashire & Yorkshire Ry. Co.,[13] there was delivery of the goods by the seller on board a ship belonging to the buyer. The bill of lading was also taken in buyer's order. It was held that in this case it amounted to the delivery of the goods to the buyer so that the seller was precluded from exercising his right of stoppage in transit. Lord Cairns said: "The master was his (buyer's) servant. No special contract was entered into by the master to carry the goods for or to deliver them to any person other than Cunliffe, the purchaser. In point of fact, no contract of affreightment was entered into… The essential feature of a stoppage in transitus, as has been remarked in many of the cases, is that the goods should be at the time in possession of a middleman, or of some person intervening between the vendor, who has parted with, and the purchaser, who has not yet received them. It was suggested here that the master of the ship was a person filling his character, but the master of the ship is the servant of the owner; and if the master would be liable because of the delivery of goods to him, the same delivery would be delivery to the owner, because delivery to the agent is delivery to the principal.

Lord Chelmsford observed:

> "if the goods are actually delivered to an agent of the vendee employed by him to receive delivery, the vendor is divested of his right of stoppage in transitus. On the other hand, although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable… if the vendor desires to protect himself, he may preserve his right of stoppage in transitus by taking bill of lading, making the goods deliverable to his order or assigns."

In Turner v trustees of Liverpool Docks,[14] the cargo of cotton was put on the board of the vessel belonging to the buyers but the goods were made deliverable to the sellers or their order. Patterson J. giving judgment of the Court observed that "there is no

[13] 1867 LR Ch. 332.
[14] 1851 6 Ex 543.

doubt that the delivery to him, unless the vendor protects himself by special terms, restraining the effect of such delivery. In the present case, the vendor by the terms of the bill of lading made the cotton deliverable at Liverpool to their order or assigns, and there was not therefore a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship. The vendors still reserved to themselves, at the time of delivery to the Captain, the jus disponendi of the goods, which he by signing the bill of lading acknowledged.

When Transit comes to an end

- When the buyer takes delivery: According to section 51 (1), the goods are deemed to be in transit from the time they are delivered to the carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee. When the buyer or his agent takes actual possession of the goods, the right of stoppage comes to an end. It is not necessary that the buyer or his agent takes the possession after the goods have reached destination. According to section 51 (2), if the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. Although the seller may have indicated a certain destination to which the goods are to be carried, it is open to the buyer to make arrangement with the carrier and have delivery of the goods before they arrive at the appointed destination and thus make an end to the seller's right of stoppage in transit. In Whitehead v Anderson, Parke B. said:

  > "the law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destinationoriginally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee takes them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end, though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right to action."

- When the carrier or the other bailee acknowledges to the buyer: According to section 51 (3), if after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end. There is deemed to be constructive delivery of the goods to the buyer and that obviously puts an end to the seller's right of stoppage iin transit. An acknowledgment on the part of the carrier that he holds the goods for the buyer is essential, but if he indicates that he would deliver the goods to the buyer or his agent on freight being paid that is not

enough. In Whitehead v Anderson,[15] on arrival of the ship the assignee of the buyer who had become insolvent went to take the delivery of the timber. They only saw and touched the timber. The Captain refused to deliver the same until the freight had been paid. The seller subsequently gave a notice of stoppage in transit. It was held that neither the buyer's assignee had taken the actual possession, nor had the Captain of the ship contracted to hold the timber as the buyer's agent, the seller's right of stoppage in transit had not come to an end.

- When the carrier wrongfully refuses to deliver the goods to the buyer: If the buyer wants to take the delivery when it ought to have been made to him but the carrier wrongfully refuses to deliver the same, the transit is at an end. The carrier by his wrongful act of refusing to deliver the goods cannot extend the period of transit. In Bird v Brown,[16] a notice to stop goods in transit was given by a certain stranger, who had no authority from the seller to do so. On a demand for the delivery of the goods by the assignees of the insolvent buyer, the carrier refused to deliver the goods to them. Subsequently, the seller tried to ratify the stoppage in transit made by the stranger. It was held that the transit had come to an end when the buyer's assignees demanded the delivery of th goods because the carrier's refusal to deliver the goods to them was a wrongful one and the right of stoppage, which had come to an end could not be revived by subsequent ratification of an ineffectual notice to stop.

Effect of part delivery-

According to section 51 (7), when a part delivery of the goods has been made by the carrier to the buyer or his agent, the seller may still exercise the right to stoppage in transit over the remainder of the goods. If the goods are sent partly by one route and partly by another and the buyer takes the delivery of the goodssent by one route, the seller is entitled to exercise his right of stoppage over the goods coming through another route, but if the part-delivery of the goods was made to the buyer in the circumstances which show an agreement on the part of the seller to give up his right against the whole of the goods, the right of stoppage in transit on the remainder of the goods comes to an end. It, in other words, means that the right of stoppage in transit, when waived comes to an end.

Effect of rejection of goods by the buyer-

Section 51 (4) says that if the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

[15] 1842 9 M&W 518.
[16] 1850 4 Ex. 786.

How the right is effected-

The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are.[17] The seller is thus to express his intention countermanding the delivery. Notice of stoppage may be given either to the person in actual possession of the goods or to his principal. In order that the notice to the principal is effectual, it shall be given at such time and in such circumstances that the principal,by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.[18]After a proper notice has been duly received by the carrier, he has a duty not to deliver the goods to the buyer but to redeliver them to the seller[19] failing which he can be made liable for conversion. In Litt v Cowley,[20] after the receipt of the notice to stop the goods, the carriers by mistake delivered the goods to the buyer. It was held that the assignees of the insolvent buyer were bound to restore back the goods to the seller, or be liable for damages. According to section 52 (2), the expenses of re-delivery of the goods are to be borne by the seller. On exercise of the right of stoppage, the seller's duties towards the carrier are, the issue of proper directions as to how and where and to whom the goods are to be delivered, and the payment of the expenses of redelivery.

Effect of sub-sale or pledge-

Sometimes the buyer may dispose of the goods purchased by him although neither he has obtained their possession nor he has paid for them. In such a case, the question which generally arises is that whether the unpaid seller can exercise his right of lien or stoppage in transit in respect of those goods. The general rule, as provided in section 53 (1) is that unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer might have made. It means that if the buyer disposes of the goods for which he has not yet paid, the seller may exercise his right of lien or stoppage in transit, as the case may be, and the person to whom the goods were disposed of by the buyer will not have any right in respect of those goods. However, there are the two following exceptions:

- When the seller has assented to the sale or other disposition which the buyer may have made. If the seller himself assents to such a sale or other disposition by the buyer, the law of estoppel applies against him and he is estopped from denying the buyer's right to dispose of the goods and is thus precluded from exercising his right of lien or stoppage in transit against the sub-buyer or the pledgee. In Knight v Wiffen,[21] A sold 80 maunds of barley out of a large stock lying in his granary, to B. Out of his purchase, B sold 60 maunds to C before the goods had been ascertained. C obtained delivery order and presented it to A, who informed C that the barley would be forwarded to him in due course. Subsequently B became insolvent and A wanted to exercise the

[17] S. 52 (1).
[18] Ibid.
[19] S. 52 (2).
[20](1816)2 Marsh 457.
[21] (1870) 5 QB 660.

right of lien over the barley which he had sold to B. It was held that A had assented to the sub-sale of 60 maunds of barley by B to C and therefore he could not exercise his right of lien over 60 maunds of barley, though such a right could be exercised in respect of the remainder i.e., the other 20 maunds.

- The second exception to the rule is contained in the proviso to section 53 (1). Where the buyer has lawfully obtained the possession of the document of title to the goods and the buyer then transfers the document of title to another person and the transferee takes the document of title in good faith and for consideration, the rights of the unpaid seller would be affected thereby. How far the rights of the seller are affected depends upon the kind of disposition of goods which may have been made by the buyer after obtaining the document of title. If the transfer by such buyer is by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated. But if such a transfer is by way of pledge or other disposition for value the unpaid seller can exercise his rights of lien or stoppage in transit subject to the rights of the transferee. For example, A sells certain goods to B and also sends the document of title to B. Before B pays for the goods, he sells those very goods to C, who takes them in good faith. If B becomes insolvent, A cannot exercise his rights against the goods because B has transferred by way of sale the document of title pertaining to those goods. But, on the other hand, if B has pledged the document of title of C for Rs. 5,000/-, A can exercise his rights subject to the rights of C i.e., A cannot exercise his rights so as to affect the interests of C. If A wants to exercise his rights he may pay to C, the pledgee, a sum of Rs. 5,000/- i.e., the amount secured by the pledge and then exercise his rights. Section 53 (2) grants a right to the unpaid seller, if his buyer pledges not only the document of title concerning the goods in respect of which he wants to exercise his rights, but also certain other goods of his own as well. In such a case, the unpaid seller can compel the pledgee to marshal his securities in such a way that as far as possible he recovers the amount out of other goods or securities of the buyer in the hands of the pledgee. For example, A sells 500 bags of sugar to B and on despatch of the sugar to B through rail he forwards to him the railway receipts in respect of them. B takes a loan of Rs. 50,000 from C and by way of security for the loan, he pledges the RR concerning 500 bags of sugar and also 5,000 bags of cement belonging to B himself and lying in his own warehouse. A, the unpaid seller, can compel C, the pledgee to realise his loan of Rs. 50,000 as far as possible, out of 5,000 bags of cement. If C recovers Rs. 40,000 out of those bags of cement, he can recover the balance of Rs. 10,000 out of the bags of sugar. In other words, the unpaid seller can exercise his right of stoppage in transit in respect of 500 bags of sugar on paying Rs. 10,000 to C, the pledgee.

c) Resale (S. 54)

This is a very valuable right given to an unpaid seller after he has exercised his right of lien or stoppage in transit. After exercising the right of lien or stoppage in transit, the seller has a right to retain the goods until the buyer pays the price. If within a

reasonable time after the exercise of such a right, the buyer does not pay the price the unpaid seller may re-sell them under any of the following circumstances:

- Where the goods are of perishable nature (S. 54 (2)); or
- Where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell (section 54 (2)); or
- Where the seller expressly reserves a right of re-sale in case the buyer should make default (S. 54 (4)).

Notice of re-sale

Before making the re-sale, the unpaid seller is required to give a reasonable notice of re-sale to the buyer. No such notice is, however, required if the goods are of a perishable nature. Such a notice gives an opportunity to the buyer either to fulfil his part of the obligation by making an arrangement for the payment of price and have the goods, or, if he cannot pay, then to supervise the sale to see that the same is properly made, because the loss on re-sale is to be ultimately borne by the buyer. Notice must be given within a reasonable time[22] after the breach of contract and should also give him a reasonable opportunity of either fulfilling the contract or supervising the sale.

Loss or profit on re-sale

On re-sale the seller may either suffer loss or he may make profit. The question which arises is can the seller recover such loss from the original buyer and can he retain the profit made on resale. Section 54 (2) provides that if the re-sale is properly made i.e., after due notice to the buyer (except when the goods are of a perishable nature), and within a reasonable time, the unpaid seller can "recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on re-sale." On re-sale, the seller is entitled to recover the loss occasioned from the original buyer because such loss had occurred due to the buyer's failure to perform his part of the obligation. The re-sale is necessitated because of default on the part of the buyer in making the payment of the price, and handing over the profit to him would mean a premium on committing the breach of contract. Since no one can take advantage of his own wrong such surplus can be retained by the seller himself. It may be noted that the seller's right to recover damages, in the event of loss on re-sale, and to retain the surplus, in case of profit on re-sale is subject to the condition that the notice of re-sale was given to the original buyer (except when the goods are of a perishable nature). According to section 54 (2), if such notice is not given, the unpaid seller shall not be entitled to the profit, if any, on re-sale. If the seller makes undue delay inmaking re-sale and suffers more loss than he would have suffered if the re-sale had been made within a reasonable time, he would be entitled to claim compensation equal to the difference between the contract price and the market price on the date when the resale ought to have been made. In Mysore Sugar Co. Ltd., Bangalore v Manohar Metal Industries,[23] the buyer having

[22] What is reasonable time is a question of fact, S. 63.
[23] AIR 1982 Kant. 283.

made a default in taking the goods, the seller gave him a notice on 12th September 1966 that if the buyer did not lift the goods within three days the contract would be treated as cancelled. The buyer did not lift the goods. The seller made a re-sale of the goods on 30th December 1966. The seller sought to recover the loss arising on re-sale. It was held that there was inordinate delay of over 3 months in making the re-sale after notice to the buyer and due to such delay, particularly in the falling market as in the present case, the value realised on re-sale did not afford a good ground to fix the damages. If the re-sale had been properly made in September 1966, the seller would have suffered no loss and therefore seller's claim for compensation was rejected.

Measure of damages on re-sale

According to section 54 (2), on the re-sale being properly made, the unpaid seller can recover from the original buyer damages for ay loss occasioned by his breach of contract. The loss which in such a case is occasioned to the seller is the difference between the contract price and the re-sale price, and the measure of damages, therefore, is the difference between the contract price and the re-sale price. It may be noted that the measure of damages in case of resale is different from that for breach of any other contract, because in other cases the damages are governed by the provision contained in section 73 of the Indian Contract Act, according to which the measure of damages is the difference between the contract price and the market price prevailing on the date of the breach of contract. Since the re-sale is to be made after giving notice to the buyer, the re-sale may not be made on the date of breach of contract, and on re-sale the seller may recover different price than prevailing on the date of breach of contract. It may be observed that the criterion of allowing difference between contract price and re-sale price is followed by applying section 54 (2) of the Sale of Goods Act, if the resale has been properly made. If the re-sale has not been properly made then the damages are allowed according to the formula under section 73 of the Indian Contract Act i.e., the difference between the contract price and the market price, is allowed by way of damages.

Section 54(4) provides that where the seller expressly reserves the right of re-sale in case the buyer should make a default and then re-sells the goods, the original contract of sale is thereby rescinded. This sub-section protects the rights of the seller to claim damages from the buyer whose default necessitated the re-sale, even though the contract between the seller and the original buyer is rescinded.